

1042

Y 4
.J 89/2
96-91

16-96
J 89/2
96 44

**CITIZENS' RIGHT TO STANDING IN FEDERAL COURTS
ACT, S. 680**

GOVERNMENT

Storage

DOCUMENTS

APR 21 1981

FARNELL LIBRARY
KANSAS STATE UNIVERSITY

HEARING

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 680

OCTOBER 12, 1979

Serial No. 96-91

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1981

72-708 O

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION



AY
5/28/77
18-08

COMMITTEE ON THE JUDICIARY

EDWARD M. KENNEDY, Massachusetts, *Chairman*

BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JOSEPH R. BIDEN, Jr., Delaware
JOHN C. CULVER, Iowa
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
THAD COCHRAN, Mississippi
ALAN K. SIMPSON, Wyoming

STEPHEN BREYER, *Chief Counsel*
EMORY SNEEDEN, *Minority Chief Counsel*

(II)

CONTENTS

FRIDAY, OCTOBER 12, 1979

STATEMENTS

	Page
Opening statement of Senator Metzenbaum-----	1
Opening statement of Senator Thurmond-----	3

TESTIMONY

Morrison, Alan B., director, Public Citizen Litigation Group-----	4
Kaye, Lawrence M., on behalf of Association of the Bar of the City of New York, Committee on Federal Legislation and Committee on the Federal Courts, accompanied by Michael Oberman, Victor Lewkow and Peter Sobil -----	26
Smizik, Frank I., attorney, Access to Justice Project, National Legal Aid and Defenders Association-----	72
Carrasco, Gilbert Paul, legislative director, Equal Justice Foundation, Inc.---	84
Christensen, Karen, legislative counsel, American Civil Liberties Union---	181

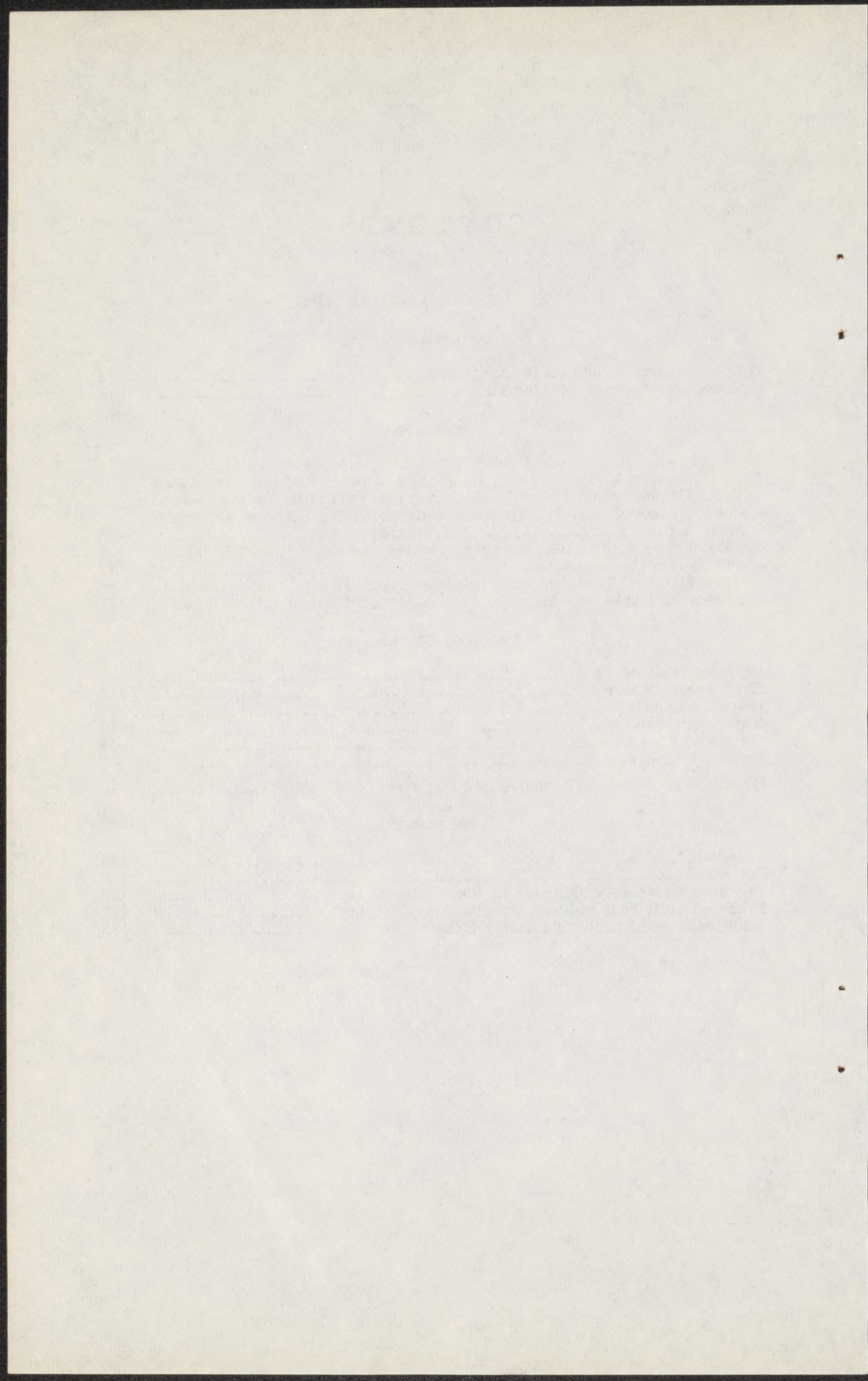
PREPARED STATEMENTS

Carrasco, Gilbert Paul-----	87
Christensen, Karen -----	135
Griswold, Erwin N-----	76
Kaye, Lawrence M-----	33
Morrison, Alan B-----	14
Smizik, Frank I-----	78
Questions of Senator Thurmond and responses of Mr. Smizik-----	75

APPENDIX

S. 680 -----	155
Letters -----	159
Prepared statement of Marilyn G. Rose-----	169
Prepared statement of Prof. Charles Alan Wright-----	173
Additional submissions of Senator Metzenbaum-----	183

(III)



CITIZENS' RIGHT TO STANDING IN FEDERAL COURTS, S. 680

FRIDAY, OCTOBER 12, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:47 a.m. in room 2228, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (acting chairman of the committee) presiding.

Present: Senators Metzenbaum and Thurmond.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The committee will come to order. Today we begin hearings on S. 680, legislation that would strengthen the rights of citizens to bring Federal court suits challenging unlawful governmental action. More particularly, this bill attempts to lower technical barriers to suits against the Federal Government—barriers which have been created through restrictive interpretations of the legal doctrine of “standing.”

The bill currently before us is the product of a significant group effort. Members of my staff and the staffs of Senators Kennedy and Ribicoff worked with the Department of Justice on the issues underlying this bill for over a year. The Justice Department endorsed a similar bill introduced toward the end of last session and has endorsed the modifications made in this year's bill.

This measure also reflects the commitment made by President Carter to improve access to the courts. As the President stated in April of 1977, “I support legislation which will give citizens broader standing to initiate suits against the Government, in appropriate cases * * *.” Relaxation of present standing barriers, the President said, will “enhance the consumer's influence with Government without creating another unwieldy bureaucracy.”

I could not agree more with the President. Legislation such as this is essential if we are to make Federal public officials more accountable through the court system to individual citizens, individual small businessmen, and others who are subject to governmental regulation and who are the intended beneficiaries of Government actions.

“Standing” is a technical legal concept involving the right of a plaintiff to present his or her case in court. The question is whether a person has a sufficient stake in the outcome of a case to insure that he or she will really fight that case. In this way, those with no real interest in a suit will not be able to tie up scarce judicial resources.

Recently, however, the courts have been narrowing the class of persons entitled to sue through an overly restrictive definition of standing. For example:

Low-income plaintiffs denied medical treatment at a hospital have been barred from challenging an Internal Revenue Service ruling granting tax-exempt status to that hospital despite its failure to serve indigents at the level of its financial ability.

The Supreme Court has barred a mother from challenging the failure of law enforcement authorities to enforce a criminal child support statute in favor of her illegitimate child.

Low-income minority plaintiffs have been denied standing to challenge a community's exclusionary zoning ordinances.

Citizens and taxpayers have been barred from challenging the legality of Congressmen's participation in military reserve units despite the constitutional prohibition against Members of the House and Senate holding offices in the executive branch.

These are but a few of the instances where barriers to "standing" have hindered judicial consideration of the merits of citizen and business complaints against illegal or unconstitutional governmental action. Not only do such decisions deny needy plaintiffs access to justice, they waste valuable judicial resources in the process. A leading "standing" case, *Simon v. Eastern Kentucky Welfare Rights Organization*, took 5 years to wend its way through the courts only to have the Supreme Court throw carefully considered lower court opinions out and dismiss the entire suit without any decision on important legal questions about the appropriateness of tax exempt status for charitable institutions.

Even where standing is ultimately found, significant judicial resources are frequently wasted. In *Duke Power v. Carolina Environmental Study Group*, the plaintiffs' standing was ultimately upheld but the trial judge felt it necessary to hold a 4-day preliminary trial and to make detailed findings of fact in order to resolve the standing issue. And this was just to make a threshold determination that the plaintiffs had a real interest in fighting the case.

I believe enactment of standing legislation is extremely important. It will permit a broader range of issues involving illegal government action to be presented to Federal judges for resolution and it will eliminate the inordinate amount of energy and resources presently devoted to the litigation of "standing" in the Federal courts.

Individual citizens should be permitted to augment enforcement efforts of Federal officials. They should be allowed to assume some responsibility for the effective operations of their government.

As the Senate Committee on Government Affairs observed:

We believe that the restrictive course the Supreme Court has taken on the issue of standing is unfortunate. The ability of members of the public to obtain judicial review of allegedly unlawful agency action is a key element in citizen participation in the regulatory process. It is also, in our opinion, an essential ingredient of a well-functioning democratic process. It is our view that persons with a legitimate and genuine interest in a particular matter should have the opportunity to challenge allegedly illegal or unconstitutional governmental action in the Federal courts. For those wrongs, there should be a judicial remedy available to the public.

So stated, the Government Affairs Committee.

This bill incorporates these vital considerations. It recognizes that citizen access to the Federal courts to redress unlawful governmental

actions is essential to the democratic process. It is our view that it acknowledges that limited judicial resources are better used to reach prompt resolution of lawsuits on their merits than in the interpretation of technical "standing" issues. And perhaps, most importantly, S. 680 emphasizes that Congress intends the Federal courts to settle disputes that have long-term and significant impact on American citizens.

I am aware that many, including Justice Douglas, believe more extensive remedial action is necessary. We will explore that question today.

I would like to close by quoting from a statement submitted by Marilyn Rose, the attorney involved in the *Eastern Kentucky Welfare Rights* litigation, which I believe makes a most compelling case for this remedial legislation:

On June 2, 1976, I called Eula Hall, the Chairperson of the Health Committee for Eastern Kentucky Welfare Rights, to tell her that the Supreme Court concluded that EKWRO's members, denied admission to charitable hospitals, did not have standing to contest the action of I.R.S. reinterpreting the term charitable adversely to the poor after 40 years. Mrs. Hall responded that she was not surprised, that she did not expect justice, but she felt sorry for me, not just because I had worked so hard on the case, but that I believed that the system worked. S. 680 helps restore the faith that our system does indeed work.

I might say in that connection that when you talk about the issue of standing to the American people—you could talk about it to 215 million Americans—they truly would not know what you were talking about. It is not one of the issues that has a high profile. It is not one of the issues that causes people to go out on the debating platform. Whoever heard of standing? What is it all about?

But actually, it really has such a vibrancy and it means so much to the quality of justice in this country and to the ability of the people to obtain redress for their rights in the courts that it is, indeed, one of the most important subjects, even though there are very few who have taken an interest in it.

Before we hear from our five witnesses, I would like to put into the record copies of three Justice Department communications to this committee: a letter in support of last year's bill, a staff memorandum accompanying that letter assessing the impact of this standing legislation, and a letter endorsing the changes made in this year's bill.

[Material referred to above appears in the appendix.]

It has been suggested that we put into the record at this point and we will include in the record, Marilyn Rose's entire statement as well as the opinions in two recent cases, *Duke Power* as well as *Gladstone v. Bellwood*.

[The cases cited above appear in the appendix.]

Mr. CHUMBRIS. Mr. Chairman, Senator Thurmond will be here and he has an opening statement.

Senator METZENBAUM. Certainly we will be pleased to hear from him or if he desires to put it into the record immediately after mine, we will be very happy to do that.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. This morning the Senate Judiciary Committee is conducting a hearing on S. 680. The Citizens' Rights to Standing in

Federal Courts Act. On August 16 and 23, 1978, hearings were held jointly by the Committee on Governmental Affairs and the Judiciary Committee's Subcommittee on Citizens and Shareholders Rights and Remedies on S. 3005, a bill very similar to S. 680. During those 1978 hearings, the pros and cons of the issues were presented for the record.

My staff has discussed the principle issues of this proposed legislation with the staff of the minority of the Senate Governmental Affairs Committee and others in order to get a reaction to this controversial bill. These discussions revealed that no markup of the bill was held by the Committee on Governmental Affairs nor by the Judiciary Committee's Subcommittee on Citizens and Shareholders Rights and Remedies.

I note that five witnesses are scheduled for this morning's hearings, and certainly we look forward to their testimony and related discussion. I also note, however, that not included among today's witnesses are such outstanding legal scholars on this particular subject as former dean of Harvard Law School and former Solicitor General Erwin Griswold who has graced our Judiciary Committee hearings on a number of instances in the past. Judge Griswold said among other items:

Well, Senator Metzenbaum, I don't think so many cases are being thrown out of court. I think that the need has been greatly exaggerated. Moreover, I think that the question of the burden on the courts is a very real one . . .

I am now reading from a letter addressed to me by the general counsel of the Administrative Office of the U.S. Courts, Mr. Carl H. Imlay, as follows:

"This subject matter, dealing as it does with citizens' protests against government action, is so broad as to defy precise predictions of future impact. I can only relate general considerations."

He [Imlay] then gives startling figures about the burdens of the Federal Courts . . .

Mr. Griswold set forth three major reasons for his opposition to the bill plus a discussion on the overall subject.

I also note, in fairness to your bill, that a number of witnesses, including U.S. Court of Appeals Judge James Oakes, spoke in favor of the bill. I shall follow the hearings and the testimony closely because I have a strong concern both for the rights of individuals and for the prerogatives of the separate branches of our Government and, particularly in this case, to the U.S. courts and the judges who make the decisions. There are times, admittedly, when we, in the Congress, disagree with a few of the court's decisions. In the overall context, however, we must evaluate the prerogatives of each separate branch—executive, judiciary, and legislative—in the best light as contained in our U.S. Constitution.

Senator METZENBAUM. Mr. Alan Morrison, we are happy to have you with us this morning, sir.

Mr. MORRISON. I am very happy to be here, sir.

STATEMENT OF ALAN B. MORRISON, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP

Mr. MORRISON. We are pleased to be here to urge the Congress to amend the law of standing in the Federal courts. There seems to me to be an urgent need to do so, for three reasons:

First, the present rules are incomprehensible, if not silly.

Second, there is an enormous waste of time and money for the courts and litigants now underway with regard to deciding questions relating to the law of standing, and

Third, for the Government of the United States to raise standing in these circumstances is immoral.

Senator, if I may, I would like to pick up something that you said at the end of your opening statement about this not being an issue for the people of this country that they are readily aware of. I believe, in many ways, the people are ahead of the lawyers and the courts on the issue. I was one of the counsel in the *Duke Power* case, and as we were litigating this case which raised the question as to the constitutionality of the statute, that would allow a person's home to be destroyed and no compensation paid if there were a major nuclear accident. We would talk to people about the case and we would say and try to describe to them what the case was all about and they would say "yes," and we would say, "But by the way, there is this issue of standing, first." They would say, "What do you mean?" Well, the Government says:

You can't go to court and have this question decided now; you have to wait until an accident takes place and then and only then can you decide whether it is constitutional for the Government to not compensate you for your property and not pay you back for your injuries.

Judge McMillan, in the district court opinion in that case upholding standing, said in words that are particularly apt here, "the time to put on the roof is before it starts to rain." I think most people believe that we ought to decide these questions at the time they arise and not at some later date. I come to this view based on three separate experiences that I have with the law of standing.

First, I was an assistant U.S. attorney in the civil division in the Southern District of New York for 4 years. In that capacity, we were called upon to raise standing by a number of Federal agencies in a number of cases. In many instances, we declined to do so, believing that it was inappropriate or the wrong thing to do. Then for the last 7 years, I have been a litigator with the Public Citizen Litigation Group. The standing shoe has been on the other side. The Government has raised this against us constantly and it has been a source of an enormous diversion of our resources and governmental resources.

Last, the 1978-79 academic year, I taught administrative law at the Harvard Law School. And I would say to you, Senator, the single most frustrating experience I had in that course was trying to explain to students what the law of standing was. It is, many ways, an obstructionist doctrine like the \$10,000 amount in controversy we used to have in Federal questions against the U.S. Government. Congress got smart a couple of years ago and struck that \$10,000 requirement. Now, it is not quite so easy to fix up the law of standing, but I believe that if Congress is willing to do it and the administration stands behind it, it can be done.

I say the doctrine of standing is uncomprehensible and I suggested that we ought to look at the cases in terms of the results. Compare the results in the *SCRAP* case with the *Sierra Club* with that in *Reservists*, with that in *Duke Power*—if you look at what interest was held sufficient to be standing in some cases and not in others, it is virtually incomprehensible to a lay person to explain how the legal technicalities produced such widely disparate results. Then if you compare the de-

cisions in *Warth v. Selden* and the *Village of Arlington Heights*, both involving exclusionary zoning cases—in one case the court said standing, and in another case, the court said no standing.

There are cynics who say, Senator, that if the plaintiff is going to win on the merits, then he doesn't have standing. But, if he is going to lose on the merits, then he does have standing. I don't know that I would adopt such a cynical view of the way the courts have been treating the law of standing, but I would leave the ultimate evaluation to somebody else.

But one thing I am certain about—the incomprehensibility of this document leaves it clearly to one result and that is, the Government is going to raise standing virtually at every turn. It is almost never a frivolous claim to raise standing. Conversely, the plaintiff will not quit when he, she, or it, if it is an organization, is thrown out because of standard. The doctrine of standing says to the plaintiff, "go mind your own business, you have no reason to be in the Federal courts, this is really none of your business what is going on here." People don't like to be told that.

Senator METZENBAUM. Mr. Morrison, do you think that the Government lawyers have a legal responsibility to raise the issue of standing—a responsibility that is higher than their moral responsibility to permit certain issues to be litigated in the courts? As you may know, I had the privilege of being thrown out of court myself on the standing question, along with Senator Barry Goldwater, in a case in which we were raising the question of the propriety of a bidding procedure to buy some airplanes by the U.S. Navy.

Does a lawyer have an obligation to raise an issue because the law gives him or her the right to do so when that lawyer knows that the issue itself really ought to be litigated in the courts and that there is a true litigable matter that should be resolved by the judiciary.

Mr. MORRISON. I do not think so, Your Honor, when that—

Senator METZENBAUM. I am not your honor. [Laughter.]

Mr. CHUMBRIS. He's being modest.

Mr. MORRISON. I do not think so when the lawyer is a lawyer representing the United States of America. After all, the taxpayers of this country pay for the Justice Department to run. It is the United States of America, it is not the particular interest, the particular person who happens to be occupying the particular office at the time who is the defendant in the given case.

Congress has passed certain laws; we have a constitution which establishes certain laws and I believe it is immoral for a Government attorney to raise those defenses when there are serious questions going to the merits. Now I do not suggest, your honor, Senator—

Senator METZENBAUM. It is because I am an honorable fellow.

Mr. MORRISON. I do not suggest, Senator, that where an attorney concludes that the Constitution itself, as a matter of article, case, or controversy requirements precludes a suit from going forward—that he does not have a duty to at least advise the court of his opinion about that.

Senator METZENBAUM. When is that?

Mr. MORRISON. When the lawyer concludes that it would be unconstitutional when there is no article III case or controversy for the matter, but I don't think anybody is suggesting in these cases, cer-

tainly not in your case or many of the other cases of which I am aware, that article III itself, assuming that the law was absolutely clear that you were entitled to standing; for instance, it had not simply been put in the appropriation bill what was supposed to be done in the competitive bidding case, but it said any Member of the Senate of the United States shall have standing to challenge it in the event that that's not followed. That in those circumstances, Senator, unless the lawyer concluded on behalf of the Government that that specific grant of standing was unconstitutional, he would have no obligation, indeed, I would say—the obligation would be to defend to the contrary. The right thing for the Government to do, if it believes it is doing the right thing is to defend it. It is a little bit like the kid on the block—where you used to say will you defend it? Not on your life I won't defend it. I will go hide behind something.

Well, put up your dukes and fight, the U.S. Department of Justice, if you think you are right, then the right thing to do is to defend it on the merits and if you are wrong, if the Constitution or the Congress says you are supposed to do something else, then it is your duty, as a public servant, to do what is right and not simply what happens to be preferable and feasible to you.

Third, I want to point out, besides the incomprehensibility and immorality is the enormous waste of resources of both private litigants, governmental litigants and the courts. The *Duke Power* case, we had a 4-day trial plus there was enormous preparation in advance solely on the question of standing. The issue on the merits was decided with virtually no pretrial preparation and no trial time at all.

My prepared statement—

Senator METZENBAUM. All your prepared statement will be included in the record, as well as the prepared statement of all of the witnesses.

Mr. MORRISON. Thank you, Senator.

Senator METZENBAUM. Are you reading from particular points in your prepared statement at this point?

Mr. MORRISON. No, Senator, I am not. I am making reference to cases that are discussed in there—the *Health Research Group* case against Kennedy involving a challenge to the FDA's program dealing with over-the-counter drugs. That case was initially brought on behalf of the Health Research Group. The case was fully briefed and argued on the merits. The court then, sua sponte raised the issue of standing. The Health Research Group standing was then fully briefed and litigated and the court said "Health Research Group did not have standing." However, I will allow you to bring before the court additional individual plaintiffs. The complaint was then amended and individual plaintiffs were brought before the Court; they were deposited; submissions were made; further argument on the standing issues took place. The court then ruled the individual plaintiffs do have standing and it agreed with us 100 percent on the merits, struck down the entire FDA program and, ironically, the FDA and the private groups that intervened in this case were so convinced by the judges' opinion that they decided not to appeal that case and the FDA is now reformulating its process.

We wasted a good year in time, not to mention countless judicial hours and litigants' hours litigating an issue which turned out to be absolutely nothing.

Senator METZENBAUM. Do you think that the courts sometimes use the issue of standing in order to duck the more weighty issues in the case?

Mr. MORRISON. I would say so, Your Honor, Senator.

Senator METZENBAUM. You are determined to put me on the bench. I really don't want to go there. [Laughter.]

Mr. MORRISON. I think we need you in the Senate. Senator, I think that is unfortunately the case and you could never be sure but there are a significant number of cases in which lower courts' opinions—the *Reservists* case which is discussed at various points—was a case in which the district court concluded that the plaintiffs had standing and that the merits were clearly in their favor. The court of appeals thought the matter was so clear that they summarily affirmed, without even writing an opinion, on the merits. The Supreme Court reversed on the issue of standing and we will never know what the law is.

Senator METZENBAUM. On behalf of Senator Simpson, I would like to ask you a question. Would you give to the committee your understanding of the reasons for standing requirements and comment on these reasons?

Mr. MORRISON. In my view, standing requirements are grounded in the requirement of article III of the Constitution that we have a case in controversy. The principal reason to insure that there is a case in controversy is to assist the court in making the determination based on true adversity between the parties. This will insure that the issues and the presentations on both sides are adequate and the court will not be making a hypothetical ruling or a ruling which all sides have not been heard. *Flast v. Cohen*, *Baker v. Carr* indicate that where the reckless adverseness is present, as no one disputes that it is in any of these cases that that is the reason behind the requirement of standing. So we insure that there are two sides to a controversy and the people who have a genuine concern about an issue are litigated.

Senator METZENBAUM. Mr. Morrison, I am going to have to step out for a few minutes. Mr. Chumbris, on behalf of Senator Thurmond has some questions and we would appreciate if you would respond.

Mr. MORRISON. I would be pleased to.

Mr. CHUBRIS. Mr. Morrison, Senator Thurmond has been delayed and since Senator Metzenbaum has to make his commitment here, I am going to ask a question in his name.

On August 16, 1978, former dean of Harvard Law School and former U.S. Solicitor General, Irwin N. Griswold testified before a joint committee on S. 3005, a similar bill to S. 680 as follows:

Well, Senator Metzenbaum, I don't think so many cases are being thrown out of court. I think that the need has been greatly exaggerated. Moreover, I think that the question of the burden of the courts is a very real one.

And he continues:

I am now reading from a letter addressed to me by the General Counsel of the Administrative Office of the United States Court. Mr. Carl H. Imlay, as follows: "This subject matter dealing as it does with citizens' protests against government action, is so broad as to defy precise predictions of future impact. I can only relate general considerations.

He continues the quote.

He, Imlay then gives startling figures about the burdens of the Federal courts.

Mr. Griswold then sets forth three major reasons of his opposition to the bill on page 57 and 58 which I asked to be printed as if read in full.

You may comment now, or you may submit your answer in writing after reviewing a copy of these series of quotes.

Mr. MORRISON. I would like to do both, if I may.

Mr. CHUMBRIS. Good.

Mr. MORRISON. Since I haven't heard the three specific reasons, I obviously can't comment on those, but I do want to make two points.

Mr. CHUMBRIS. I could read those to you.

Mr. MORRISON. Well, maybe I will make these two first and then we can try that afterwards, if I could.

Former Solicitor Griswold, in his position as the Solicitor General and as dean of the Harvard Law School, didn't see all the cases we had that were thrown out of court and I can assure that there are significant number that are thrown out of court although there are many that are not thrown out of court. But the important points, and this gets to the second objection Mr. Griswold made is that the courts are being enormously burdened now by litigating standing because the law is unclear and because the courts are often very result-oriented and the reason that I believe that this legislation or even more sweeping legislation would be appropriate is because it would not result in a net increase in the amount of litigation in the Federal court. It would shift the litigation from litigation over the law of standing to litigation over the merits and the courts would be there to do what they are supposed to do which is to say what the law is—not who should have entry into the Federal courts.

So, it is for those reasons that I believe that there would be almost no net increase in litigation in terms of judicial time in the Federal courts.

But let me say one other thing—that I believe that even if there were an increase, that that's a proper increase. That if we want to get rid of some actions in the Federal court we could start with diversity and knock out those 25 percent of the cases or most of them that come in on diversity. The Federal court's first and primary responsibility ought to be to decide Federal questions. That is a resource allocation question and I believe that when Congress passes laws, when the Founding Fathers enacted the Constitution, they meant for those provisions to be enforced and not simply left up in the air. The law of standing isn't doing that.

Mr. CHUMBRIS. Let me read you these three statements. They are found on page 57 of last year's hearings on S. 3005, August 16 and 23. "The reasons for the college's opposition to S. 3005 may be summarized as follows:"—

Mr. MORRISON. Excuse me, that is the American College of Trial Lawyers?

Mr. CHUMBRIS. Yes; because he was speaking of the American College.

Mr. MORRISON. Let me just note for the record that the American College of Trial Lawyers by and large is representative of the defense bar and the defense bar in the cases in which we have been involved in these agency challenges are often in the same side of the agency which

is being sued. So, having said that, I think we ought to make that clear that I don't think he is speaking in his capacity as the Solicitor General, although the Solicitor General often raised these defenses.

Mr. CHUMBRIS. This subcommittee knows that the American Trial Lawyers—they have been before us a number of times but this is the first point.

There is no evident need for the enactment of such a provision. The Federal courts are full of cases involving public questions. Many cases have been brought by organizations such as the Sierra Club, the NAACP, and even such a group as SCRAP, Students Challenging Regulatory Agency Procedures, consisting of five students in a seminar at Georgetown Law School. See *United States v. SCRAP*, 412.

I hate to say it that way but that is the way they pronounce it.

412, U.S. 669, 1973. Such cases have also been brought successfully by individuals as in *Flast v. Cohen*, 392 U.S. 83 (1968). There is nothing to indicate that there is under present law any unreasonable restriction on the right of citizens to raise before the Federal courts the sort of questions which are appropriate for court action.

Mr. MORRISON. I think maybe it would be easier if I tried to answer the one.

Mr. CHUMBRIS. Go right ahead.

Mr. MORRISON. I don't think you can get an answer to this question by counting the number of cases that are in court as opposed to the ones that might have been in court. The question can't be answered that way.

Second, the fact that there are many cases doesn't indicate that that is an appropriate number of cases.

Third, I would say that all those cases cited in that memorandum are several years old and the tide has turned rather dramatically in the Supreme Court and what the statement doesn't mention is cases like *Warth*, *Eastern Kentucky Welfare Rights* and so forth. So I would find that first point not to be very persuasive at all.

Mr. CHUMBRIS. Well, since the chairman is back, we will give you the other two—they are rather long—and we will have you submit them in writing.

Thank you very much.

Mr. MORRISON. I would be glad to submit them in writing.

Senator METZENBAUM. Thank you very much, Mr. Chumbris.

Mr. Morrison, Mr. Simpson, Mr. Simpson is the Senator.

Mr. MORRISON. We seem to be having confusion about our roles today. If the Senator doesn't want to be a judge, I don't want to be a Senator. [Laughter.]

Senator METZENBAUM. In *EKWRO*, the court said that it could not find injury fairly traceable to the challenged action and denied standing.

Two years later in *Duke Power* it used the same fairly traceable standard and fund standing in circumstances which appear to be far more attenuated than those in *EKWRO*. Is this legislation still necessary?

Mr. MORRISON. Senator, probably the best evidence of that is a brief which we received just yesterday signed by the Assistant Attorney General Shenefield on behalf of the Department of Justice in a case called *Public Citizen v. Foreman* challenge by public citizen an indi-

vidual consumers to the USDA and FDA's nonregulation of nitrites in bacon. The basic question is whether the agencies are doing what they are supposed to do under the law. We lost the case in the district court. District court declined to rule on the standing question and said that it would rule on the merits and it did so. Now we are in the court of appeals. Despite the *Duke Power* case, they are saying that an organization which commented extensively on the regulations issued below, participated over a long period of time in this process, and the two individuals, one of whom is desirous of eating meat products, particularly bacon, which have no nitrites in them, and another who says that he will not eat those products until the FDA makes them available without them, do not have standing.

The Department of Justice says that those people don't have a stake in the controversy and they should go mind their own business. Now you may think that the *Duke Power* case controls it; I may think it controls it; the court of appeals may think it controls it; but we have to go and litigate it again and it seems to me a silly way to have lawyers and judges spend their time. Until we get some clear legislation, we are going to have to keep litigating these things in situations that don't make any sense.

Senator METZENBAUM. Mr. Morrison, did you ever discuss with the Department of Justice this question that I raised and that is the moral obligation to raise an issue even if you have a legal right to do so?

Mr. MORRISON. I raised that when I was assistant U.S. attorney, Senator. I didn't think I got very far at that point although sometimes we were able, in our little power struggles between the Southern District of New York and the Civil Division in Washington, to sometimes prevail and not raise the issue, I once wrote a little piece about it which some of my friends in the Justice Department have agreed with but didn't agree with. We suggested on numerous occasions that they ought not to raise it.

Senator, let me just give you a footnote here in this *Public Citizen v. Foreman* case, which I just mentioned. I intended to raise it before. This is footnote 6 on page 8, a footnote to the heading "Appellants Lack Standing to Maintain this Litigation." "It is the publicly stated policy of the Food and Drug Administration not to raise standing as a defense in suits assailing agency action." Citation to the regulation. "For that reason, the FDA does not join the standing argument advanced in this brief." Will the real Department of Justice, will the real United States of America please stand up and tell us what they think?

Senator METZENBAUM. The lawyers are saying that the case should be dismissed because there is no standing and the Department has a publicly enunciated position?

Mr. MORRISON. There are two departments—the Agriculture Department which is one client and the Food and Drug Administration which is another. This brief which is signed by one of the lawyers, the Chief Counsel and Assistant Chief Counsel for the Food and Drug Administration and a lawyer from the Department of Agriculture and three lawyers in the Justice Department. They can't seem to make up their minds whether they are going to assert standing or not. We have to do something about that.

Senator METZENBAUM. Well, I don't quite understand that. There is a publicly enunciated position that they have a policy not to raise the issue of standing and then sign the brief, or the motion.

Mr. MORRISON. It is a brief, your honor.

Senator METZENBAUM. A brief, to raise that very issue. And then they point out in the brief that it is contrary to their own policy.

Mr. MORRISON. Well, apparently this is really a two-part brief. One part is joined in by both defendants and one part—the standing issue—is joined in only by the Agriculture defendant.

Senator METZENBAUM. So that the standing issue is not raised by the FDA attorneys?

Mr. MORRISON. But it is raised by the USDA, at least that is the best that I can figure out.

Senator METZENBAUM. Will you favor my staff with a copy of that brief, because I think we would like to inquire into it and possibly inquire of the departments directly.

In particular, what is it in the courts' opinions which creates the practical difficulty for litigants. Is it the restrictiveness of the courts' opinions or their unpredictability, or both?

Mr. MORRISON. I think some of it is restrictiveness, but I think much more of it is unpredictability. What I really feel is needed is a clear test that makes it very difficult to have to litigate over the law of standing anymore. It is also, I think, Senator, that this lack of clarity is encouraging for litigation on both sides. It encourages those who have a glimmer of hope that their standing may be upheld to litigate and it encourages those who don't have a very strong defense on the merits to litigate standing in the hopes of avoiding this.

I don't think that is the right way for the Government to be running. If I may turn to S. 680 in particular, I applaud the goals of S. 680, but I must respectfully suggest that there is a fundamental problem with it and that is that the bill as now written is framed in the negative rather than the positive fashion. That is, as I understand S. 680, it is now saying plaintiffs will not lose standing cases for the following reasons. It doesn't say that they are going to win standing issues. I don't care so much why I lose, but I want to win these issues. And I think what the bill needs is an affirmative grant of standing and I have suggested language at page 13 of my prepared testimony to that. There is nothing magic about the particular words that we have chosen here. But, what we want to do is to see some results be different—not simply some rationales. That may be fine for the academics, but the people in the real world, the people that want to see that the laws are enforced and for judges who don't want to have to litigate it, they want to know what the answer is and have it clear.

Senator METZENBAUM. Mr. Morrison, with respect to the restrictiveness of the courts' standing requirements, there appear to be at least three different issues. One is the degree to which direct as opposed to attenuated connection between the injury and the challenged action are required; the second is how primary or dominant the challenged action must be in the causal chain; and the third is how much up-front proof is required at the time of a motion to dismiss for lack of standing? Are these all equally serious problems and, if not, which presents the most serious practical difficulties to litigants?

Mr. MORRISON. I think the first two are much more of a problem than the third. The first, this semantic game between direct and indirect injury reminds me of a statement that Mr. Justice Jackson made in a case involving interstate commerce—*Wickard v. Filburn* in which he said that the use of the term “direct” means that you have reached the conclusion that it affects interstate commerce and, therefore, it is unconstitutional and the use of the term “indirect” means that you have reached the opposite conclusion but doesn’t help us how we got there in either instance. I think that direct versus attenuated is simply a way of announcing the result—it doesn’t tell you how you get there. I don’t know of any very good way, when we are trying to evaluate under the present criteria.

Second, as far as how important the particular event is in the claim of events seems to me to be a similar problem. It is a very visceral reaction—very subjective. And, I don’t think legislation, however, carefully drafted focusing on those kinds of words is going to help us out. I think that the problems of proof are only problems because of the need to prove directness or primacy.

Senator METZENBAUM. Mr. Morrison, I have a number of other questions, but I am watching the clock, and I have a number of other witnesses. If it meets with your approval, we may want to submit our questions to you in writing and ask you to respond in writing and we will include them in the record.

Mr. MORRISON. Fine.

Senator, if I could, could I make one last set of remarks.

Senator METZENBAUM. Sure.

Mr. MORRISON. I want to say a word about judicial review in the context of administrative agency decisions of Federal agencies. S. 680 deals with Federal and State actions. There are two types of cases, basically. One involving independent Federal actions not arising out of an administrative action—I think of the *Reservists* case so forth and so on as a typical case in that variety. Then there is by far the largest group of cases—those which there has been an administrative proceeding of some kind already, either an adjudication or most typically a rulemaking proceeding. After a party has fully participated either as a party status in or simply is a participant since there are no parties in rulemaking status, rulemaking proceedings.

In those cases, when the question of judicial review and whether the person who participated below should get it, that issue of judicial reviewability for participants is a separate issue and can be dealt with in a separate bill or can be dealt with as part of the regulatory reform bills that are now proceeding for consideration in both this committee and in the Governmental Affairs Committee. Accordingly, we have proposed in our written statement that there be a specific provision that would authorize any person who participated in the administrative proceeding leading to agency action, which is the subject of judicial review, be entitled to seek judicial review without any further tests whatsoever. We think that there is more than a sufficient stake in the outcome required to meet the constitutional minimum or, moreover, the test is a clear, bright-line test that would provoke no litigation of any kind and it would simply make it fair that the Government decide cases at the administrative level, not based on who can seek judicial review, but on the merits of the controversy.

So, we urge you to give particular consideration to that matter which can be handled, I believe, somewhat differently from the more general problems raised by S. 680.

Senator METZENBAUM. Thank you very much Mr. Morrison. That was very helpful.

[The prepared statement of Mr. Morrison follows:]

PREPARED STATEMENT OF ALAN B. MORRISON

Mr. Chairman and distinguished members of the Judiciary Committee, thank you for the opportunity to comment on S. 680, a bill that I believe reflects a sincere effort to restore legitimate order to the realm of "standing."

"Standing," of course, is the technical term defining who may properly ask a court to correct unconstitutional or otherwise illegal action. I first appeared to urge the enactment of remedial standing legislation three years ago, before Senator Kennedy's Judiciary Subcommittee on Administrative Practice and Procedure. Then, the term "standing" was not so well known. It was just the name of an esoteric procedural doctrine. But now the term has become rather infamous because of the serious problems that it has created.

Restrictive standing rules have completely insulated many illegal actions from judicial review, and every segment of the population is beginning to feel the effects of this institutional lawlessness. Moreover, the rules have become so confusing that our limited judicial resources are being wasted litigating the issue of standing.

As a result of these problems, the need for remedial legislation has now been widely recognized. The Senate Governmental Affairs Committee recommended in its "Study of Federal Regulation," Vol. III at xi (1977): "Congress should ease the requirements of standing in order to provide greater public access to the Federal courts for review of regulatory agency decisions."

Likewise, President Carter declared in his April 6, 1977 consumer message:

"I support legislation which will give citizens broader standing to initiate suits against the government, in appropriate cases . . . Recent court decisions have greatly restricted their ability to do so."

In addition, the Department of Justice—which has traditionally been the most outspoken opponent of standing reform—has now actively participated in the drafting of remedial legislation. Another promising sign is that standing legislation is also being considered in the House of Representatives. Representatives Kastenmeier, Railsback, and Harris have introduced H.R. 1047, the House version of S. 680, which has been referred to the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

In the climate of broad, bi-partisan support generated by the crucial need for standing legislation, I hope that the Congress will swiftly enact a statute adequate to correct the problems posed by the many restrictive decisions that have been handed down in recent years. But meaningful reform can be expected only if the purpose of the doctrine of standing, and the problems caused by recent decisions, are fully understood.

PURPOSE OF THE DOCTRINE

Perhaps the worst aspect of the present law of standing is the particular way in which the doctrine has been abused. Standing was originally intended to help the courts do a better job of interpreting the laws by making sure that a plaintiff had a sufficient stake in the outcome of a lawsuit to present adequately the issues to the court in an adversary context. In the frequently quoted words of Justice Brennan:

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 . . . upon which the court so largely depends for the illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, (1962). [*Flast v. Cohen*, U.S. 83, 99 (1968); also quoted in *United States v. Richardson*, 418 U.S. 16, 173 (1974)].

The standing requirements imposed in recent cases, however, have completely overlooked this purpose and have produced precisely the wrong result. Rather than enabling the courts to do a better job of interpreting the laws, standing requirements have been applied in such a stringent manner that in many cases

the courts never even reach the merits. Moreover, application of the requirements has become so artificial that standing no longer has anything at all to do with the issue-presentation function that standing evolved to serve.

Not only have private parties been denied the right to sue because of lack of standing, but the doctrine has been taken so far that the Attorney General of the United States has been barred from suing on behalf of individuals whose constitutional rights have been abridged. See *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979), where the court threw out the efforts of the Attorney General to protect mentally retarded individuals confined in an unsanitary, unsafe environment, resulting in death and serious injuries to them.

Similar standing challenges have also been upheld in cases involving a state mental hospital, *United States v. Solomon*, 563 F. 2d 1121 (4th Cir. 1977), and a racially discriminatory school system, *United States v. School District of Ferndale*, 400 F. Supp. 1122 (E.D. Mich. 1975). The fact that the Department of Justice, which has an entire division that works exclusively on civil rights matters and has an obvious stake in protecting mentally retarded individuals and preventing racially discriminatory schools, was denied standing, is little short of amazing. If the law of standing can produce such outrageous results, it is time to change that law.

Some of the older, better reasoned decisions of the Supreme Court have taken a more realistic approach to standing. They have recognized that even a relatively minor stake in the outcome of a suit is enough to satisfy the purposes of the doctrine. In *Baker v. Carr*, 369 U.S. 186 (1962), the plaintiff had standing to maintain an action even though only a fraction of a vote was involved. In *McGowan v. Maryland*, 366 U.S. 420 (1961), a five-dollar fine was at stake, and in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), a \$1.50 poll tax was at issue.

In *United States v. SCRAP*, 412 U.S. 669 (1973), the interest of a single citizen in preserving the environment was found by the Supreme Court to be enough for standing, and in *Flast v. Cohen*, 392 U.S. 83 (1968), the nearly minute interest of a single taxpayer was enough for standing to challenge the constitutionality of expenditures from the federal treasury. These cases and hundreds of others like them are products of an era in which standing rules reflected a more meaningful concern with the lawful operation of our government. More recent decisions, however, have allowed standing to be used as a procedural defense in controversial and politically unpopular cases when no defense existed on the merits.

PROBLEMS CAUSED BY RECENT DECISIONS

There are three fundamental problems that have been created by recent standing cases. First, many decisions have made it difficult, if not impossible, for individuals and organizations to protect their own interests from the effects of unlawful government and private action. Second, some cases have astonishingly held that many laws and constitutional provisions which are intended to protect the public in general simply cannot be judicially enforced because no one will ever have standing to enforce them. Third, the law of standing has become so confused and riddled with inconsistent and contradictory holdings, that substantial judicial resources are being wasted litigating this technical issue, thereby needlessly increasing the workload of the federal courts. In order to fully appreciate just how serious these problems have become, it is important to consider the actual cases in which they have arisen.

Protection of interests

One of the most disturbing examples of a case in which individuals were held to lack standing to protect their own interests is *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). There, the Supreme Court showed a deplorable lack of sensitivity to the rights of indigents unable to afford medical care, and turned a deaf ear on their pleas for relief. The plaintiffs were several low-income individuals who could not afford to pay the high costs of hospital care, and organizations representing the interests of such individuals. They sued to set aside a Revenue Ruling granting favorable tax treatment to hospitals that would not provide free medical care to indigents, even if they were financially able to do so. The plaintiffs argued that because such favorable tax treatment was reserved for charities, the Revenue Ruling was invalid because it violated a provision of the Internal Revenue Code.

Although the plaintiffs had an obvious stake in the enforcement of a law enacted to benefit them by providing a financial incentive for hospitals to treat

them free of charge, the Supreme Court dismissed their case for lack of standing. That decision must have been a very bitter pill for those plaintiffs to swallow. Although they had enough at stake to file a lawsuit and take it all the way to the Supreme Court, the Burger majority told them that their interest was not sufficient for standing because they did not meet the Court's ill-defined concept of injury. Decisions such as *Simon* hardly inspire confidence in the judiciary. Therefore, legislative action is needed to change the results in such cases if confidence in the fairness of our government is to be restored.

Law enforcement

The obvious harm caused by restricting standing decisions is that plaintiffs with important legal claims are left without a forum in which to assert them. But in some instances, illegal actions can be so pervasive that every member of the public is injured by them. Ironically, however, under current standing rules, the more people that are injured, the less likely it is that anyone will have standing. *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), provide instructive examples.

In *United States v. Richardson*, a taxpayer challenged the secrecy of the CIA budgetary process, arguing that Art. 1, § 9, cl 7 of the Constitution, which requires publication of "a regular Statement and Account of the Receipts and Expenditures of all public Money," was violated by the secret budget. Mr. Richardson, however, was denied standing even though the court admitted that no other citizen would ever have standing. Thus, the secrecy of the CIA budget may well be unconstitutional, but the courts will allow the practice to continue solely because no plaintiff will ever have standing to challenge it.

The *Reservists* case is similar. There, citizens and taxpayers argued that Art. I, § 6, cl. 2—the Incompatibility Clause—of the Constitution prohibited Members of Congress from serving in the armed forces reserves. The Supreme Court dismissed for lack of standing stating that:

"Standing to sue may not be predicated on an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." 418 U.S. at 220.

However, the Incompatibility Clause was enacted by the framers to prevent the potential conflicts of interest that can result when a member of Congress holds another government office at the same time. Because that provision necessarily benefits the public in general, it is nonsensical to hold that the injury resulting from violations of the Incompatibility Clause is too "generalized" to serve as a basis for standing.

When the law of standing deteriorates to the point where illegal actions can be placed beyond the reach of judicial remedies simply by inflicting them upon large numbers of citizens and taxpayers, it is time for Congress to take action. Therefore, remedial legislation should not only insure that individuals and organizations have standing to protect their own rights and interests, but should insure that any citizen has standing to enforce laws intended to benefit the general public.

Drain on judicial resources

The third serious problem created by recent standing decisions is that they have resulted in unnecessary work for the courts. Because the leading precedents are not only inconsistent, but are unrelated to the purposes for which standing rules evolved, courts and litigants alike must spend enormous amounts of time on this procedural issue which should hardly ever arise.

For example, in *Simon v. Eastern Kentucky Welfare Rights*, which I mentioned a few months ago, five years of litigation were virtually wasted because of this issue. The case was filed in July of 1971, and it was litigated until June 1976. The District Court invalidated the challenged Revenue Ruling on the merits. The Court of Appeals reversed, upholding the Revenue Ruling. But then the case went to the Supreme Court where, despite the benefit of two carefully-considered lower court opinions on the merits, the Court dismissed the entire suit on the issue of standing. That meant that the prior 5 years of litigation served no purpose whatsoever in determining whether the Internal Revenue Service was violating the law.

A similar waste of judicial resources occurred in *Warth v. Seldin*, 422 U.S. 490 (1975), where minority plaintiffs who were the victims of housing discrimination were denied standing to challenge the constitutionality of a racially restrictive zoning ordinance that they claimed to be responsible for their inability

to live in the suburb of Penfield, New York. That case was litigated from January 1972 until June 1975, but the waste of judicial resources was even more extensive. As a result of the *Warth* decision, *Evans v. Lynn*, 537 F.2d 471 (2d Cir. 1975) (en banc), another case involving a similar legal claim, had to be reconsidered en banc, resulting in the ultimate denial of standing, although the plaintiffs' standing had initially been upheld. That process took three and one-half years and involved 11 separate judges.

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), a case involving the constitutionality of the Price-Anderson Act's limitation on liability resulting from a nuclear power plant accident, also illustrates the drain that standing is placing on valuable judicial resources. Although the plaintiffs' standing was ultimately upheld in that case, the District Court believed that the Supreme Court's standing precedent required it to hold a trial on the issue of standing. Consequently, four days were spent on a trial relating to this issue, followed by very detailed findings of fact, before the standing issue could be resolved.

It is ironic that the Chief Justice, who has spent so much of his energy complaining about the heavy burden placed on the Federal Courts, has done so much to increase that burden through restrictive standing decisions. To the extent that the federal courts have been overburdened in recent years, many of their problems will be eased by the 152 new judgeships created by Congress in 1978. If problems remain, Congress will be taking another step forward by enacting remedial legislation with clear and sensible standards relating to standing. Such standards will eliminate the considerable and senseless drain on judicial resources that presently arises from standing litigation, as well as relieving litigants of the burdens of trying the issue.

CONSTITUTIONALITY

Because standing relates to the "case or controversy" requirement of Art. III of the Constitution, some questions have been raised concerning the power of Congress to enact remedial legislation. However, the controlling cases indicate that Congress has a considerable amount of power in this area. With the exception of the requirement that a plaintiff suffer some threshold degree of injury, all of the restrictions placed upon standing are what have been termed "prudential," and the cases have authoritatively established that Congress has the power to limit such prudential limitations. See, e.g. *United States v. Richardson*, 418 U.S. 166, 196 n.18 (Powell, J. concurring); *Warth* 1. Seldin, 422 U.S. 490, 501 (1975); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970). Moreover, the Supreme Court's decision in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), holds that the "nexus" requirements for standing, including the traditional "zone-of-interest" test, as well as the "generalized grievance" and "third-party" tests are non-constitutional in nature. *Id.* at 78-79.

All that the Constitution requires is that a plaintiff be threatened with a "distinct and palpable injury" that has a "fairly traceable" causal connection to the challenged action, *Duke Power*, supra, 436 U.S. at 72, but the injury can be very small and the causal connection can be very attenuated. The cases discussed in the section of my testimony relating to the purpose of the doctrine of standing provide examples of very small and speculative individual injuries that have been sufficient for standing. In addition, the *Duke Power* case itself shows that a long or attenuated chain of causation does not defeat the plaintiff's standing. There, the connection between the environmental injuries complained of by the plaintiffs and the liability limitation being challenged was very indirect, but was nevertheless sufficient to satisfy the demands of Art. III.

It should also be emphasized that Congress possesses a reservoir of power to affect the parameters of an Art. III injury. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), indicated that Congress can recognize new rights and grant standing to enforce them. Moreover, as Kenneth Culp Davis has pointed out, because the public interest requires that government officials operate within the bounds of law, the involvement of the public interest alone in a lawsuit is a sufficient basis for constitutional standing even where the plaintiff's interest might not suffice by itself. Davis, "Administrative Law Treatise," vol. 3, § 22.05, pp. 225-26 (1958). *Associated Industries of New York v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See also *Federal Communications Commission v. Sanders Radio Station*, 309 U.S. 470, 477 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S.

4, 14 (1942); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966). Under this theory, Congress has broad powers to grant standing to enforce the laws of the United States under a "private-attorney-general" theory, especially where the laws at issue are intended to benefit the general public.

Many statutes have already been enacted which contain broad grants of standing to "any person," "any citizen," or "any interested person." See, e.g., the Clean Air Act Amendments of 1970, 42 U.S.C. § 1957h-2; the Noise Control Act, 42 U.S.C. § 4911; the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365; the Marine Protection, Research and Sanctuaries (Ocean Dumping) Act, 33 U.S.C. § 1415(g); the Consumer Product Safety Act, 15 U.S.C. § 2073. These statutes, as well as the Federal Informers Act, 31 U.S.C. § 232(B), which I will discuss in a moment, all base standing on the same type of citizen interest in effective law enforcement that should be recognized by Congress in comprehensive standing legislation.

IMPACT ON THE COURTS

In hearings on prior proposed standing legislation, testimony was offered in opposition to relaxed standing rules, which expressed the fear that a flood of new litigation would overburden the courts. This is wholly unwarranted and mischievous speculation, however. Most states have liberal standing provisions, and their courts have not been overburdened as a result. In addition, the "any person" statutes that I just mentioned have not "flooded" the federal courts. The words of Chief Justice Burger himself, when he was on the D.C. Circuit, are instructive. In *Office of Communication of the United Church of Christ v. FCC*, 359 F. 2d 994, 1006 (D.C. Cir. 1966), he said concerning administrative proceedings:

"The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome."

The same economic reality will prevent overburdening of the courts under comprehensive standing legislation, and if such legislation provides long needed clarification of the law, judicial resources will be saved rather than drained. As Kenneth Culp Davis has stated:

"Why should not 'any citizen' or 'any person' be allowed to litigate any question in which the public has an interest? Some state courts have gone about this far, and experience has shown that no significant harm seems to result. The difference between the law that stems from *Data Processing and Barlow* differs only slightly from a system allowing 'any person' to litigate any question in which the public has an interest." [Davis, *Administrative Law Text*, 1972, at 429.]

The public has a strong interest in seeing that federal laws are enforced, and, here, where there is no reason to believe that relaxed standing requirements will overburden the courts, private civil enforcement of those laws should be welcomed rather than discouraged.

NECESSARY MODIFICATION TO S. 680

As I stated earlier, I believe that S. 680 represents a sincere effort to remedy many of the problems posed by the current restrictive standing rules. The Bill precludes dismissal for lack of standing because the plaintiff's injury is a "generalized grievance" shared by a large number of other people, because the defendant's conduct is not the primary cause of the plaintiff's injury, because a favorable decision is not certain or likely to remedy the plaintiff's injury, or because the plaintiff's injury is not within the zone of interests to be protected or regulated by the applicable statutes or constitutional provisions. The Department of Justice, which participated actively in the drafting of the Bill, also prepared a memorandum to accompany an earlier version of the Bill, S. 3005, explaining how it believes the Bill would affect the results of the best-known standing decisions. In light of the language of the Bill and the background memorandum, I believe that, with a few exceptions, there is general agreement among most of the interested parties concerning the ways in which remedial legislation should change the law of standing. However, I

believe that certain modifications are necessary to insure that the Bill produces those desired results.

One shortcoming of S. 680 in its present form is that it takes a negative rather than a positive approach to the problem of standing. It says, "do not dismiss for any of the following reasons," but it nowhere contains an affirmative grant of standing to interested citizens. As I discussed in the section of my testimony relating to the constitutionality of remedial standing legislation, Congress can fully exercise its authority to bring some meaning to the elusive concept of injury by explicitly recognizing that certain rights exist and that particular classes of plaintiffs have standing to enforce those rights. Accordingly, I believe that S. 680 should affirmatively grant standing to any individual or organization that may benefit from enforcement of the law or constitutional provision at issue. When the law at issue is intended to benefit the general public, as in the *Richardson* and *Reservists* cases, any member of the public should have standing as a beneficiary. S. 680 precludes dismissal because the desired benefit is not certain to result from success on the merits but by making an affirmative grant of standing to beneficiaries, Congress will be placing the full thrust of its power behind the statute.

In a letter written last year to you, Senator Metzenbaum, by Mr. Justice Douglas, concerning S. 3005, the predecessor to S. 680, Justice Douglas stressed the need for Congress to take a more affirmative approach. He suggested that Congress pass legislation which succinctly declares that "there is a conclusive presumption of proper standing for all citizens who file suit in Federal Courts against their government." That seems to go straight to the heart of the matter, and I strongly urge the Committee to adopt a more affirmative approach for both constitutional and policy reasons.

The needed modification can be accomplished by adding a new section (1) to the Bill which states:

(1) A person who may benefit from enforcement of a provision of the Constitution or of a law of the United States is injured when such provision is not enforced, and that injury is sufficient to enable such person to advance the public interest in ensuring compliance with the Constitution and the laws of the United States.

As a constitutional matter, this section would make it clear that in enacting S. 680, Congress intends to exercise the full scope of its authority to define the parameters of an Article III injury. As a policy matter, the suggested modification would emphasize that Congress is not in the business of creating hollow rights without remedies; when Congress enacts legislation, the intended and incidental beneficiaries of that legislation have the right to insure that it is enforced. Also, Congress would be assigning to potential beneficiaries of legislation the role of private attorneys general, to supplement public enforcement and to insure that the laws are not ignored when public enforcement is not viable or likely.

Another needed modification relates to the specific prohibitions on dismissal contained in the present Bill. Although the enumerated prohibitions address most of the grounds for dismissal that have been articulated in recent cases, three additional prohibitions should be enumerated. First, a section should be added which prohibits dismissal for lack of standing because (d) the injury which plaintiff alleges to have suffered is small, indirect, or speculative.

This provision would simply codify the decision of the Supreme Court in *United States v. SCRAP*, 412 U.S. 669 (1973), which held that even a very small, indirect and speculative injury was a sufficient basis for standing. It is my understanding that S. 680 as presently drafted was intended to retain the vitality of the *SCRAP* ruling, but it would be better to add a section which would do this directly and to indicate that *SCRAP* is not limited to environmental cases, as some have suggested.

The second additional prohibition that should be added is one that would eliminate the rule that in some instances a plaintiff may not raise the rights of third parties. *Scordari v. Alexander*, 69 F.R.D. 656 (E.D.N.Y. 1976), one of the cases discussed in the memorandum prepared by the Department of Justice, shows the need to eliminate the "third-party" prudential restriction. There, several treasury agents challenged the legality of a new IRS policy requiring them to disclose the identities of their confidential informants. In addition to arguing that the new policy would interfere with their ability to perform their jobs, the agents attempted to assert the constitutional rights of their informants, but were prevented from doing so by the "third-party" rule.

The fact situation presented by *Scodari* shows that the third-party rule can be unrealistic and very wasteful. There, the informants could not reasonably be expected to enter court and challenge the new IRS policy themselves. However, even if such a suit were realistic, there is no reason to require two lawsuits where one would suffice. Once a suit is commenced, the plaintiff should be permitted to raise all pertinent legal arguments in order to assist the court in reaching a well-reasoned decision. Sound arguments should not be arbitrarily precluded by prudential rules such as the "third-party" rule.

Third, S. 680 should contain an explicit prohibition on dismissals based on any other "prudential" ground which is not already specifically enumerated in the Bill. As Senator Kennedy indicated in his remarks accompanying the introduction of S. 680, the so-called "prudential" limitations on standing are not really "prudent" at all. They have not only generated waste in the use of judicial resources and confusion among courts and litigants, but they have often forced important federal rights to go unenforced for reasons which are unable to withstand scrutiny. Where the Constitution permits a lawsuit to be maintained, that should end the inquiry into the plaintiff's standing. Accordingly, I believe that S. 680 should contain an explicit prohibition on dismissal based on any "prudential" ground.

TAXPAYER STANDING

Another major problem with S. 680 is that it does not contain a taxpayer standing provision and, in fact, expressly disclaims any intent to clarify taxpayer standing rules. I must emphasize that the way S. 680 is presently drafted, the disclaimer of intent to affect taxpayer standing, which is contained in § 1591(a), is stated so broadly that it would render the rest of the Bill nugatory whenever the tax liability of anyone other than the plaintiff was even indirectly affected. That provision, for example, would not permit the remainder of the Bill to change the result in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), even though, as Senator Metzenbaum's speech introducing S. 680 indicates, that is one of the cases which S. 680 was primarily drafted to reverse. While I am certain that the use of such broad language in the disclaimer was inadvertent, it creates a problem which must be dealt with.

The best way to eliminate this problem is to eliminate the disclaimer, since its only purpose is to maintain the status quo until the problem of taxpayer standing is addressed in subsequent litigation. This purpose can be accomplished most safely by simply not addressing the issue of taxpayer standing at all. Once an explicit disclaimer is added, serious unintended results such as the incidental-tax-liability problem that I just cited can be produced. However, if a disclaimer is retained, great care must be taken to insure that it is narrowly drafted, to minimize unforeseen problems, and, at the very least, the incidental-tax-liability problem must be corrected.

By far the better approach, however, is to use S. 680 to improve the law of taxpayers standing. The absence of a taxpayer standing provision in the Bill is a serious defect because in many instances, the courts have denied standing where the result has been to force taxpayers to watch helplessly as property acquired with their tax dollars was given by the government to favor corporations for less than its actual value. An example is provided by the case of *Public Citizen v. Lockheed Aircraft Corp.*, No. 74-535 (D.D.C., Jan. 8, 1975), *aff'd*, 565 F.2d 708 (D.C. cir. 1977). There, a wide variety of plaintiffs were denied standing to challenge the legality of the sale of an Air Force plant to Lockheed at a price far below its assessed value. The plaintiffs included a citizen/taxpayer organization, a trade association representing some of Lockheed's competitors, and a United States Senator—William Proxmire—concerned with eliminating wasteful government actions. The plaintiffs argued that the Government failed to comply with the competitive bid requirements of the Federal Property Act, 40 U.S.C. § 471, in selling the plant to Lockheed, but, because they were denied standing, the legality of the sale was never considered by the courts. As a result, the purpose of the Federal Property Act, which is to insure top-dollar for the government in disposing of taxpayer-owned property, was frustrated.

Predictably, because of the denial of standing, the sale was finalized, and the government received less money for the plant than it was worth. Moreover, Lockheed then went on to sell the plant to the City of Burbank, California at a substantial profit—a profit which the government might have obtained if it had complied with the statute. The final irony is that Burbank used federal funds to pay for the plant. That means that the government not only failed to realize a

profit on the sale, but the government itself ended up paying the profit that Lockheed realized.

Senator Metzenbaum, I know that you are aware of this problem because you and Senator Goldwater were denied standing in a similar case, *Metzenbaum v. Brown*, 448 F.Supp. 538 (D.D.C. 1978). There, you challenged the legality of the Defense Department's failure to purchase the CTX aircraft through competitive bidding as required by statute, but were denied standing even though you and Senator Goldwater specifically established during the floor debate on the appropriation bill that competitive bidding was intended by Congress. Despite the frequency with which these types of cases arise, no one has standing to prevent the waste of tax dollars—not competitors, not Members of Congress, and not the taxpayers themselves.

The need for taxpayer standing legislation is very strong. Taxpayers support the government, and they should be able to insure that laws regulating government operations are enforced, especially with respect to financial matters. The connection between taxpayers and expenditures of federal funds is intuitively a close one, and taxpayer standing would allow needed private enforcement of the laws that governmental officials never get around to enforcing.

The idea that private civil law enforcement is necessary to supplement Executive enforcement is by no means a new idea. As Judge Frank noted in his now famous opinion in *Associated Industries v. Ickes*, 134 F. 2d 694, (2d Cir. 1943), statutes providing for supplemental law enforcement by private citizens "... have been in existence for hundreds of years in England, and in this country ever since the foundation of our government," *Marvin v. Trout*, 199 U.S. 212, 225, 26 S. Ct. 31, 34, 50 L. Ed. 157." Congress, for example, has already authorized private individuals to bring actions to recover for the United States funds obtained through false claims against the federal government. See the Federal Informers Act of 1863, 31 U.S.C. §§ 231-32. These so called qui tam actions, however, cannot be brought with respect to any claim of which the United States government is aware. This means that qui tam actions do not provide needed supplemental enforcement where the Executive simply refuses to bring an enforcement action for whatever reason.

In addition, qui tam actions are designed to recover money and do not appear to be authorized where only declaratory or injunctive relief is sought to prevent future unlawful spending. Further, qui tam actions cannot be maintained to challenge the legality of Treasury rulings and regulations, even though they can result in the loss of millions of tax dollars. Consequently, a taxpayer provision is necessary to fill the huge gap left by the Informers Act so that more meaningful private enforcement can be had.

Most states already have taxpayer standing provisions. In his concurring opinion in *Flast v. Cohen*, 392 U.S. 83, 108 (1968), Mr. Justice Douglas indicated that all of the states except Kansas and New York allow some forms of taxpayer suits to supplement official enforcement of the laws, with many states explicitly authorizing taxpayers to sue as private attorneys general. Several commentators have also surveyed the law of taxpayer standing in the states. See, e.g., Davis, *Administrative Law Treaties*, Vol. 3, § 22.09 (1958) §§ 22.09-22.10 (1965 Supp.); Jaffe, "Standing to Secure Judicial Review: Public Actions," 7 Harv. L. Rev. 1265, 1276-1281 (1961); Comment, "Taxpayers' Suits: A Survey and Summary," 69 Yale L. J. 895 (1960). Moreover, Flast indicates beyond doubt that a taxpayer standing provision meets the Art. III constitutional requirement, since the plaintiffs granted standing there had precisely the same interest as any taxpayer. For all of these reasons, a taxpayer standing provision should be added to S. 680.

REPRESENTATIONAL STANDING

A new problem that has emerged in some recent cases relates to the ability of organizations to represent the interests of their members, contributors, and supporters. In *Health Research Group v. Kennedy*, 83 F.R.D. 21 (D.D.C. 1979), a case in which I am one of the counsel, the court held that a consumer organization with an established reputation for high quality advocacy relating to food and drug safety matters did not have standing to represent the interests of its contributors and supporters in challenging the legality of a particular FDA practice. There, the Health Research Group challenged the FDA's practice of permitting over-the-counter drugs to be marketed where there was concededly insufficient evidence to establish that the drugs were safe and effective. Because the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-381 (1976), permits

the marketing of drugs only after they are proven to be safe and effective, the Health Research Group argued that the FDA regulations permitting premature marketing violated the statute.

Rather than reach the merits, the Court ruled that the plaintiff lacked standing because the Court disapproved of the plaintiff's organizational structure and method of internal governance. The Health Research Group is one component of Public Citizen, an organization with 70,000 contributors that was established by Ralph Nader as a non-membership organization in order to promote efficiency and to minimize the expenses and other burdens that frequently render membership organizations less effective than they otherwise might be. The well-known activities of the Health Research Group are financed exclusively by private contributions, and many contributors choose to support the Health Research Group rather than other, less effective membership organizations precisely because the Health Research Group is structured in a way that avoids bureaucratic waste and inefficiency. Through regular reports and newsletters, contributors and supporters are apprised of the Group's activities, and they continue to support the Group because they approved of those activities.

Under the law as articulated by the Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the fact that an organization is not technically established as a membership organization does not defeat a standing claim. However, in *Health Research Group v. Kennedy*, the District Court chose to conduct an extensive inquiry into the internal governance of the Health Research Group because of its nonmembership structure. Then, because the Court disapproved of the Group's method of internal governance, it denied standing.

Even a moment's reflection reveals that this was an improper result. The relevant question is not whether the Court approves of an organization's structure, but whether the supporters do. As long as a lawsuit is germane to the purposes for which an organization was founded, and for which contributors or supporters continue to associate themselves with the organization, the organization should have standing to represent their interests. The courts should not, under the guise of conducting a standing inquiry, intrude into areas of internal governance.

Moreover, the test of germaneness should be a realistic one, not an artificial one such as that applied by the Court in the *Health Research Group* case where it concluded that broad public interest activities precluded a finding of germaneness. Rather, germaneness should be tested by determining whether the suit at issue is within the purposes of the organization as set forth in its articles of incorporation or other formal documents, or is within the range of activities in which members, contributors or supporters could reasonably expect the organization to engage in light of its newsletters and other reports of past activities.

Accordingly, a provision to that effect should be added to S. 680 in order to reverse the decision in *Health Research Group v. Kennedy*. Although the decision is a recent one, it has already had a pernicious impact. In *Consumers Union v. Miller*, No. 78-2188, a case now pending in the District Court for the District of Columbia, the government argued that Consumers Union, a classic example of a membership organization, lacked standing because its members had not voted to authorize the particular lawsuit at issue. It is, of course, unrealistic to expect an organization to poll its members or contributors with respect to every lawsuit authorized by its officers or directors, but that is what the government cited *Health Research Group v. Kennedy* as requiring. The fact that the government was able to make such a suggestion with a straight face illustrates just how problematic the law of standing in this area has become.

There is one additional point that I would like to emphasize with respect to representational standing. It might be argued that representational standing by an organization is unnecessary because a suit could always be filed in the name of one or more of the individual supporters or contributors of the organization. However, that is frequently not the case. For example, in the *Health Research Group* case itself, there was never any doubt that a large number of the organization's supporters and contributors were consumers of the over-the-counter drugs at issue. However, because the legal status of each drug and drug ingredient was continually subject to change, there were potential problems in having an individual consumer serve as a plaintiff. This is because at any given point in time, the case might be moot or not yet ripe with respect to the drug being used by any particular consumer. Moreover, as soon as a

substitute consumer could be found to serve as a plaintiff, new ripeness or mootness problems could arise before the case could be finally adjudicated. It is precisely this type of case—where the class of affected individuals is large but the membership is fluid over time—in which representational standing is essential.

There are also cases in which representational standing is necessary because, by definition, there can never be an adequate individual plaintiff. Again, the *Health Research Group* case provides an example. One of the claims made there was that consumers had been misled by the FDA regulations at issue and were relying on perceived FDA approval which did not actually exist. However, once a particular plaintiff became involved in the suit, he or she necessarily knew about the lack of actual approval and arguably no longer had standing to raise the claims of misled consumers. This "Catch-22" approach to standing is simply an amusing curiosity as long as we permit organizations to represent the interests of their supporters and contributors. However, if representational standing is denied, the problem becomes a serious one, possibly precluding all judicial review for an entire category of cases.

It should also be noted that many individuals contribute to consumer organizations so that their interests will be protected without the need for them to undertake the expense and inconvenience of bringing their own lawsuits. In the *Health Research Group* case, each of the individually named plaintiffs had to undergo extensive depositions by attorneys for the drug manufacturers. The depositions were not only time consuming, but the lawyers inquired into personal matters such as political associations and social acquaintances. Overly restrictive limitations on representational standing should not be permitted to unnecessarily interfere with the ability of consumers and citizens to utilize the organization that they support to protect their interests.

Since the original decision in *Health Research Group v. Kennedy*, there have been two new developments. First, the District Court in that case upheld the standing of the individual consumer plaintiffs even though it denied standing to the Health Research Group. *Cutler v. Kennedy*, No. 77-0734 (D.D.C., July 16, 1979). It also decided the merits—just as it had been urged to do on the motions for summary judgment which had been argued more than a year before—and it decided the case in plaintiffs' favor, ruling that the FDA's entire program under challenge was illegal.¹ Second, in *Consumers Union v. Miller* (D.D.C. July 17, 1979), the Court refused to adopt the government's construction of the *Health Research Group* case and ruled that Consumers Union had standing. However, these decisions do not obviate the need for legislation to prevent the problems discussed above. The cases may be reversed on appeal, or other courts may resolve the issues differently. But the most serious problem relates to the amount of time and judicial resources wasted on this issue. Until remedial legislation is enacted which addresses representational standing, as well as the other problems to which the Committee's attention has been directed, we can be sure that substantial amounts of time and resources will continue to be expended on representational standing issues, regardless of how they are ultimately resolved. Accordingly, S. 680 should contain a provision limiting representational standing inquiries to the question of whether the suit at issue is germane to the purposes for which an organization exists and for which contributors and supporters associate themselves with the organization.

JUDICIAL REVIEW OF AGENCY ACTION

A final modification that should be made in S. 680 is the addition of a special provision amending the Administrative Procedure Act in a way that will clarify the rules governing standing to seek judicial review of administrative agency actions. I propose that a section be added which simply grants standing to any participant in an agency proceeding to obtain judicial review of the agency action taken in that proceeding, just the way litigants in a trial court have the right to obtain review of the trial court's ruling in an appellate court. Such a provision is desirable for both policy and constitutional reasons.

As a policy matter, a participant-standing provision certainly makes intuitive sense. The law has traditionally focused on a litigant's stake in the outcome as central to the issue of standing, and once a party expends the time and money necessary to participate in an agency proceeding, he or she has certainly acquired

¹ In fact, both the FDA and the drug makers were sufficiently persuaded by the Court's opinion on the merits that they have decided not to appeal.

a substantial stake in the outcome. As a result of participation, petitions or comments will have been drafted, briefs will have been filed, or testimony will have been presented, and the presiding agency officials will have made numerous factual and legal determinations that affect the interests of participants. Accordingly, participants are entitled to ensure that their briefs are read and that their arguments are adequately considered. In fact, fundamental notions of due process require many of the procedural safeguards that are now guaranteed by the Administrative Procedure Act. Accordingly, once parties participate in an administrative proceeding, they should, at a bare minimum, be able to ensure that the Administrative Procedure Act guarantees to which they are entitled are honored by the agency.

The similarities between judicial review of agency proceedings and appellate review of trial court proceedings are striking. In both, a higher tribunal is charged with reviewing the proceedings of a lower tribunal in order to ensure that the substantive and procedural rights of the parties are not violated. Moreover, in both, the scope of review is narrowly limited to prevent waste of judicial resources. I wish to emphasize that a participant-review proceeding would not expand the scope of permissible judicial review. Review would continue to be available only within the parameters already set by the Administrative Procedure Act and the pertinent substantive legislation. The proposal that I am suggesting would simply eliminate the need to waste time litigating the issue of standing where participants seek merely to obtain review under the Administrative Procedure Act.

Although much confusion exists with respect to the scope of congressional power to confer standing, a participant-review provision is well within the power of Congress to enact. The Supreme Court has repeatedly held that Congress has the power to grant standing as long as the Article III "case or controversy" requirement of the Constitution is satisfied. *Gladstone Realtors v. Village of Bellwood*, 47 U.S.L.W. 4377 (U.S. April 17, 1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970). As I mentioned a moment ago, and as the Supreme Court recently reaffirmed in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978), the gist of the question of standing, for Article III purposes, is whether the plaintiff has a "personal stake" in the outcome of the proceeding at issue.

This requirement, frequently referred to as the "injury in fact" requirement, is satisfied under a participant-review provision because once parties become involved in an agency proceeding, they have an obvious and substantial stake in making sure that they are accorded the protections that the Administrative Procedure Act and substantive statutes provide: they have a stake in ensuring that the testimony they present is weighed with all the other testimony; they have a stake in ensuring that the agency does not treat them in an arbitrary and capricious manner; and they have a stake in ensuring that the agency does not subject them to actions which exceed the limits of the Constitution or the agency's enabling legislation. These are certainly sufficient to satisfy the demands of Article III, especially in light of the much smaller personal stakes that were constitutionally sufficient in cases like *United States v. SCRAP*, 412 U.S. 669 (1973); *Flast v. Cohen*, 392 U.S. 83 (1968), and the other cases cited in the section of my testimony entitled "Purpose of the Doctrine." In fact, in *Committee For Full Employment v. Blumenthal*, No. 77-1939 (D.C. Cir., June 12, 1979), a recent decision of the U.S. Court of Appeals for the District of Columbia, the Court squarely held that violation of procedural rights created by the Administrative Procedure Act or an agency's own regulations constitutes "injury in fact" for the purposes of standing under Article III. Slip op. at 6.

That leads to a second reason why a participant-review provision is within the power of Congress to enact. Although the Constitution requires an injury to create a "case or controversy," the Article III concept of injury is not static or absolute. Rather, the Supreme Court has ruled that Congress has the power to enact legislation creating substantive rights, the deprivation of which gives rise to standing. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). The Administrative Procedure Act creates such a substantive right; participants in agency proceedings are entitled to the safeguards contained in the Act as well as the rights contained in other relevant substantive legislation. Deprivation of those rights and safeguards, therefore, give rise to an Article III injury.

Finally, as is discussed more fully in the section of my testimony on Constitutionality, many cases have held that Congress can assign to private litigants the right to assert the public interest in compliance with the laws under the

private-attorney-general theory. The involvement of the public interest is then sufficient to satisfy the injury requirement of Article III. A participant-review provision would assign to participants in agency proceedings the ability to assert the public interest compliance with the Administrative Procedure Act and the substantive legislation to which it relates.

Because the problem of standing to obtain judicial review of administrative agency actions can be readily eliminated by a simple amendment to the Administrative Procedure Act, a participant-review provision should be added to S. 680.

CONCLUSION

With the modifications that I have suggested, I believe that S. 680 would become an excellent piece of legislation which we would vigorously support, and we are willing to work actively with the Committee to implement the needed modifications. Prompt enactment of remedial standing legislation is important, but it is also important for that legislation to be carefully tailored to solve the many standing problems that have arisen. I hope that the Congress will take advantage of the favorable climate that presently exists to enact legislation allowing the courts to get back into the business of deciding the merits of the cases presented to them, thereby fulfilling their function as the guardians of our federal rights.

Senator METZENBAUM. Our next witness is Lawrence Kaye appearing on behalf of the Committee on Federal Legislation and the Committee on the Federal Courts of the Association of the Bar of the city of New York.

Mr. Kaye, are you here?

Mr. Kaye, we will put your entire statement in the record and ask you to summarize. How many pages is your statement?

Mr. KAYE. 175 pages.

I fear our statement is somewhat lengthy, Senator.

Senator METZENBAUM. That is the understatement of the year. But I am sure that you have dealt with the material very thoroughly.

Do you want to introduce the others who are with you here?

Mr. KAYE. I would very much like to, Senator. To my right is Michael Oberman, my left, Victor Lewkow and Peter Sobil who are members of the two committees of the Bar Association of the city of New York who prepared the lengthy report before you. They worked very closely with me in the preparation of the report and I shall make my statement as brief as possible, stating our conclusions in summary fashion and then we will try to respond to any questions you may have.

Senator METZENBAUM. Well, I notice that you call it an unofficial draft not for publication or general distribution—for use by the Judiciary Committee only. Do you want to explain that?

Mr. KAYE. I certainly shall, Senator. The mechanics of the production of a report by the bar association warrant that temporary caveat, the association of the bar which has, by the way, more than 12,000 members engaged in all aspects of the legal profession, has a number of committees which study a variety of public issues and publish reports which represent the formal opinion of the association on those issues.

The report before you is the joint product of two of our committees—the Committee on Federal Legislation and the Committee on the Federal Courts and, while the report has been cleared through all channels of the bar association, one of our committee chairmen has been on trial and merely has to be his on the form of the report and he has assured me that the final version will be ready within the week and we respectfully request that it be included in the record. But, so

far as the substance of the report is concerned, the draft before you will essentially be identical to the final version.

Senator METZENBAUM. There may be some changes, is that what you are saying?

Mr. KAYE. Of a technical nature, only, Senator.

Senator METZENBAUM. And you are asking that the report as finally drafted be included in the record.

Mr. KAYE. Yes; I am.

Senator METZENBAUM. Without objection, that is agreeable.

Can you make your presentation relatively brief so that we may know the substance of your position because we have you and three more witnesses.

Mr. KAYE. I understand that. I am watching the clock, too, Senator. I notice as I look at my brief summary that it is probably not brief enough so I will go through it and make it even more brief.

STATEMENT OF LAWRENCE M. KAYE ON BEHALF OF ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON FEDERAL LEGISLATION AND COMMITTEE ON THE FEDERAL COURTS, ACCOMPANIED BY MICHAEL OBERMAN, VICTOR LEWKOW AND PETER SOBIL

Mr. KAYE. I would like also just to note, for those who may not be more familiar with our association that the members of the association who serve on our committees represent no particular constituencies or interest groups and they strive to issue objective reports on questions we believe are appropriate to study by the legal profession.

We have been studying the standing legislation since the introduction as 3005 and the report, which you have in draft before you, recognizes the significant issue and also recognizes the confusion and inconsistency and restrictiveness of the development of law in this area and is so articulated by Mr. Morrison.

Also, we recognize as Mr. Morrison also stated, that the doctrine of standing has constitutional and policy underpinnings. The constitutional dimensions routed in article III and beyond this constitutional standard, prudential tests created by the courts as matters of judicial self-governing.

In our report, we trace the history of the standing doctrine focusing particularly on the leading recent cases of the Supreme Court which is where we note the unfortunate inconsistency in the law which we believe is due in part to the failure of the Supreme Court in many cases to distinguish adequately between the requirements of article III and prudential tests, and also to the numerous inconsistencies which have been achieved in the results of particular cases.

Moreover, we note that the major decisions of the courts issued between 1973 and 1976 against a particularly restrictive trend sharply reducing the availability of the Federal courts forum to litigants challenging Government actions. It is plainly these restrictive decisions that provided the impetus for remedial legislation such as the bill before us.

We believe, in view of the state of the law, that there is plainly a need for congressional guidance. The difficult thing for us is what type of legislation is called for, what type of legislation is proper.

It is clear in our view that Congress may not abrogate the minimum standing requirement of article III but equally, the prudential restrictions are subject to congressional reversal. We believe that the elimination of the prudential test is justified. That any citizen, adversely affected by Government action, should have standing to challenge that action if the requisites of article III are fulfilled. But we must emphasize at the outset that the impact of any such remedial legislation is necessarily limited. Legislation cannot automatically cure all the ills, all the problems in the law that have been described.

In particular, we believe that legislation cannot automatically reverse the restrictive trend evidenced in those decisions between 1973 and 1976 because our review of those cases leads us to the inescapable conclusion that they are grounded firmly on the strict application of constitutional standards and not primarily on prudential concerns. That this is so was made very clear by the two decisions that you refer to earlier, *Duke Power* and *Gladstone*. These decisions are significant, not only because they signal the return to the liberal trend on standing prior to 1973, but also because they delineate the constitutional and prudential tests more precisely than ever before, though make claim that the formulation of those tests is not substantially different than earlier pronouncements.

Senator, I do not intend to go into the cases which we described in detail in our report; however, because I think it is a necessary focal point for analysis of the present bill, I would like briefly to state the formulation of the test in *Duke Power* and *Gladstone Realtors*. As to article III, two elements were plainly identified. A distinct and palpable injury, in fact, to the plaintiff, and second, that there be a fairly traceable causal connection between the injury and the challenged conduct.

Moreover, and we believe this quite significant, the court made claim that the second prong of the test, causation, must be viewed in terms of redressability. In other words, whether the exercise of the court's remedial powers would redress the claimed injuries. The court noting only a substantial likelihood that the relief sought would redress the injury need be shown. The court also identified prudential tests beyond the constitutional minimum: the generalized grievance test, the third party standing test, and the much maligned zone-of-interest-standing test. Also, there was recognition of the nexus test formulated in *Flast v. Cohen* in which the court in due power plainly limited to taxpayer litigation.

It is clear we believe, as I have said, that these cases read in light of due power, that the cases from 1973 to 1976 read in light of due power, are plainly constitutional cases. We believe thus and we analyze this in more detail in our report that the results in these cases, however unfortunate, are not subject to reversal by Congress. We nevertheless believe that remedial legislation abolishing the prudential test is warranted and may well contribute to a relaxation of standing barriers. If the Supreme Court has repeatedly suggested to Congress that standing can be expanded to its constitutional limits, there is no doubt that the Court's restrictive application of the constitutional requirement, like the creation of the prudential test, has evolved out of notions of separation of power.

Senator METZENBAUM. Mr. Kaye, when you say that these are decisions that are irreversible by the Congress, I gather the basis of your

point is that you think that we don't have the constitutional authority to do so; is that what you are saying?

Mr. KAYE. Yes, we do, Senator and I will elaborate in a moment on that.

But we do suggest though, though the decisions may not themselves be subject to reversal, that an elimination, an abolition of prudential tests drafted in a positive affirmative form may help relax application of the constitutional tests. As I have stated, the Supreme Court has often suggested to Congress that Congress may eliminate standing requirements and extend standing to the full limits permitted by the Constitution. We believe that an affirmative grant of standing would help alleviate the separation of powers notion that we believe may be responsible for certain restrictive trends in the Court's decisions. We also firmly believe that the congressional action may reduce the confusion and inconsistency which we have referred to today.

Certainly, the disarray has been aggravated by the failure to distinguish between policy and constitutional tests and also by eliminating policy concerns; the Court will focus more precisely on the constitutional standards and we will have a more evenhanded and easily applied area of law.

Also, of course, to the extent that the courts have in the past relied on prudential tests to bar plaintiffs from court, obviously, the abolition of prudential tests will alleviate standing in those areas.

Although we believe that remedial legislation is warranted for the reasons I have just suggested, we are unable to endorse 680 in its present form because we believe there are serious constitutional problems presented and also because we have some question with the negative and piecemeal manner in which the problem is addressed. Very briefly, our primary concern on the constitutional side is subparagraph (c) which, in our view, would directly contravene the second prong of the article III test as clarified in the *Duke Power* and *Gladstone Realtors* decisions. There is no doubt that that subparagraph is intended to eliminate the standards of redressability first articulated in *Simon* and now reaffirmed in *Duke Power*, but *Duke Power* makes plain that it is a constitutional standard and that Congress does not have the power to eliminate this.

Senator METZENBAUM. Mr. Kaye, many of us in the Congress think that when there is a serious constitutional question and we think that certain legislation should be enacted, that we should not act as both the judge and the legislator. We feel that we ought to act in accordance with the dictates of what we believe to be appropriate and then, if there is a constitutional question, let that matter be resolved by the courts.

Do you think that this is possibly one of these areas? We have that issue many times where somebody argues that a piece of legislation is unconstitutional. If you happen to be for it, you vote for it and say, let the courts take care of it. If you happen to be against it, you say, well I can't vote for an unconstitutional bill. Myself, I have always felt that when there is any area of doubt, and the legislative thrust is right, that we ought to go ahead and enact the legislation and then let the court determine whether or not it is constitutional. Do you challenge that position?

Mr. KAYE. I appreciate that position, Senator, and I know that in certain circumstances, it is the most appropriate way to proceed. Our problem here is focusing on a long line of decision. It is our view that there really is no doubt as to this aspect of the constitutional infirmity. That the Court has articulated the problem as a question of interpretation of the judicial power under article III; that the tests are plain; they are there; they have been articulated; that it is not a question of, perhaps this is, and perhaps this is not, an infringement. We, unfortunately, we believe that any attempt to redefine the standards of article III standing that has been applied differently in certain cases, but consistently set forth in the earlier cases and in *Duke Power* and *Gladstone Realtors* is very unwise, that it is not legislation where there may be a hope that it is constitutional but where it is plainly in disregard for constitutional standards that have been reiterated and reiterated by the Court.

Our problem, as I said, is the more significant, with respect to subparagraph (c) because the language of the legislation particularly would eliminate a need for a showing that there is a substantial likelihood that the relief sought would redress the claimed injuries. That language of substantial likelihood is quoted in the *Duke Power* decision, and in *Simon* and *Warth* and other earlier cases, and we feel that that situation, that what the Senate appears to want to do is to take a firm constitutional standard and abrogate it. We are troubled by that. We also are troubled generally in an area such as this where it is plainly a question of article III power that there be any attempt by Congress to suggest the parameters of the constitutional requirement—that is for the court to do and I think that lesser problems is evidenced by subparagraph (b) which would eliminate the need to show primary cause.

The bill purports to eliminate prudential standards. There is no prudential concern or primary cause that is a means of determining the parameters of the causation requirement. Those, as liberally applied, in *Duke Power*, this standard might pass muster. It is not a question of the test itself, but of the application of the test. We are troubled by it. In a moment, I will suggest how we believe that can be cured, but I would mention also very briefly that even if constitutional infirmities were cured, we do not believe that a negative approach, as articulated by Mr. Morrison, is a proper approach; that by eliminating certain prudential tests and not others doubt that was reiterated last year on the hearings on 3005, we think would serve as to whether there was an intention only to eliminate some, but not others, whether the courts can come back with some new policy inspired concerns and we think that would be very strongly cut against the intent of the sponsors of the legislation and, perhaps, to the extent that there is an impact of the bill, it would be cut back even further.

I can conclude now, very briefly, and state that in view of the difficulty in distinguishing between constitutional and prudential concerns, we believe that any attempt to isolate and to eliminate particular tests is going to be troublesome.

What we do recommend is direct corrective legislation drafted to declare that standing be granted to every citizen who seeks to challenge illegal or unconstitutional Government conduct to the fullest extent permitted by article III. That is language very similar to that

employed by States in connection with long-arm statutes where they want to have the long-term statutes to be as broad as possible and that type of statute is a signal to the courts that they should go to the full extent of the Constitution. In determining long-arm jurisdiction, we believe that a similar signal to the Court here will aid in a relaxation of the requirements but, more importantly, that it is the only way to eliminate unconstitutional concerns being utilized by the courts and, at the same time, avoid the constitutional problems which we believe are so evident in the present draft of the bill.

One of the other areas that we have gone into in our report which I would comment on if you would like, Senator—

Senator METZENBAUM. What I would really like is to ask a few questions at this point.

Isn't the issue of Congress authority to affect the parameters of article III standing fundamentally rooted in the separation-of-power doctrine?

Mr. KAYE. Yes, it is Senator.

Senator METZENBAUM. If so, then isn't there a role for Congress to play in defining the scope of its own authority? Shouldn't we expect the court to be attentive to a message from Congress about the proper enforcement of rights it has created? I take it that is the thrust of your report. On page 26 of your statement you suggest that if Congress wants standing expanded, the courts may not apply article III so strictly.

Mr. KAYE. That is a hope, Senator. It is a hope that our signal, the signal that we recommend will be taken by the Court to continue what we believe is a very liberal trend of *Duke Power* and *Gladstone Realtors*.

Yes, Congress does have a role to play. That role is being very well served here by first telling the courts that they are not to employ non-constitutional standards in denying standing. The arguments have been heard that if prudential limitations are abolished, public action will flood the courts. They are better reserved to the legislative process. In that regard, we believe, and the Court has noted this before, that once Congress speaks and says you are better equipped to deal with it than we are, then the Court will. The alleviation of the separation of powers concern will be present and the courts will not concern themselves with prudential tests.

The problem is one of power. The Congress in our view does not have the power to determine what is required by the case or controversy standard of article III. Only the courts have that power and the courts have done that here. Legislation to reverse that, we think, we believe, would violate the separation of powers.

Senator METZENBAUM. Doesn't this really go to the question of the root of Congress authority to act in this area. Aren't you suggesting by your testimony that we don't have that authority. Aren't you almost making the judicial determination on your own?

Mr. KAYE. No; in our view, we are recognizing the unquestionable statement of the Supreme Court of the United States that Congress is without that power, to effect the constitutional standards.

Senator METZENBAUM. But really what you are saying is: "This is the way we interpret the Court's decisions that have been made heretofore and therefore we are saying to you, you don't have that author-

ity." And I, both as a private citizen and as a public servant, have heard the argument made so often about that which is and isn't constitutional—that if we had followed the claim of unconstitutionality over a period of our Nation's history, we never would have had any workmen's compensation laws; we never would have had any social security; we never would have had any medicare or medicaid. We never would have had probably a hundred social concepts that have now been included into the law, including all the labor laws, wage and hour laws. And in every instance, the argument has been made, it is unconstitutional. And in every instance, prominent scholars such as yourself have come forward to speak with great efficacy that this is unconstitutional. What I am saying to you is that we enact the law and the Court determines that it is unconstitutional and, so be it. But should we not act because an organization such as yours predetermines the constitutionality issue? Incidentally, how big a committee is yours?

Mr. KAYE. There are two committees Senator, each of which consists of approximately 20 members.

Senator METZENBAUM. And is it a unanimous decision in each instance?

Mr. KAYE. The report and the form before you has been unanimously approved by the two committees.

Senator METZENBAUM. Go ahead and answer the question.

Mr. KAYE. I first thank you for the compliment that was included in the middle of your articulate statement.

Senator METZENBAUM. The previous speaker made me a judge and I am happy to make you a part of that group.

Mr. KAYE. I am happy to benefit without engaging in the expertise of my colleagues.

I would not have any of the legislation which you have just referred to treated in any other way. I think that obviously that constitutional fears expressed by scholars or others should not dissuade Congress from enacting what it feels is proper legislation and then let the Court say whether that is or is not constitutional legislation. The difference here, we believe, is that the courts have already done that in the manner, the very plain unambiguous manner in which S. 680 would eliminate what the Court has already decided, we think, makes it a very different situation from those that you just described.

I would like to add one other thought because I believe, and I think it would come out of our report, but I don't think that we necessarily take the position quite as stringent as the Senator may believe. We do not suggest that Congress does not have areas of authority here. We note in our report that on a statute-by-statute basis, the Congress can grant standing. They can increase the class of aggrieved persons under particular statutes and the Court has said that Congress can do that so long as the constitutional tests are still applied. And, I think the *Gladstone Realtors* and the *Traffickanti* cases are a very good example of that where Congress specifies a particular injury or creates a right, the violation of which would be an injury and then provides the remedy thus eliminating any question whatsoever on a determination by the Court as to whether this redressability standard has been satisfied. Congress can do that.

Professor Tribe in the supplement to his recent treatise in which he discusses the *Duke Power* case makes that distinction very plain. The substantial likelihood case is there, the test, the Congress cannot do anything about it. But what Congress can do is find factually that certain type of injuries are sufficiently likely to be redressed by specified forms of relief to confer standing. That is our problem.

We also know that there are a variety of proposals that have been made by various groups that suggest an affirmative grant which they define injury broadly and use terms such as "direct" or "indirect," and "beneficiary of the statute."

We don't think that those statutes are very far off from the type of statute that we are urging. What we are troubled by is that it is very difficult to make those, to create definitions that will uphold in a general sense. On a statute like that you, statute by statute, the Congress can do it; they do it very well, and they have done it and they will continue to do it. It is in a broader area that we think legislation of that type will do nothing for this, nothing more than create very prolix litigation on the types of definitions that are being made and we believe that our standards that Congress direct the courts to extend standing to the broadest extent permitted by article III will accomplish every bit as much as those affirmative definitions of standing without the fear of a prolix litigation over the meanings of definitions and the possibility of the Court creating new policy limitations that nobody has thought of before.

We think that our language is precise; it is clear and will give the courts the direction that we believe the sponsors of this legislation want to give.

Senator METZENBAUM. Thank you very much, Mr. Kaye. We appreciate your testimony and appreciate the others who have come here with you from New York, and we certainly will take into account your entire report as well as the suggested language.

I think that Senator Thurmond and others may have some questions for you.

Mr. KAYE. I will be glad to respond, Senator, and we will have our final version of the report to you in the next few days.

Mr. CHUMBRIS. May I have the record show, I was right in the middle of one of three points and that the second and third point be added to that colloquy that I had while you were absent?

Senator METZENBAUM. Without objection.

[The prepared statement of Mr. Kaye follows:]

Prepared Statement of Lawrence M. Kaye

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

REMEDIES FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS BY
FEDERAL OFFICERS AND EMPLOYEES:
PROPOSED AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT

By THE COMMITTEE ON FEDERAL LEGISLATION

<i>Contents</i>	<i>Page</i>
I. Introduction and Summary of Committee's Views	1
II. The Present State of the Law	5
A. Actions against the Government—The Federal Tort Claims Act and Other Statutes	5
B. Actions against Federal Officers and Employees—"Bivens" Suits and Statutory Remedies	7
C. § 1983 Actions against State and Municipal Officers and Employees	8
D. Existing Disciplinary Mechanisms	10
III. S. 695 and H.R. 2659	11
IV. The Committee's Recommendations	15
A. Waiver of Sovereign Immunity and the Good Faith and Discretionary Function Defenses	15
B. Deterring Unconstitutional Conduct: Liability of Federal Officers and Employees	16
C. Strengthening the Disciplinary Mechanism	17
D. Damages and Attorneys' Fees; Jury Trial	20
E. Additional Comments on S. 695 and H.R. 2659	22
F. The Federal Tort Claims Act is Not the Appropriate Framework for Constitutional Tort Claims	23
V. Conclusion	24

I. Introduction

A democratic society must maintain mechanisms for insuring that the conduct of government employees does not deprive citizens of constitutionally guaranteed rights. Disclosures during the past decade of misconduct by government officials have led to increased concern that such mechanisms have not been sufficient, particularly with respect to the activities of investigative and intelligence agencies.¹ These same revelations, coupled with expanded opportunities to obtain information from the government under such statutes as the Freedom of Information Act, have spawned a great number of lawsuits against present and former individual government employees as well as the federal government itself. The desire to shield government employees from the demoralizing effects of such legal actions, and to reduce the expense of retaining private counsel to defend them, has produced several bills introduced in Congress which would provide that the civil remedy for the acts and omissions of federal employees, including their so-called "constitutional torts," would lie exclusively against the United States and not against the employees.

This report focuses upon the bills currently pending, H.R. 2659 and S. 695, introduced in March 1979, which would amend the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, to provide for an exclusive remedy against the government, coupled with a procedure for the injured party's participation in an agency disciplinary action against the employee.

Any structure of remedies for controlling government employee conduct must serve a number of sometimes competing interests. Most obvious are compensation of injured parties and punishment of offending employees in order to deter future misconduct. Also important, however, are establishment and enforcement of agency standards that protect and encourage lawful conduct by all levels of governmental employees, including supervisory officials; promotion of efficiency and economy in government operations;² and maintenance of incentives for "innovative" and "courageous" conduct³ by government employees.

Properly balanced civil damage remedies can be a very important element in any such structure, especially since civil damages are the only remedy which can both compensate the injured party while at the same time deterring the offending party.⁴ The framework for federal civil dam-

age actions has, however, developed very slowly, hindered by the doctrine of sovereign immunity and various other doctrines granting immunities to individual government employees.⁵ In the last two decades, the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, has become a major means of redress for persons deprived of constitutional rights by *state and local* law enforcement officers or other employees.⁶ But Congress has never enacted legislation providing for a similar cause of action against federal employees.

Although the United States first waived its sovereign immunity for torts of its employees by enacting the Federal Tort Claims Act in 1946, the FTCA originally excluded most intentional torts. However, under a 1974 amendment broadening the FTCA to cover torts such as assault, battery, false imprisonment, and false arrest by investigative or law enforcement officers, injured parties have been able to sue *either* the government or its employee. An election is required, since it has been judicially determined that plaintiffs may not sue both the government and the employee in one action.⁷ Even when the United States is sued, it has generally been held entitled to assert as its own defense the good faith belief of its employee that his conduct was lawful.⁸ In addition, under the FTCA the government can only be liable to the extent that the conduct would constitute a tort under the law of the state where the act was committed.⁹

Further impediments to civil redress for wrongful government conduct have been provided by several long-standing "immunity" doctrines surrounding the activities of government employees. One is even enshrined in the Constitution: members of Congress "shall not be questioned in any other Place" for what occurred in speech or debate on the floor of either house.¹⁰ Not only legislators, but judges, prosecutors and persons performing analogous functions have been held entitled to absolute immunity.¹¹ The courts have also developed a doctrine of immunity for employees of the executive branch who are performing a "discretionary function" within the scope or perimeter of their duties. This doctrine was exemplified by the 1959 Supreme Court decision in *Barr v. Matteo*,¹² where the Acting Director of the Office of Rent Stabilization was exonerated of liability for an allegedly libelous press release regardless of whether it had been issued with malicious motives. The doctrine has in recent years evolved from one of absolute immunity into a qualified immunity based, again, upon the "good faith" defense.¹³ The doctrine is also embodied in the FTCA, which excludes government liability for claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."¹⁴

Despite these restrictions in the FTCA and case law, many recent federal statutes contain specific statutory remedies for the violation of individual rights by government employees—for example, the Privacy Act of 1974,¹⁵ the Foreign Intelligence Surveillance Act of 1978,¹⁶ and the Tax Reform Act of 1976.¹⁷ This Committee has supported such remedies in numerous reports on pending or proposed federal legislation. As indicated in our 1977 report on Legislative Control of the FBI, we are in favor of

remedies that place primary responsibility on the government and hold individual employees liable only if the injured party can prove that they acted willfully or maliciously (rather than placing the burden on the employee to prove "good faith"). It seems to us that this strikes a fair balance and affords an opportunity to reach supervisory and policy making personnel, who often bear responsibility for unconstitutional employee conduct.¹⁸

Even without specific legislation, the Supreme Court held in 1971, in *Bivens v. Six Unknown Fed. Narcotics Agents*,¹⁹ that persons injured by Fourth Amendment violations could maintain civil damage actions against federal government employees, leading to the development of the concept known as "constitutional tort." It was subsequently established, however, that (like the government in FTCA suits) individual employees would not be liable if they could establish as a defense their own reasonable good faith belief in the lawfulness of their conduct.²⁰

Since the accountability of government employees is such an important goal, the current patchwork of civil remedies sketched above should certainly be improved. The bills that the administration has proposed, S. 695 and H.R. 2659, would expand the FTCA to cover virtually all deprivations of constitutional rights by government employees; the government would waive what remains of its sovereign immunity in this area. The "good faith" defenses of individual employees could not be asserted by the government, nor would the employee's exercise of a "discretionary function" be relevant to recovery against the government for violation of constitutional rights, except where present law gives absolute immunity, as in the case of judges, prosecutors, or members of Congress. In return for the imposition of broad liability on the government, individual employees themselves would become virtually immune from civil suit. If an employee were sued, and the Attorney General certified that the conduct complained of was within the scope of the defendant's employment or under color of it, the United States would automatically (with a minor exception) be substituted as sole defendant. The bills would not affect the right of agencies to discipline their employees, but would give a plaintiff who recovered from the United States, whether by judgment or settlement, certain limited rights to initiate and participate in the disciplinary proceedings.

A Summary of the Committee's Views

This Committee is sympathetic to the goals of this legislation. As stated above, we believe that improved mechanisms to insure accountability are essential. We strongly support the extension of the liability of the United States to all deprivations of constitutional rights by its employees—indeed, we think the extension should reach all intentional invasions by government officials of individual rights, whether "constitutional" or not. Sovereign immunity is an outmoded doctrine no longer appropriate to our form of government. We therefore support legislation waiving sovereign immu-

nity in all suits to redress federal government deprivation of rights secured "by the Constitution and laws" of the United States. That is the standard of liability for suits to redress injuries caused by actions of state and local officials under 42 U.S.C. § 1983, and we believe the same standard should apply to injury caused by federal officials as well.

The Committee of course shares the view that innovative and courageous action by federal officers and employees should be encouraged. But we believe equally that unlawful conduct should be discouraged, and that employees of the federal government must be held accountable for their actions in the most effective manner that can be devised.²¹ Finding a balance between these conflicting interests is not easy. But we have serious doubts that accountability would be encouraged at all by the grant of virtually complete civil immunity for government employees proposed by S. 695 and H.R. 2659. Even though the availability of the "good faith" defense has meant few actual recoveries against individuals, we believe that the *possibility* of such a civil recovery does and should continue to deter willful and intentional misconduct. We are not convinced that internal disciplinary procedures, with or without the participation of the injured party, can provide equivalent deterrence. We therefore strike a different balance than S. 695 and H.R. 2659: rather than immunizing individual employees, persons whose rights have been violated by a federal employee should be allowed to sue *both* the government and the employee, but recovery against the employee should be granted only after plaintiff carries the burden of establishing that the employee acted willfully or with malicious intent. This standard would protect the employee more than present law, which requires that he establish his own "good faith". The Church Committee reached a similar conclusion in its final report, although staying closer to present law by recommending that the employee be required to prove his good faith as an affirmative defense.²²

Even if the foregoing formulation is adopted, we have another major reservation about S. 695 and H.R. 2659: after considerable study and thought, we have concluded that the FTCA is not the appropriate vehicle for establishing a statutory remedy for intentional violations of individual human rights. The FTCA was originally designed to provide recovery primarily for negligent torts; it has a cumbersome administrative structure; and it does not provide for jury trial or punitive damages. The proposed legislation shows, in several places, the strain of trying to consolidate dissimilar structures for redressing negligent and intentional torts. We therefore believe that the new civil damage remedy envisioned by the drafters of S. 695 and H.R. 2659 would be better enacted in a separate statute rather than by amendments to the FTCA. We will comment below on the features we think this statute should incorporate.

Whether or not civil liability of individual employees is preserved, and regardless of the framework employed, we generally approve the concept of disciplinary proceedings embodied in the pending legislation. Permitting an injured party to trigger an agency disciplinary proceeding against an offending employee could be a useful device, particularly if it spurs agencies to establish and enforce standards for lawful employee conduct.²³

The disciplinary mechanisms set out in S. 695 and H.R. 2659 therefore deserve careful attention and, we feel, can be improved in a number of ways.

Finally, the most effective total structure must include a balance of civil liability, criminal liability, agency discipline, and the exclusion from criminal trials of evidence gathered in violation of the Constitution. It has been suggested that a structure such as S. 695 and H.R. 2659 propose might be a substitute for the exclusionary rule.²⁴ Last year's congressional hearings do not reveal any such intent nor any reason to make such a basic change, and we would strongly oppose it. Ultimately, the best protection against government conduct in violation of constitutional rights is a broad array of remedies, of which the established and effective exclusionary rule is one of the most important.

II. *The Present State of the Law*

A. *Actions Against the Government—the Federal Tort Claims Act and Other Statutes*

The doctrine of sovereign immunity ("the King can do no wrong", or at least should not have to pay for it) was brought over from England and engrafted onto our republican form of government from the very beginning. By the mid-1970's, however, the doctrine had been substantially narrowed in its application. In 1855, Congress established the Court of Claims, with jurisdiction over claims against the United States arising out of any contract or law of Congress. The Tucker Act of 1887 granted concurrent jurisdiction to the federal district courts.²⁵ The Tucker Act also gave the Court of Claims jurisdiction to hear claims "founded upon the Constitution" but "not sounding in tort".²⁶ There was then no concept of a "constitutional tort" as federal wrong; rather, this clause of the Tucker Act was construed to cover compensation for the taking of property.²⁷ In 1910, the government agreed to accept liability for patent infringement and in 1920, for maritime torts.²⁸ But the great bulk of common law torts committed by federal government employees, such as negligent driving, could be redressed by the government only through private bills.²⁹ By the 1940's, the number of such bills introduced in each Congress had grown so large and their consideration so time-consuming that a general waiver of sovereign immunity for common law negligent torts, which had been rejected several times before, was enacted in 1946 as the Federal Tort Claims Act.³⁰

The present FTCA has been amended several times but is not dissimilar from its original form, with one major exception, noted below. The FTCA permits the recovery from the United States of money damages for injury caused by "the negligent or wrongful act or omission of any employee of

the Government while acting within the scope of his office or employment" but only "in the same manner and to the same extent as a private individual under like circumstances", *i.e.*, under state law.³¹ There is no jury trial.³² The government is not liable for interest prior to judgment or for punitive damages.³³ Employees of any federal agency and members of the military³⁴ are covered, but not a "contractor" with the United States.³⁵

A plaintiff may not institute an FTCA action unless he has first presented his claim to the appropriate federal agency and the claim has been denied in writing or six months have passed.³⁶ The head of the agency may settle a claim for an amount up to \$25,000, or more if approved by the Attorney General or his designee.³⁷ The acceptance of a settlement or a judgment under the FTCA constitutes a complete release (and a complete bar of additional actions) not only against the United States but also against the employee whose act or omission gave rise to the claim.³⁸ Attorneys' fees must be borne by plaintiff and are limited to 25% of the amount of the settlement or judgment; for a lawyer to charge more is punishable by a fine of up to \$2,000 or a year's imprisonment or both.³⁹

Under the so-called "Drivers' Act" amendment of the late 1950's, the FTCA was made the exclusive remedy for claims arising out of the operation of a motor vehicle by government employees acting within the scope of their employment. If an employee is sued in any court, and the Attorney General certifies that he was acting within the scope of his employment at the time of the accident, the United States must be substituted as the defendant. If the action was brought in state court, it is removed to federal court.⁴⁰ Thus, in claims for operation of federal motor vehicles, along with certain medical claims⁴¹ and claims for violations of statutes such as the Right to Financial Privacy Act, the federal employee responsible may be completely shielded from liability for negligent, or even intentional, acts committed within the scope of his employment.⁴²

The FTCA excludes many classes of tort claims from its coverage.⁴³ Significant among such exclusions are claims arising out of enumerated *intentional* torts. Originally, the FTCA excluded all claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights, although it has been held that the United States may be sued under the FTCA for the intentional torts of its employees not enumerated in the exception, such as trespass or invasion of privacy.⁴⁴ In 1974, widely-publicized raids by federal and state narcotics agents on two innocent households in Collinsville, Illinois, prompted a speedy modification of the FTCA.⁴⁵ An exception to the exception was created: the United States agreed to accept liability for assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution, but only based on acts or omissions of federal investigative or law enforcement officers. Thus, the FTCA is now available to redress some unconstitutional acts of federal employees, although it has rarely been used successfully by injured parties.⁴⁶ It still cannot be used at all where conduct such as defamation is at issue, and would thus be inapplicable to such illegal

conduct as the FBI campaign against Dr. Martin Luther King, Jr., or its COINTELPRO activities involving deliberate dissemination of injurious falsehoods.⁴⁷

The FTCA is not, however, the sole vehicle for statutory actions against the government. A number of recent statutes create rights of action against government agencies in situations where the conduct involved might involve the deprivation of constitutional rights. For example, if any agency "acted in a manner which was intentional or willful" in violation of the Privacy Act of 1974, an individual adversely affected may recover actual damages or a minimum of \$1,000, costs of the action, and attorneys' fees.⁴⁸ The Right to Financial Privacy Act of 1978 also allows persons injured by a statutory violation to recover actual damages or minimum of \$100, attorneys' fees and costs. In the case of willful or intentional violations of that Act, punitive damages may be awarded against the agency.⁴⁹

Some of these statutes recognize civil actions against individual federal employees for statutory violations which may also involve deprivation of constitutional rights. For example, the Omnibus Crime Control and Safe Streets Act of 1968 creates a civil cause of action for wiretapping in violation of that Act; the aggrieved plaintiff may recover actual or liquidated damages, punitive damages, and attorneys' fees from any person who intercepts, discloses, or uses his communications in violation of the Act.⁵⁰ A similar cause of action is created for violations of the Foreign Intelligence Surveillance Act of 1978.⁵¹

B. *Actions Against Federal Officers and Employees— "Bivens" Suits and Statutory Remedies*

The facts that gave rise to Webster Bivens' lawsuit were not dissimilar from the Collinsville, Illinois incidents mentioned above. In 1965, federal narcotics agents entered his apartment, manacled him, threatened his family, searched his apartment, and took him to the station house, all allegedly without a warrant or probable cause.⁵² His suit in the Federal District Court for damages was dismissed for failure to state a cause of action; the Court of Appeals affirmed. In 1971, the Supreme Court reversed the dismissal, holding that Bivens was not relegated to his state tort remedies. Rather, the alleged violation of the Constitution gave rise to an independent claim, and damages were available because of the violation even if no federal statute specifically so provided. The Supreme Court left the separate issue of defendants' immunity to the Second Circuit. On remand, that court decided the agents had no immunity from damage suits charging constitutional violations, but held that they would have a valid defense if they proved they acted in good faith and with a reasonable belief in the validity of the search and arrest.⁵³

Although neither the Supreme Court nor the Second Circuit used the term, the type of conduct at issue in *Bivens* became known as a "constitutional tort", to contrast it with a cause of action specifically created by statute, such as 42 U.S.C. § 1983. During the 1970's, various lower federal courts found additional "constitutional torts" under the Fourth, and

other, Amendments.⁵⁴ Within the last eighteen months, the Supreme Court has specifically acknowledged that damage remedies are available for violation of the First Amendment⁵⁵ and the due process clause of the Fifth Amendment.⁵⁶

C. § 1983 Actions Against State and Municipal Officers and Employees

Although this Report is concerned with federal remedies for constitutional violations by federal officers and employees, the comparable body of law with respect to such violations by state or local officers and employees is better developed and offers several interesting points of comparison. In addition, as discussed below, 42 U.S.C. § 1983 (which provides for such liability) may well be a more appropriate model than amendment of the FTCA for the legislation being considered.

42 U.S.C. § 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."⁵⁷

Although enacted in the wake of the Civil War, it was not until after World War II that this statute became an important means of vindicating constitutional rights (other than voting rights) against state and local government employees. The term "under color of law" has come to mean not simply conduct authorized or directed by a state statute, but "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state action".⁵⁸ First so construed in the context of a criminal civil rights statute, in 1961 in *Monroe v. Pape*⁵⁹ the definition was extended to civil actions under § 1983. An extraordinary growth ensued in the number of lawsuits filed under that section and related civil rights statutes: there were 280 such cases filed nationwide in 1960, 3,985 in 1970, and 12,213 in 1977.⁶⁰

While *Monroe v. Pape* also held that governmental entities were not subject to suit under § 1983, that holding was overruled in large measure last year in *Monell v. Dept. of Social Services*.⁶¹ In *Monell*, the Supreme Court continued to read § 1983 as granting absolute immunity to municipalities where the claim against the local government is based solely upon the doctrine of *respondeat superior*. However, the Court rejected absolute immunity where an unconstitutional action taken by a local government's employee "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or results from an "official policy" or "governmental 'custom' even though such a custom has not received formal approval through the body's

official decision making process".⁶² The Court left for the future the issue of which, if any, qualified immunities were left to municipalities in cases where absolute immunity no longer protects them under § 1983. Thus, while the scope of § 1983 liability of state and local governmental bodies remains undefined, it is clearly narrower than that proposed under the pending bills to amend the FTCA.

Many states and localities have responded to the potential liability of their employees under § 1983 by enacting legislation indemnifying officers and employees found liable under that section.⁶³

The practical worth to plaintiffs of § 1983 suits has been questioned, at least in instances where police officers are being sued.⁶⁴ A recent study of § 1983 suits against police officers in Connecticut showed that juries render few verdicts against police officers; that any such verdicts are small; that pro-police and racial and economic prejudices appear to have a significant effect on verdicts; and that indemnification is so broadly granted in practice by municipalities that police officers are routinely shielded from personal liability, even, in one case, when punitive damages were awarded.⁶⁵

Section 1983 takes an approach to government employee liability diametrically opposed to S. 695 and H.R. 2659. The recent move toward liability of governmental entities shown by *Monell* strikes us as salutary, since the evidence suggests that, without such liability, § 1983 actions have serious short-comings as a means of compensating victims of constitutional torts. If, as we suggest in this report, § 1983 is used as a basic model for a statute covering such torts by federal employees, there should be full responsibility of the government, beyond that found in *Monell*.⁶⁶

The Justice Department's section-by-section analysis of S. 695 states that:

"[i]t is not contemplated that every unconstitutional act necessarily will rise to the level of a constitutional tort. The bill makes no attempt to define the breadth or scope of those rights or constitutional deprivations which are compensable under a *Bivens* theory. Rather, that is left to the developing case law."⁶⁷

Thus, in addition to the cases following *Bivens*, the foregoing case law under § 1983, which speaks of the deprivation of rights secured by the Constitution, should be relevant to construction of the new legislation, whether it retains its present form, or is re-modelled after § 1983.⁶⁸ Although that case law has undergone a longer and more extensive development than that following *Bivens*, there still remain many unanswered questions. In June of this year, for example, the Supreme Court found that a false imprisonment claim against a sheriff, possibly tortious under state law, on its facts did not give rise to a constitutional claim under § 1983; the Court specifically deferred consideration of whether negligent conduct (in this case, the sheriff's failure independently to investigate the validity of the arrest) could give rise to such a claim.⁶⁹

D. *Existing Disciplinary Mechanisms*

There are well-established mechanisms for the federal government's discipline of employees who engage in misconduct. Civil service law covers all the executive agencies except the FBI, CIA, and other intelligence agencies.⁷⁰ Such disciplinary proceedings (called "adverse actions") against government employees range from various forms of reprimands and delays of salary increases and promotion to the maximum sanction—removal. A proceeding is initiated by the agency, in practice by the employee's superior. There is no provision for a person outside the agency to initiate or participate in such a proceeding, although he may make what complaint he wishes to the agency about the conduct of its employees. Where the "adverse action" entails the possibility of a suspension of fourteen days or a greater sanction, employees are entitled to administrative review by their agency and thereafter by the Merit Systems Protection Board,⁷¹ and they may seek judicial review of the Board's decision in the Court of Claims or a Court of Appeals.⁷²

Although the FBI is exempt from these civil service procedures, the Department of Justice and the FBI responded to the Church Committee Report and other disclosures of unlawful and unconstitutional conduct by revising agency disciplinary procedures. In 1975, Attorney General Edward Levi established an Office of Professional Responsibility in the Justice Department, and in 1976 a similarly named office was established in the Planning and Inspection Division of the FBI. In some cases, special task forces were appointed to investigate specific matters, such as the FBI's activities involving Dr. Martin Luther King, Jr. In a related area, and responding to similar concerns, an Intelligence Oversight Board under the President's direction was set up by Executive Orders 11905 and 12036 to watch for illegal or improper intelligence activities, including FBI counter-intelligence.⁷³

The effectiveness and fairness of bureaucratic disciplinary mechanisms have been much commented upon.⁷⁴ Where norms of conduct accepted within an agency are violated, disciplinary procedures are apparently effective. However, when conduct *not* condemned by agency norms, but nevertheless violative of the Constitution, is involved, no such assurance can be gleaned from the record to date. The present public record would not support the conclusion that such internal mechanisms have adequately discharged the responsibility of punishing employees for violations of constitutional rights. Indeed, it would be particularly unlikely that an "adverse action" or similar proceeding would result from a violation sanctioned or ordered by the same superior who would have to initiate the disciplinary action.

* * *

Against this background, we turn now to a consideration of the two pending bills—S. 695 and H.R. 2659—which would address the problem of “constitutional torts” by federal employees through amendments to the FTCA.

III. S. 695 and H.R. 2659

S. 695 is the Carter administration’s bill; it was introduced by Senator Kennedy of Massachusetts, Chairman of the Judiciary Committee, who nevertheless expressed certain reservations about it and indicated that the issue of granting absolute immunity to federal employees should be explored thoroughly in committee.⁷⁵ H.R. 2659, while containing virtually all of the provisions found in S. 695, was restructured by House Subcommittee staff before its introduction, in an attempt to create a more manageable format.⁷⁶

A. General Provisions

Both bills would amend the current FTCA to give the federal district courts jurisdiction over claims involving acts or omissions of government employees

“where the claim sounding in tort for money damages arises under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law.”⁷⁷

The FTCA would continue to cover claims not arising under the Constitution based on a negligent or wrongful act or omission of a federal employee, but only if the employee was acting within the scope of his office or employment.⁷⁸ The bills would make no change in the sections of the FTCA denying jury trial, punitive damages, and interest prior to judgment. Nor would they change the definition section of the FTCA, so that the United States would not waive its sovereign immunity for claims arising under the Constitution but performed by its “contractors”. The United States would be liable for claims brought against former employees, including former Presidential appointees, and they would receive the benefit of the immunity provisions, but only if they agreed to submit to the bills’ disciplinary procedures.⁷⁹

The proposed legislation would grant new substantive rights by adding a subsection to the FTCA placing liability upon the United States for “tort claims arising under the Constitution.” In addition, significant restrictions would be placed upon the government’s right to assert the defenses now available to its employees in cases of this sort. Thus, both bills would

specifically preclude the United States from asserting as a defense either the absolute or qualified immunity of its employee (except a member of Congress, a judge, a prosecutor, or a person performing analogous functions) or the employee's "good faith." A successful plaintiff would recover actual damages, which "may not be less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher, up to a maximum of \$15,000." In contrast to the FTCA's existing limitation of attorneys' fees to 25% of the recovery, the bills would permit a successful plaintiff on a constitutional tort claim to receive a reasonable attorneys' fee and litigation costs, excluding, however, attorneys' fees or costs incurred for the processing of the initial administrative claim required under the FTCA.⁸⁰ Class actions would be permitted for constitutional torts, but liquidated damages in such actions could not exceed \$1,000,000.⁸¹

The legislation would shorten the FTCA's laundry list of excluded intentional torts so that only actions for libel, slander, misrepresentation, deceit or interference with contract rights would remain outside the Act's scope.⁸² In other words, assault, battery and the other intentional torts for which the United States may now be sued only if they were committed by an investigative or law enforcement officer would, in the future, give rise to an action against the United States regardless of who committed them. Both bills appear to provide, albeit in somewhat confusing language, that all of the other material exceptions to government liability under the FTCA, including the discretionary act exception, the foreign country exception, the exceptions for libel, slander, misrepresentation, deceit, or interference with contract rights, would *not* apply to "constitutional tort" actions.⁸³ Administrative adjustment of claims against the United States would be permitted (indeed, prior submission of claims to the administrative adjustment process would continue to be a precondition to suit), but the bills would require the Attorney General's prior written approval for any settlement of a "constitutional tort."⁸⁴

A central feature of S. 695 and H.R. 2659 is apparently modeled after the "Drivers' Act" amendment to the FTCA for automobile accidents: upon commencement of any suit against a federal employee sued in his individual capacity, the Attorney General must certify whether the defendant was acting (a) within the scope of or (b) solely under the color of his office or employment at the time the action arose. If the Attorney General certifies to either circumstance, the United States would automatically be substituted as the defendant. If the certification is that the employee was acting within the scope of his employment, the action would proceed only against the government. However, if the certification is that the employee was acting solely "under color of"—but not within the scope of—his office, the plaintiff could still elect to proceed against the individual, but then not against the government. Any such action commenced in state court would be removed to federal court upon the Attorney General's certification (even, apparently, if the plaintiff elected to proceed against the employee alone). The certification of the Attorney

General, which only the individual defendant could challenge, would establish the scope of office or employment for purposes of removal and would be binding and conclusive.⁸⁵

B. Disciplinary Proceedings

Both bills provide measures designed to ensure that an aggrieved party has an opportunity, at least under certain circumstances, to cause disciplinary proceedings to be initiated against the offending government employee. Thus, they would permit a person who recovers from the United States on a constitutional tort claim by judgment, award, compromise or settlement to request within sixty days that the employing agency commence an inquiry of the conduct underlying the claim. Such an inquiry could also be requested between sixty and one hundred twenty days after starting suit, even if there has been no recovery. If the agency institutes such an inquiry, it may "in its sole and unreviewable discretion" invite the plaintiff to participate, but only to the extent described below.⁸⁶

Once an inquiry is initiated, the head of the agency may terminate it if he "finds that the matter is . . . lacking in substance . . . or unsubstantiated". A hearing must be held if there is a "genuine, material and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing and the decision of the agency in the matter is likely to depend on the resolution of such dispute". The head of the agency may, "in his sole and unreviewable discretion", give the injured person, the employee, or both (in H.R. 2659, only the employee or both) the opportunity to suggest witnesses, to be called and documents to be produced at the hearing and to examine and cross-examine witnesses. After all of the above, the head of the agency or his designee shall determine whether disciplinary action is warranted, issue a statement of findings and the disciplinary action taken, and notify both the employee and the person who requested the inquiry.⁸⁷

Both bills contain provisions for administrative review of disciplinary decisions. A person who has recovered against the United States may seek administrative review of the matter within sixty days after this determination or upon expiration of one year after the inquiry was requested, if no final action has been taken by then. However, a person who has not recovered against the United States may not seek review unless the agency consents, again "in its sole and unreviewable discretion".⁸⁸

The administrative review would in most cases be conducted by the Merit Systems Protection Board; in a few cases, review would be by the head of the employing agency. A special body designated by the President would act as the reviewing body with respect to an officer or employee who at the time of alleged misconduct was engaged in intelligence activities.⁸⁹

The designated reviewing bodies are directed by the bills to issue regulations to implement these procedures. The standard on review would be whether the agency's initial determination was "reasonable"; in the

absence of final agency action, or if the reviewing body finds the record inadequate, it may remand for further proceedings or itself take evidence to supplement the record.⁹⁰

Both bills also provide for judicial review. Thus, a person who has recovered against the United States could petition a United States Court of Appeals for review within sixty days after the issuance of the administrative review decision. (Again, a person who has not recovered against the United States must obtain the agency's consent, even if it previously consented to the first level of review.) The standard of judicial review would be whether the decision was "arbitrary or capricious" or whether "material factual determinations [were] . . . unsupported by substantial evidence."⁹¹

In the case of a Presidential appointee, the agency conducting the review could only issue a statement of findings and a recommendation to the President as to appropriate disciplinary action, if any.⁹² As to such employees, there is no provision for administrative review in either bill.

A former employee, including a former Presidential appointee, would be entitled to have the United States substituted as defendant only upon agreeing to submit to the disciplinary procedures. The maximum discipline that could be imposed on a former employee would be limited to a reprimand or a civil penalty not to exceed one-twelfth of the average annual federal salary earned by the former employee when the act or omission at issue occurred.⁹³

A former employee or former Presidential appointee who has been assessed a civil penalty (*i.e.*, not one who has merely been reprimanded), and the person requesting the inquiry if he has recovered against the United States, would be entitled to petition the Court of Appeals for review within sixty days after the "decision".⁹⁴

Finally, in a court action under the disciplinary procedures of these bills, the court could award reasonable attorneys' fees and reasonable costs of experts, and other reasonable costs of litigation, including taxable costs, to the complainant (injured party) or to the employee, whoever obtains the relief sought "in substantial measure".⁹⁵ Attorneys' fees and other costs incurred in the various levels of administrative action are not mentioned in either of the bills, except that fees and costs incurred in connection with administrative claims are specifically *not* recoverable.

C. Miscellaneous Provisions

Seeking to avoid overlapping liability, both bills would add a paragraph to the wiretap provisions of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2520) to exempt from liability under that section any officer or employee of the United States acting within the scope of his office or employment or under color of it. However, neither bill would affect the similar civil liability section of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1810). The pending bills would also repeal a number of sections scattered throughout the U.S. Code that relate pri-

marily to immunizing the conduct of certain government medical personnel.⁹⁶ But they do not refer to, and presumably would not affect, the existing statutory remedies against government agencies provided under the Privacy Act of 1974, the Freedom of Information Act, and the Right to Financial Privacy Act of 1978.⁹⁷

Each bill would apply to "all claims and actions pending on the date of enactment", including "causes of action known to an aggrieved party on or before the date of enactment". There would be limited retention of the right to trial by jury for a plaintiff who has made a jury demand prior to enactment or if the right to such demand had not expired by the date of enactment (which would include all aggrieved parties who have not filed suits). If a plaintiff elected to retain his jury right, however, he would not be entitled to the government's waiver of immunity and the "good faith" defense, or to liquidated damages or the expanded provision for recovery of attorneys' fees. A case pending on appeal when the legislation is enacted would be remanded to the district court for further proceedings.⁹⁸ The bills also contain a "sunset" provision providing that, unless Congress re-enacts the legislation, it will terminate five years after enactment and the present FTCA will be revived; claims pending on the date of expiration would nevertheless continue to be processed under the terms of the new legislation.⁹⁹

IV. *The Committee's Recommendations*

A. *The Waiver of Sovereign Immunity and the Good Faith and Discretionary Function Defenses*

The Committee strongly approves the waiver of sovereign immunity by the United States and its acceptance of liability for deprivation of constitutional or analogous federal statutory rights by federal officers and employees. "Sovereign immunity" has been chipped away in many respects, and we see no reason for its continued application in cases where the doctrine of "*respondeat superior*" would otherwise apply. We note that many states and localities have already waived their sovereign immunity.¹⁰⁰ The extension of 42 U.S.C. § 1983 to such governmental entities, so that they would be liable in addition to their employees, has been urged several times.¹⁰¹ Although such proposals are beyond the scope of this report, if a satisfactory structure is worked out at the federal level for the liability of government agencies, it might serve as a model for restructuring § 1983, so that there would not be "one law for Athens and another for Rome."¹⁰²

We further approve imposition of liability upon the government for actual or liquidated damages regardless of the employee's good faith or his performance of a "discretionary function." This assures an injured party of some recovery in most cases where violation of individual rights can be

shown. It is fitting that the government compensate an injured party who has had a constitutional right violated, even if the violation would otherwise fall within one of the FTCA's exceptions, *e.g.*, if it was committed by a governmental employee outside the United States. We recommend that the language of S. 695 and H.R. 2659 provide clearly for removal of all such exceptions.¹⁰³

As noted, the proposed legislation would impose liability upon the government for "constitutional torts". But we believe the bills should go further: the United States should no longer be immune from suit for *any* intentional torts of its employees, even those not amounting to constitutional wrongs. The distinction is ill-defined and difficult to apply in practice.

Even if a satisfactory line could be drawn, we agree with Prof. Davis that the absence of a remedy against the government for intentional torts is "contrary to elementary justice".¹⁰⁴ The recent assumption by the government of liability for its employees' violations of certain statutory requirements, as in the Privacy Act of 1974, the Tax Reform Act of 1976, the Right to Financial Privacy Act of 1978, and the Omnibus Crime Control and Safe Streets Act of 1968, among other statutes, provides an important precedent for expansion of the waiver of sovereign immunity to all intentional torts. Likewise, as we urged in our 1977 report on Legislative Control of the FBI, any statutory charter for the Federal Bureau of Investigation should make the government liable for damages caused by violations of the charter, such as by unauthorized or otherwise illegal use of intrusive investigatory techniques, with individual employees liable only where the plaintiff can prove willfulness.¹⁰⁵ The government should shoulder the responsibility for those wrongs; injured persons should not be deprived of redress for actions that strike very close to, and often directly at, the basic protections our Constitution provides.

If the present legislation must be limited to so-called "constitutional torts", we urge that the legislative history make it clear that the term is to be given an expansive reading. The government should be liable for all intentional acts by its employees in the nature of constitutional wrongs. Persons so injured should not be deprived of a remedy or thrown back upon the structure of the present FTCA, with its several immunities, exceptions and defenses, the absence of any right to liquidated damages and with at best nominal attorneys' fees.

B. *Detering Unconstitutional Conduct: Liability of Federal Government Employees*

While we agree with the imposition of liability upon the United States, this committee has serious reservations about the trade-off embodied in S. 695 and H.R. 2659. By immunizing individual employees from even the threat of liability, the legislation would, in our opinion, leave no adequate mechanisms for preventing repetition of unconstitutional conduct. The Treasury can make injured persons whole, but that has no deterrent effect

on the employees who injured them. We do not dispute that it is fitting and proper for the government to be primarily liable, but granting government employees and officials complete immunity from civil liability removes a strong deterrent to unlawful conduct. The possibility of civil liability becomes most important as a deterrent to high-level misconduct by supervisory officials and top-level appointees who are less likely to be found judgment proof.

Deterrent factors under present law stem from three principal sources: civil liability, criminal liability, and disciplinary action by the employing agency. Criminal liability would be unaffected by these bills, although, as noted above,¹⁰⁶ it has to date been of limited usefulness as a deterrent. Elimination of civil liability as a deterrent is not balanced by subjecting the employee to a disciplinary process, because that process already exists. Giving the claimant a role in the disciplinary process does not, in our view, correct the balance.

A large majority of the Committee thus believes that the possibility of civil liability of employees and officers of the government, present and former, must be preserved, at least in the most egregious cases, where the plaintiff can prove willful or malicious violations. We would therefore urge that the procedure for substituting the government as a defendant be eliminated, with the plaintiff left free to sue either the government, the employee, or both—but that the legislation clearly impose a heavy burden on plaintiff to prove willfulness or malice in order to recover from the individual.

C. Strengthening the Disciplinary Mechanism

Whether or not they are accompanied by individual civil liability, this Committee believes that the disciplinary mechanisms proposed in S. 695 and H.R. 2659 are inadequate in any event. We recognize, of course, that participation of the claimant in disciplinary proceedings could become a valuable part of a total scheme for assuring employee accountability,¹⁰⁷ but we see the need for strengthening the proposed mechanism in several respects.

The value of such a procedure as a deterrent depends in large measure on the speed and certainty with which the facts are disclosed and discipline is meted out. That objective is undermined by the proposed requirement that a claimant's request for an inquiry—the first step in a disciplinary proceeding—must await completion of the administrative claims process, the filing of suit and the passage of at least sixty days thereafter. Thus, many months will normally have elapsed before the claimant's right to initiate an inquiry ripens. Even then, speed is by no means guaranteed; while the agency is required to conduct the inquiry "without unnecessary delay," no right to administrative review of agency inaction arises until a year after the inquiry was requested. And if the initial stage of the disciplinary inquiry results in an agency decision unsatisfactory to the claimant, additional delay may frequently be encountered because the right to request administrative review of that decision does not mature until and

unless the claimant has recovered from the government. Nor do the bills mandate that the administrative review be completed within any particular time frame; they say only that a petition for review by a United States Court of Appeals is permitted after a "final decision" of the reviewing agency.¹⁰⁸ Indeed, as drafted, the bills would deny any administrative or judicial review to a person who requested the disciplinary inquiry before receiving a judgment against the government and who then obtained judgment more than sixty days after the initial disciplinary decision. That is surely an unintended result which should be corrected.

Instead of the proposed amalgam of confusing administrative and judicial review provisions, we recommend that the complainant be entitled to initiate and participate in disciplinary proceedings without the requirement of a prior judicial proceeding. Indeed, complainants who have not suffered actual damages and are primarily interested in preventing recurrence of wrongful conduct may opt for the disciplinary proceeding alone, thereby avoiding needless federal litigation. Agencies would be free to devise administrative procedures for weeding out frivolous claims, which would not in any event be diminished simply by the requirement of first filing a lawsuit.

The proposed procedures not only foster delay, they do not guarantee certainty of action. While a claimant in some circumstances would be entitled to both administrative and judicial review of the administrative record, there is no assurance that a satisfactory record will have been created during the disciplinary proceeding. The bills require a hearing only if, after preliminary inquiry, there is a

"genuine, material, and substantial dispute of fact which can be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing and the decision of the agency in the matter is likely to depend upon resolution of such dispute."¹⁰⁹

The claimant's active participation in the initial disciplinary proceeding is subject to the virtually complete discretion of the agency. The claimant may, as of right, make a written statement to the agency; but his rights to appear in the proceeding, to examine and cross-examine witnesses, and to suggest witnesses to be called and documents to be produced are subject to the agency's unfettered discretion. All in all, the record reviewed on appeal will frequently be sketchy.¹¹⁰ It seems to us that a hearing below should be mandated, if not in every case, then at least under broader guidelines than the present bills provide; otherwise, *de novo* review on appeal, at least for the administrative appeal, might be appropriate. And when a hearing is held, the claimant must be given the right to appear, to suggest necessary documents and witnesses, and to examine and cross-examine the witnesses.

We are concerned about the provision of both bills that would keep "national security" information from being introduced in any disciplinary hearing. It is in this area that all too many of the most serious abuses have occurred in the past.¹¹¹ Only at the second appeal level is provision made for a review, *in camera*, of what the agency has alleged must be kept

secret. This does not seem satisfactory to us, particularly if the legislation continues to shield employees from civil liability and consequently from the possibility of any other judicial inquiry. In such a case, the government could simply offer a settlement of maximum liquidated damages, thereby preventing the challenged conduct from receiving judicial scrutiny until the second appeal level.

We do endorse the concept embodied in S. 695 and H.R. 2659 that would take the administrative review of disciplinary decisions involving intelligence officials away from the employing agencies. The goals of deterrence and accountability ought to be furthered if agents are on notice that their agencies' disciplinary decisions will be reviewed by an independent body. However, we do not agree that the review function should be lodged with a special body designated by the President, rather than the Merit Systems Protection Board, which would discharge that function as to other federal agencies.¹¹²

The need for certainty as an element of effective deterrence also requires that significant disciplinary action can be foreseen by employees. But the pending bills neither set nor suggest guidelines for sanctions to be imposed upon an agency finding of wrong-doing by its employee. Accordingly, this Committee urges that Congress set guidelines for sanctions or, at least, require that each agency adopt regulations, reviewable by the Attorney General, establishing minimum (and maximum) disciplinary sanctions to be imposed upon a finding that an employee committed an intentional wrong. For example, we would endorse a standard that required an agency, in the absence of mitigating circumstances, to dismiss an employee who intentionally violated a person's constitutional rights without reasonable cause to believe that his conduct was lawful.

We also question whether a civil penalty not to exceed one-twelfth of a former employee's annual salary, as proposed by the bills, is an adequate deterrent when the employee acted maliciously.¹¹³

Our final comment on the disciplinary procedures concerns the accountability of supervisory officials. Although the recent record shows that low level employees may sometimes take it upon themselves to invade constitutional rights, it also shows that such invasions are often dictated directly by supervisors or by policies and standards of conduct known to and sanctioned by supervisory officials.¹¹⁴ Effective deterrence requires that accountability reach all levels of government. Yet we do not see such accountability in the pending bills. At a minimum, we suggest that provision be made for employees to implead their superiors in the disciplinary proceedings (as they may now do under the Federal Rules of Civil Procedure, in *Bivens*-type actions).¹¹⁵ We also recommend that a government-wide study be instituted to find ways to increase the accountability of supervisory personnel and give them incentives to prevent their subordinates from violating constitutional rights.

D. Damages and Attorneys' Fees; Jury Trial

The Committee approves the basic provisions contained in S. 695 and H.R. 2659 for awarding compensatory damages in suits against the government. The provision for a minimum statutory damage award of \$1,000 or \$100 a day up to a maximum of \$15,000 is consistent with this Committee's recommendations in prior reports, although we question whether the \$1,000 minimum provides a sufficient incentive to someone who has been wronged, but cannot prove actual financial loss. And, as noted, we recommend that recovery of damages also be permitted against individual employees who have acted willfully.

We are also troubled by the absence of any provision for recovery of punitive damages, even in the most egregious cases of misconduct. When the FTCA was enacted in 1946, punitive damages were specifically excluded. A commentator noted at the time that this omission followed from the exclusion from the FTCA of all intentional torts, in which punitive damages are most frequently awarded.¹¹⁶ Since the 1974 amendment extending coverage to certain intentional torts was passed hastily and no broad review was undertaken of the effect on the other sections of the FTCA, there was no consideration of punitive damages. But if the government is now to assume full liability for intentional torts of its employees or for those that rise to the level of constitutional violations, we believe it is time to rethink this exclusion. We believe that the court should at least retain discretion to award punitive damages against the United States, especially in circumstances where the constitutional tort was committed pursuant to policies or instructions emanating from supervisory officials of federal agencies.

Although authorization for punitive damages against the government is not unprecedented, as evidenced by the Right to Financial Privacy Act,¹¹⁷ the Justice Department has argued that the imposition of punitive damages against the government in constitutional tort cases would "penalize only the taxpayer without serving any meaningful deterrent purpose".¹¹⁸ We disagree and believe that the award of punitive damages against the government would serve several deterrent purposes. To begin with, it would add incentive for suit by plaintiffs wronged by particularly egregious acts, but not suffering significant actual damages, which is often the case with constitutional violations. As noted above, we question whether the minimum liquidated damages of \$1,000 provides sufficient incentive. But we believe punitive damages would make civil litigation attractive in the egregious case, thus adding to the overall scheme of accountability. Moreover, deterrence would be accomplished if, as we recommend, the legislation were to require that any damages paid by the government—compensatory or punitive—be charged to the budget of the offending agency, rather than general Treasury funds. Such a requirement was included in a bill introduced in the last Congress by Senator Percy.¹¹⁹ We recognize that most agencies' budgets are so large that it will be the rare damage award which will have a substantial effect on its own. But we

believe that several such assessments would not be lost on those in charge of agency purse strings nor, we hope, congressional committees approving agency budgets. Especially if punitive damages are visible through adverse publicity, they would serve to remind the agency's supervisors that their agency as an institution has failed to live up to its commitment to respect the rights of the individuals it exists to serve.

If, as we recommend, injured parties may also sue officials guilty of willful offenses, then punitive damages should also be available against individuals. The possible recovery of punitive damages taxed personally against willful offenders would have undeniable deterrent effect.

We have noted that maximum liquidated damages of \$15,000 for an individual might be acceptable if punitive damages are available. But we see no justification for limiting liquidated damages in proper class actions to an aggregate of \$1,000,000. For example, illegal government surveillance of the members of a group for 150 days or more would, under the bills, entitle each individual to a \$15,000 award and is exactly the sort of conduct that should be deterred and redressed by a class action. But the \$1,000,000 limitation would permit maximum liquidated damages only if the class did not exceed sixty-six members—in which case class action status might be denied for lack of "numerosity" under Fed. R. Civ. P. 23(a)(i). We believe that the liquidated damages available to a class should be no less and no greater than if each class member had sued individually.

While we approve the allowance for reasonable attorney's fees and costs to successful claimants in court proceedings involving "constitutional torts", we are troubled by the absence of any provision for attorneys' fees in the disciplinary proceeding or in the administrative claim process. This lack could serve (perhaps it is intended to serve) as a disincentive for an injured party to pursue disciplinary proceedings. The agencies' reaction to date upon the disclosure of constitutional violations by their personnel does not give us confidence that, left to themselves, they will discipline future violators. As noted above, these proceedings are primarily designed, where they have operated at all, to punish transgressions of bureaucratic norms, not constitutional mandates. Unless the injured party is encouraged actively to participate in the proceedings by the same incentives available in judicial actions, it seems most unlikely to us that they can ever have the effect of disclosing and deterring constitutional violations.

Although the FTCA does not provide for jury trials, a majority of this Committee believes that there should be a right to trial by jury in actions against the government alleging constitutional violations. While it is settled that jury trial *may* constitutionally be denied in suits against the government¹²⁰ (although it is required when individual employees are sued), we believe that the interests both of justice and of the appearance of justice are served by affording injured parties a public trial by jury of their peers in these kinds of cases. The FTCA originally dealt merely with the negligence of government employees, and so denied jury trials. But these bills concern something entirely different. The judgment of a panel of ordinary citizens is particularly appropriate where it is a citizen's fundamental rights vis-à-vis his government that are at issue.

*E. Additional Comments on
S. 695 and H.R. 2659*

S. 695 and H.R. 2659 would apply the amended FTCA to all actions pending on the date of enactment and apparently also to those that are known to exist but have not led to the institution of suit. We find these retroactivity provisions troubling in several respects.

In recognition of the constitutional questions arising through an automatic deprivation of the right to jury trial, the bills provide that, in cases where jury trial has been elected or the right to elect has not expired, the plaintiff may have his case against the United States tried before a jury. However, a large price is exacted if he chooses that option: he would be denied liquidated damages, government waiver of the employee's immunity defenses, and attorneys' fees.¹²¹ Nor would punitive damages be available to compensate the plaintiff for having lost a potential recovery of such damages from the individual defendant.

We have already indicated that in our view both punitive damages and jury trial should be permitted in suits against the United States arising from injuries to constitutionally protected rights. It is particularly disturbing to us, and seems at least questionable under the Constitution, that in addition to denying these rights in such suits, S. 695 and H.R. 2659 would exact such a price from a plaintiff who exercises a vested right to jury trial. Instead, we believe plaintiffs should be given an unfettered option to elect, within a reasonable time period, whether to proceed under prior law or under the new statute, if that statute does not permit jury trial.

It would also be unfortunate, if the proposed legislation does give immunity to individual employees, for it to appear as a retroactive "bail out" of current defendants. But the retroactivity provision, together with the bills' "sunset" provisions, which would terminate these revisions of the FTCA in five years unless Congress extends their life, give the legislation at least an appearance of absolving individual officials of liability for claims arising out of the Watergate era, while not assuring the survival of any of the reforms in the disciplinary process that are proposed as a countermeasure.

Another disturbing feature of S. 695 and H.R. 2659 is the procedure for certification by the Attorney General that an individual was acting within the scope of his employment or under color of it. This certification is critical to the immunization of individual employees under the present bills: if the employee is certified to have acted within the scope of his employment, he is completely insulated from civil liability; if he is certified to have acted only under color of his employment, the claimant must elect whether to sue him or the government. But the Attorney General's certification would not be reviewable by any court or agency at the claimant's instance; only the employee could seek review of a certification which fails to immunize him.¹²²

Under our recommended approach, the "scope of—under color of" distinction would not be relevant, since individual employees would be subject to suit in either event, provided the plaintiff can prove willfulness.

page 23

That change would obviate the necessity for any certification by the Attorney General. But if the distinction and accompanying immunity provision is preserved, we believe that the right to judicial review of the Attorney General's certification must at least be made mutual. It hardly seems appropriate for a remedial statute designed to redress violations of constitutional rights and foster accountability in government to permit the Attorney General to immunize government officials from suit, with no opportunity for review of that decision, while giving those same officials a right to review if the decision goes against them.

Lastly, we are concerned that the bills would allow any constitutional tort claim to be settled at the administrative stage, but only with the "prior written approval" of the Attorney General.¹²³ That would allow the government to "bury" embarrassing incidents, while at the same time shielding the responsible officials from suit, merely by offering a large enough settlement. To prevent this, we recommend that the Attorney General be required, in approving any such settlement, to set forth in writing the details of the claim, state what has been done to investigate it, and disclose any disciplinary action taken—and that all such approvals be published in the Federal Register.

*F. The Federal Tort Claims Act is
Not the Appropriate Framework
for Constitutional Tort Claims*

As all of the foregoing makes clear, FTCA is a complex statute and there are many problems in adapting it to provide a satisfactory remedy for "constitutional torts."¹²⁴ We believe such problems follow inevitably from the fact that the FTCA was designed primarily to compensate persons injured by negligence, not to redress intentional violations of individual rights. As we have noted throughout this Report, different considerations apply to these two types of claims. Since no statute covered the conduct at issue in *Bivens*, it became known as a "constitutional tort," leading many to conclude that such conduct might be dealt with simply by amending the existing tort claims statute. With strain, the FTCA could of course be adapted to include "constitutional torts". But we think that the type of conduct at issue here is much better dealt with in a separate statute, which (excluding disciplinary procedures) would have the simplicity of Section 1983, instead of the complexity of the FTCA.

The strains of adaptation have been identified throughout this Report: the absence of punitive damages and jury trials, the inevitable delay inherent in the requirement that an administrative claim be presented to the agency before suit is brought, the FTCA's restriction to damage actions to the exclusion of injunctive and other relief—remedies recommended by the Church Committee¹²⁵ and already available in § 1983 actions.

All of the foregoing problems could be considered and resolved by abandoning the attempt to re-mold the FTCA to incorporate intentional

and constitutional torts and formulating a new statute, modelled perhaps after § 1983 (which is quoted above, pp. 11-11). An appropriate title might be "The Constitutional Rights Protection Act." It, too, would waive sovereign immunity for claims against the government based on constitutional torts. It could deal with immunities and defenses in simple, direct language such as this:

"In any suit brought pursuant to this statute, immunities and defenses available at common law, including the defense of good faith, are abolished."¹²⁶

If the disciplinary mechanisms are to be retained, as we have indicated they should be, with improvements, the length of the statute would be increased; but its core—the structure of the government's civil liability and, in our view, individual liability in cases of wilful or malicious misconduct—would remain simple. This, we feel, is a far more appropriate and effective structure than the attempts to amend the FTCA represented by S. 695 and H.R. 2659.

V. Conclusion

For the reasons stated above, this Committee supports the concept of creating a statutory remedy for redress of constitutional violations by federal officers and employees. But it does not support the enactment of S. 695 or H.R. 2659 as proposed. We think a better structure can be devised that (1) deters conduct by officers and employees of the federal government that would deprive persons of fundamental rights; (2) encourages "innovative and courageous" employee conduct and protects employees lawfully exercising their functions; and (3) fully compensates persons whose constitutional rights have been violated by government misconduct.

December, 1979

COMMITTEE ON FEDERAL LEGISLATION

STEVEN B. ROSENFELD,
Chairman

MICHAEL A. BAMBERGER
MARSHALL BEIL
MARK A. BELNICK
JAMES N. BENEDICT
DONALD L. BOROD
HOWARD BUSCHMAN, III
HALSEY B. COLLINS
BLAIR C. FENSTERSTOCK
STEVEN FINELL
JEFFREY GLEKEL
THOMAS V. HEYMAN
KATHLEEN IMHOLZ
LAWRENCE M. KAYE
ROBERT J. KHEEL
DANIEL J. KORNSTEIN

DANIEL J. KORNSTEIN
EDWARD LABATON
VICTOR LEWKOW
LESLIE LUPERT
NANCY F. McKENNA
OTTO OBERMAIER
MICHAEL OBERMAN
ROBERT C. SHEEHAN
JONATHAN D. SIEGFRIED
ALAN R. SLOATE
PETER J. WALLISON
KAREN J. WEINER
DENNIS R. YEAGER
CAROLYN ZIEGLER

FOOTNOTES

¹ See *Intelligence Activities and the Rights of Americans: Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, 94th Cong., 2nd Sess., S. Rep. No. 94-755 (1976) [hereinafter *Church Committee Report*]; Committee on Federal Legislation, *Legislative Control of the F.B.I.*, Federal Legislation Report (May 1, 1977), reprinted in part in 32 Record of N.Y.C.B.A. 478 (1977) [hereinafter *F.B.I. Report*]. The Federal Bureau of Investigation and the Central Intelligence Agency have been the primary subjects of concern, but disclosures have also involved the Internal Revenue Service, the Drug Enforcement Administration, the National Security Agency, and other federal agencies, in particular those with intelligence responsibilities.

² The Department of Justice has developed the practice, for morale and other reasons, of representing or retaining private counsel to represent federal government employees sued individually for actions within the scope of their employment. The retention of private counsel is the practice when there are or may be conflicts of interest, either because the employee is also the target of a criminal investigation of a prosecutive authority within the Department of Justice or because several employees have conflicting legal or factual positions in the same case. See Department of Justice, Statement of Policy on Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977); 28 C.F.R. §§ 50.15, 50.16 (1979). The private counsel program has grown and is said to have cost \$600,000 in fiscal year 1977, with a 60% increase expected for fiscal 1978. See *Hearings on H.R. 9219 relating to the Federal Tort Claims Act before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 95th Cong., 2nd Sess., at 5 (1978) (statement of Griffin B. Bell, Attorney General) [hereinafter *House Hearings*]. Eliminating this expense appears to be one of the moving forces behind the bills the administration has proposed. See generally *Joint Hearing on Amendments to the Federal Tort Claims Act: S. 2117 (part 1) and Joint Hearing on Amendments to the Federal Tort Claims Act: S. 2117, S. 2868 and S. 3314 (part 2:)* Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2nd Sess. [hereinafter *Senate Hearings*]. While eliminating or reducing this expense is a worthy government purpose, the Committee does not consider it to have the same importance as the other factors mentioned. The American Bar Association has also stated

that this factor should be given relatively low priority. See *Senate Hearings*, part 2, at 408 (statement of John Greacen).

³In introducing S. 695, Senator Kennedy stated:

"Viewed from the employee's perspective, under the present system, a Federal employee who has acted in good faith is subject to law suits for large amounts of money whenever he takes an innovative or courageous action. Even though he may ultimately prevail by asserting his good faith defense, the employee must face the spectre of financial ruin, the anxiety, and the damage to reputation which are inherent in any law suit which is, in essence, attacking his personal integrity. Thus the possibility of personal liability for monetary damages arising from activities performed in the scope of their employment is a Sword of Damocles which discourages Federal officials from performing assignments vigorously and courageously."

123 Cong. Rec. S2919 (daily ed. March 15, 1979).

⁴Criminal actions and administrative proceedings of various kinds, while also available, do not compensate the injured party. Administrative proceedings might in theory be so structured, but they have not been to date. Even in their deterrent function, criminal actions have a number of shortcomings, such as the high standards of proof and intent required and the inability of the injured party to assure that a criminal action will be brought regardless of the available evidence. Criminal cases have in fact rarely been brought by the government even in the egregious cases under COINTELPRO described in the *Church Committee Report*; see *Senate Hearings*, *supra* note 2, part 1, at 19-22.

⁵State law (common law and statutory) tort actions for damages are also available, although outside the scope of this report. We note that they are circumscribed by jurisdictional limitations and subject to the various immunity doctrines described in the report; see text accompanying footnotes 10-14. See also *Note: Damage Remedies against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922 at fn. 7 (1976).

⁶*Monroe v. Pape*, 365 U.S. 167 (1961). See generally *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133 (1977) [hereinafter *Developments—Section 1983*].

⁷*Uarte v. United States*, 7 F.R.D. 705, 707 (S.D.Cal. 1948) (ordering a joint tort-feasor dropped from the action). Noting that waivers of sovereign immunity are to be strictly construed, the court reasoned that the FTCA contemplates that the government shall be the sole defendant, in part because of the absence of jury trial. In some recent cases, both the government and its employees have been sued together, apparently without a jury and without an argument by the government against joinder. See e.g. *Norton v. United States*, 581 F.2d 390, 392 (4 Cir. 1978).

⁸It has been suggested that under the developing case law the government may not in fact be entitled to that defense. Letter dated January 31, 1979, from John Shattuck, Director, Washington Office, American Civil Liberties Union, to Senator Edward M. Kennedy, at 2-3. Also in the

Norton case, *supra* note 7, Judge Butzner in dissent argued that the government should not be immunized from claims arising out of "good faith" constitutional violations of its employees because private employers sued under the doctrine of *respondeat superior* are not allowed to assert the personal defenses of their employees. 581 F. 2d at 397.

⁹ 28 U.S.C. § 1346(b) and § 2674.

¹⁰ U.S. Const., Art. I, § 6, cl. 1 (the Speech and Debate Clause). In *Davis v. Passman*, 47 U.S.L.W. 4643 (June 5, 1979), the Supreme Court concluded that an employee of a Congressman who was discharged because of her sex had a cause of action under the Due Process Clause of the Fifth Amendment, but remanded for further proceedings as to whether the Congressman-employer was shielded by the Speech and Debate Clause.

¹¹ See e.g. *Pierson v. Ray*, 386 U.S. 547 (1967) (state court judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Butz v. Economou*, 438 U.S. 478 (1978), reprinted in *Senate Hearings, supra* note 2, part 2, at 702 *et seq.* (judicial officer, chief hearing examiner and prosecuting attorney in federal agency proceedings).

¹² 360 U.S. 564 (1959).

¹³ See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). That action was brought under 42 U.S.C. § 1983 by personal representatives of students killed by National Guardsmen in the May 1970 civil disorder at Kent State University. The Governor of Ohio, various officers and enlisted members of the National Guard and the President of the University were defendants. Holding it erroneous for the District Court to have dismissed the complaint, the Court concluded that an executive officer has only a qualified immunity under Section 1983 which is based upon his good faith belief formed on grounds which seem reasonable when judged in light of the circumstances existing at the time he made his decision. See also *Halperin v. Kissinger, et al.*, 607 F. 2d 1192 (July 12, 1979, D.C. Cir., Civil Action No. 1187-73), holding President Nixon entitled only to qualified immunity from suit for constitutional violations. The Court made the further distinction that the standards for Presidential immunity should be applied on a sliding scale to make allowance for the special demands on the time and attention of the President.

¹⁴ 28 U.S.C. § 2680(a).

¹⁵ Where an agency has willfully or intentionally violated the provisions of the Privacy Act (other than those requiring access to or correction of a record), the plaintiff may recover from the agency the greater of \$1,000 or his actual damages plus an attorneys' fee and court costs. 5 U.S.C. § 552a(g)(4). See generally Committee on Federal Legislation, *Government Databanks and Privacy of Individuals* (H.R. 16373 and S. 3418), 30 Record of N.Y.C.B.A. 55,96 (1974).

¹⁶ A person subjected to illegal electronic surveillance, or about whom information obtained by illegal electronic surveillance is used or disclosed, may recover from the individual employee the greater of his actual damages, \$1,000 or \$100 for each day of violation, reasonable attorneys' fees,

litigation costs, and in some cases punitive damages. 50 U.S.C. § 1810. *See generally* Committee on Federal Legislation and Committee on Civil Rights, *Judicial Procedures for National Security Electronic Surveillance*, 29 Record of N.Y.C.B.A. 751, discussing a predecessor bill, and testimony of Steven B. Rosenfeld dated January 24, 1978, on behalf of the Committee on Federal Legislation, discussing S. 1566, which was enacted, with modifications, as the Foreign Intelligence Surveillance Act of 1978.

¹⁷ Any person other than the United States or the Internal Revenue Service who knowingly or negligently discloses taxpayer return information in violation of the Internal Revenue Code's confidentiality requirements may be held liable for the greater of \$1,000 or the actual damages caused by disclosure plus court costs, but not attorney's fees. Where the disclosure was willful or the result of gross negligence, the defendant also may be liable for punitive damages. Internal Revenue Code of 1954, § 7217 (26 U.S.C. § 7217); *see generally* Committee on Federal Legislation, *Access to Federal Income Tax Returns*, 34 Record of N.Y.C.B.A. 376, 403-04 (1979).

¹⁸ *F.B.I. Report*, *supra* note 1, at 37.

¹⁹ 403 U.S. 388 (1971), *reprinted in Senate Hearings*, *supra* note 2, part 1, at 220 *et seq.* [hereinafter *Bivens*].

²⁰ *Bivens on remand*, 456 F. 2d 1339, 1347-48 (2 Cir. 1972), *reprinted in Senate Hearings*, *supra* note 2, part 1, at 263 *et seq.*

²¹ This principle is widely recognized. *See*, for example, the *Church Committee Report*, *supra* note 1, stating its "fundamental conclusion" that intelligence activities have undermined the constitutional rights of citizens "primarily because checks and balances . . . to assure accountability have not been applied". *Church Committee Report* at 289. *See also* John T. Elliff, *The Reform of F.B.I. Intelligence Operations* (Princeton University Press 1979), at 6, describing the F.B.I. reform efforts made to date: "Accountability was the key . . . to bring[ing the F.B.I.] . . . within the rule of law."

²² *Church Committee Report*, *supra* note 1, at 338 (Recommendation 91). For the intricacies of pleading the employee's reasonable grounds for belief in the legality of his action (referred to as the "objective" basis) and the employee's good faith (referred to as the "subjective" basis) and the resolution of these defenses by pre-trial motions, *see Halperin v. Kissinger*, *supra* note 13, at 1208-10.

²³ The amendments to the FTCA introduced in the last Congress at first contained no provision permitting a tort victim to initiate agency disciplinary proceedings. Such a provision evolved as an additional incentive to accountability. *See House Hearings and Senate Hearings*, *supra* note 2. This Committee recognizes that the provision was proposed as a trade-off for civil immunity for government employees, which we do not support. We think that an effective administrative disciplinary mechanism is an important addition to the arsenal we would like to see built up, however, and we would support it, with the improvements suggested below, regardless of whether our position on civil immunity were adopted. If the civil immunity provisions remain in any final legislation, of course, an improved

disciplinary mechanism becomes essential.

²⁴ See Chief Justice Burger's dissent in *Bivens*, *supra* note 19, at 411.

²⁵ Note: *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947) [hereinafter *FTCA-1947*].

²⁶ *Id.* at 534, fn. 5.

²⁷ *Id.*

²⁸ *Id.* at 535.

²⁹ The victim would first have to sue and recover against the federal employee. If the employee proved judgment-proof (as was often the case), the victim would throw himself on the mercy of the government by having his Congressman introduce a private bill. See Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1, at 9 (1946) [hereinafter *FTCA-1946*].

³⁰ See generally *FTCA-1946* and *FTCA-1947*, *supra* notes 25 and 29, for a complete description of the events leading to the original FTCA.

³¹ 28 U.S.C. §§ 1346(b), 2674.

³² 28 U.S.C. § 2402.

³³ 28 U.S.C. § 2674.

³⁴ Despite the statutory language, in 1950 the Supreme Court held that on-duty servicemen injured by government negligence were not covered by the FTCA; they may seek relief only under veterans' benefit acts. *Feres v. United States*, 340 U.S. 135. The Court added that "if we misinterpret the Act, . . . Congress possesses a ready remedy." 340 U.S. at 138. Since Congress has not acted in this area despite the invitation, a long line of cases has applied the *Feres* doctrine to a variety of situations. It has recently been held that the *Feres* doctrine also bars government liability for intentional and constitutional torts against on-duty servicemen. *Thornwell v. United States*, 471 F. Supp. 344 (D. D.C. 1979). The present bills would not affect the *Feres* doctrine.

³⁵ 28 U.S.C. § 2671. To the extent that F.B.I., and other, informants are "contractors" with the federal government, this exclusion does not seem proper in the constitutional context.

³⁶ 28 U.S.C. § 2675(a).

³⁷ 28 U.S.C. § 2672.

³⁸ 28 U.S.C. §§ 2672, 2676.

³⁹ 28 U.S.C. § 2678.

⁴⁰ 28 U.S.C. § 2679(b) and (d).

⁴¹ Government employees are currently immunized from liability for certain medical claims in the nature of malpractice in five situations: health care for members of the Armed Forces and their dependents, 10 U.S.C. § 1089; for foreign service personnel, 22 U.S.C. § 817; for veterans, 38 U.S.C. § 4116; and when they are acting as officers or employees of the Public Health Service, 42 U.S.C. § 233, or the National Aeronautics and Space Administration, 42 U.S.C. § 2458(a). Generally, such immunization is not absolute.

⁴² In effect, this patchwork scheme of statutory indemnity results in the government providing liability insurance to its motor vehicle drivers and most medical personnel at no cost to them, which inures to the benefit of

victims of their negligence. The majority of employees, most notably law enforcement officers, are left to procure their own liability insurance if they are inclined to do so and if coverage is available. See the testimony of John S. McNerney, Federal Criminal Investigators Association, on the difficulty of obtaining such insurance, *Senate Hearings*, *supra* note 2, part 2, at 402.

⁴³ Among the excluded claims are claims arising in a foreign country; claims under the Trading with the Enemy Act; claims connected with war-time combatant activities; claims cognizable in admiralty proceedings where public vessels are involved; claims arising out of the performance of a "discretionary function", see text accompanying note 12 *supra*, or the execution of a statute or regulation; claims arising out of the loss, miscarriage or negligent transmission of mail; claims arising in respect of the assessment of any tax or customs duty, the fiscal operations of the Treasury or the regulation of the monetary system; claims arising out of the detention of merchandise by customs or similar officers; claims for damages caused by a government-imposed quarantine; and claims arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, a Federal land bank, a Federal intermediate credit bank or a bank for cooperatives. 28 U.S.C. § 2680.

⁴⁴ E.g., *Hatahley v. United States*, 351 U.S. 173 (1956) (trespass and conversion); *Palomo v. United States*, 188 F. Supp. 633 (D. Guam 1960) (waste); *Myers & Myers, Inc. v. United States Postal Service*, 527 F. 2d 1252 (2 Cir. 1975) (interference with business opportunity through black-listing); *Birnbaum v. United States*, 588 F. 2d 319 (2 Cir. 1978) (invasion of privacy).

⁴⁵ *Senate Hearings*, *supra* note 2, part 1, at 158-59 (remarks of Rep. Holifield); Boger, Gitenstein and Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. Rev. 497, 516-17 (1976), reprinted in *Senate Hearings*, *supra* note 2, part 1, at 164 *et seq.* [Hereinafter *FTCA Amendment Interpretative Analysis*.] The 1974 amendments to the FTCA were tacked onto a bill to repeal the transfer of 900 agents from the Immigration and Naturalization Service to the Customs Bureau. See *Senate Hearings*, part 1, at 158-163.

⁴⁶ See e.g., *Norton v. Turner*, *supra* note 7, at 395-97.

⁴⁷ The FTCA does not apply "to any claim arising out of . . . libel, slander, misrepresentation [or] deceit . . ." 28 U.S.C. § 2680(h). For a description of the F.B.I.'s activities under its COINTELPRO program against Martin Luther King, Jr., see *Church Committee Report*, *supra* note 1, at 11-12, 219-23. Recently the government made its first settlement under the FTCA with a victim of a COINTELPRO program; although the complaint alleged that the tortious activity was defamatory, among other things, the settlement agreement did not characterize the conduct. Marwick, *The First COINTELPRO Damage Award: \$48,000*, First Principles, September 1979, p. 1 (reporting settlement of *Blair v. Baumgardner*, No. 77-C-390 (E.D. Wisc. complaint of June 23, 1977)).

⁴⁸ *Supra* note 15.

⁴⁹ 12 U.S.C. § 3417(a). P.L. 95-630, 92 Stat. 3708, Section 1117. That

section also states that the remedies and sanctions in it are the "only authorized judicial remedies and sanctions" for violations of the Act, and, in a provision modelled after one in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(F), provides for commencement of disciplinary proceedings by the Civil Service Commission (now the Merit Systems Protection Board) when a court finds that the circumstances surrounding a violation of the Act raise questions whether an agent or employee acted willfully or intentionally with respect to the violation.

⁵⁰ 18 U.S.C. § 2520.

⁵¹ *Supra* note 16.

⁵² *Bivens*, *supra* note 19, at 389. In the Collinsville incidents, the individuals were not arrested; the agents discovered the identification error while still at their houses. See *FTCA Amendment Interpretative Analysis*, *supra* note 45, at 500-01.

⁵³ *Bivens*, *supra* note 20, at 1347-48, reprinted in *Senate Hearings*, *supra* note 2, part 1, at 271-72.

⁵⁴ *E.g.*, *Paton v. LaPrade*, 524 F. 2d 862 (3 Cir. 1975; First Amendment); *U.S. ex rel Moore v. Koelzer*, 457 F. 2d 892 (3 Cir. 1972; Fifth Amendment); *Patmore v. Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975; Fifth and Eighth Amendments); and see *Gardels v. Murphy*, 377 F. Supp. 1389 at 1398 (N.D. Ill. 1974). "*Bivens* recognizes a cause of action for damages for violation of any constitutionally protected interest."

⁵⁵ *Butz v. Economou*, *supra* note 11.

⁵⁶ *Davis v. Passman*, *supra* note 10.

⁵⁷ Section 1984 of Title 42 contains related jurisdictional provisions.

⁵⁸ *United States v. Classic*, 313 U.S. 299 at 326 (1941). See generally *Developments—Section 1983*, *supra* note 6.

⁵⁹ 365 U.S. 167.

⁶⁰ Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447 at 452 (1978) [hereinafter *Lawbreakers*].

⁶¹ 436 U.S. 658 (1978).

⁶² *Id.* at 690-1.

⁶³ *E.g.*, CONN. GEN. STAT. § 7-465 (1977); N.Y. GEN. MUN. LAW § 50-k (1979).

⁶⁴ Note, *Suing the Police in Federal Court*, 88 Yale L.J. 781 (March 1979) [hereinafter *Suing the Police*]; see also *Lawbreakers*, *supra* note 60.

⁶⁵ *Suing the Police*, *supra* note 64, at 814-15. The case cited was from Connecticut. The New York Court of Appeals recently ruled that the liability insurance policy of a municipality could not cover punitive damages awarded under § 1983. *Hartford Accident and Indemnity Company v. Village of Hempstead* (No. 386), N.Y.L.J. October 26, 1979, 1:3. Among other reasons, the Court stated that allowing such coverage would defeat the purpose of punitive damages.

⁶⁶ This is also recommended in *Lawbreakers*, *supra* note 60. The Supreme Court may also decide another case involving municipal liability in the § 1983 context, *Owen v. City of Independence, Missouri*, 560 F. 2d 925 (8 Cir. 1977), which was vacated and remanded for further consideration in light of *Monell*, 438 U.S. 902 (1978).

⁶⁷ Section-by-Section Analysis of S. 695 at 1.

⁶⁸ In *Butz*, *supra* note 11, the Supreme Court quoted with approval then-Attorney General Griffin Bell, writing in a Fifth Circuit case in 1971 when he was a judge: "all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct . . .". There should not be 'one law for Athens and another for Rome'. 438 U.S. at 486, fn. 7; *Senate Hearings*, *supra* note 2, at 723-4.

⁶⁹ *Baker v. McCollan*, 47 U.S.L.W. 4834 (June 26, 1979).

⁷⁰ Other government employees disciplined under regulations not applicable to the majority of civil servants include members of the uniformed services, administrative law judges, members of the senior executive service and presidential appointees confirmed by the Senate. See S. Rep. No. 969, 95th Cong., 1st Sess., at 41, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 2763; 5 U.S.C. §§ 7521, 7541.

⁷¹ Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196, 218 (1973) [hereinafter *Merrill*]; S. Rep. No. 969, *supra* note 70, at 51; 5 U.S.C. § 7513(d). The Civil Service Reform Act of 1978 established the Merit Systems Protection Board, together with the Special Counsel to the Merit Systems Protection Board and the Office of Personnel Management, as the successors to the Civil Service Commission. S. Rep. No. 969, *supra* note 70, at 5-7.

⁷² 5 U.S.C. § 7703.

⁷³ John T. Elliff, *supra* note 21, at 160-61.

⁷⁴ See e.g., *Merrill*, *supra* note 71; Vaughn, *The Personal Accountability of Public Employees*, 25 Am. U.L. Rev. 84 (1975).

⁷⁵ 123 Cong. Rec. S. 2920 (daily ed. Mar. 15, 1979).

⁷⁶ This is according to the statement of a member of the staff of the Subcommittee on Administrative Law and Government Relations of the Committee on the Judiciary of the House of Representatives in a telephone conversation with a member of this Committee on May 9, 1979.

⁷⁷ Sec. 1, S. 695; Sec. 2, H.R. 2659; in each case amending 28 U.S.C. § 1346(b). The exact language quoted is that of S. 695.

⁷⁸ In its present form the FTCA covers only acts done "in the scope of employment," which reflects its origin as an analog of private employer liability. The term "under color of law" has undergone an entirely separate development, primarily in cases under the Civil Rights Laws. See text at footnotes 58-9. The two terms have come to overlap in some recent cases; for example, in *Birnbaum v. U.S.*, 588 F.2d 319 (2 Cir. 1978), the court found that CIA conduct under its mail-opening program was "so far beyond its authority" that no discretionary function defense could be properly asserted, 588 F.2d at 332, but still assumed that the conduct was within the scope of employment for the purpose of finding that the FTCA covered it.

⁷⁹ Sec. 12, S. 695, adding 5 U.S.C. § 7804(a); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2685(a). This provision is contained only in the disciplinary provisions of the bills; the sections that provide for the United States to substitute itself when an employee is sued contain no similar provision

or cross-reference, although the determination would clearly have to be made at the time suit is brought.

⁸⁰ Sec. 3, S. 695, amending 28 U.S.C. § 2674; Sec. 3, H.R. 2659, creating a new 28 U.S.C. § 2681.

⁸¹ Sec. 4, S. 695, amending 28 U.S.C. § 2675(a); Sec. 3, H.R. 2659, creating a new 28 U.S.C. § 2681(d). In S. 695, this provision is incongruously placed in the section of the present FTCA relating solely to administrative proceedings prior to suit.

⁸² Sec. 9(c), S. 695; Sec. 4(c), H.R. 2659; in each case amending 28 U.S.C. § 2680(h).

⁸³ Sec. 9(a), S. 695, amending 28 U.S.C. § 2680; Sec. 3(g), H.R. 2659, adding 28 U.S.C. § 2681(g).

⁸⁴ Sec. 4, S. 695, amending 28 U.S.C. § 2675(a); Sec. 3, H.R. 2659, adding 28 U.S.C. § 2681(a) and (c).

⁸⁵ Sec. 7, S. 695, amending 28 U.S.C. § 2679(d); Sec. 3, H.R. 2659, adding 28 U.S.C. § 2681(e). By adding this new section, H.R. 2659 broadens the employee immunization procedures only to the case of constitutional torts, while the language of S. 695 makes them applicable to any suit against a government employee where the FTCA is available. The distinction made by H.R. 2659 is unworkable, since it would require someone—presumably, the court—to determine, before the suit is removed, whether the conduct at issue amounted to a constitutional tort; plaintiff's characterization of it, or that of the Attorney General, should certainly not suffice, and they would presumably often differ.

⁸⁶ Sec. 12, S. 695, adding 5 U.S.C. § 7802; Sec. 8, H.R. 2659, adding 28 U.S.C. § 2683. In each bill, the inquiry is made to the head of the employee's agency and must be accompanied by a certified written statement setting out facts. The employee need not be specifically identified if the facts are sufficient for the commencement of an inquiry.

⁸⁷ Sec. 12, S. 695, adding 5 U.S.C. § 7803(b); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2684(b).

⁸⁸ Sec. 12, S. 695, adding 5 U.S.C. § 7803(c) and (e); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2684(c) and (e).

⁸⁹ Sec. 12, S. 695, adding 5 U.S.C. § 7805(a) and (c); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2686(a) and (c). The body the President selects for intelligence reviews may not be the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the national intelligence components of the Defense Department, or the National Security Council or its component parts. Nor may any person who has been an employee of one of the listed agencies during the preceding two years be appointed by the President to serve on that reviewing body.

⁹⁰ Sec. 12, S. 695, adding 5 U.S.C. § 7803(c) and § 7806; Sec. 8, H.R. 2659, adding 28 U.S.C. § 2684(c) and § 2687. Ruth Prokop, Chairwoman of the Merit Systems Protection Board, in a statement dated August 1, 1979, delivered to the House Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary [the *Prokop Statement*] noted that the "reasonable" standard of this legisla-

tion is in conflict with the Board's obligations in handling employee appeals to use a "preponderance of the evidence" standard in most cases and a "substantial evidence" standard for unacceptable performance appeals. If both the complainant and the employee appeal the same decision, the Board might be compelled to reach inconsistent findings. *Prokop Statement* at 4-5.

⁹¹Sec. 12, S. 695, adding 5 U.S.C. § 7803(d) and (e); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2684(d) and (e). Review of information relating to national security, national defense, or foreign affairs would be *in camera*.

⁹²Sec. 12, S. 695, adding 5 U.S.C. § 7804(b); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2685(b).

⁹³Sec. 12, S. 695, adding 5 U.S.C. § 7804(a); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2685(a).

⁹⁴Sec. 12, S. 695, adding 5 U.S.C. § 7804(c); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2685(c). The same "arbitrary or capricious" standard would apply as in the case of other appeals.

⁹⁵Sec. 12(a), S. 695, adding 5 U.S.C. § 7807(e); Sec. 8, H.R. 2659, adding 28 U.S.C. § 2688(e).

⁹⁶Sec. 10, S. 695; Sec. 6, H.R. 2569. The affected statutes would be those listed above in footnote 41.

⁹⁷Thus, it is not clear whether both remedies would be available for a breach of one of those acts by a government employee in the nature of a "constitutional tort," or whether one set of provisions would be preempted, or if so, which one.

⁹⁸Sec. 13, S. 695; Sec. 10(a) and (b), H.R. 2659.

⁹⁹Sec. 14, S. 695; Sec. 10(c), H.R. 2659. The Attorney General and the Office of Personnel Management are each directed to submit a report to Congress six months before the termination date, recommending whether the legislation should be continued.

¹⁰⁰According to Professor Davis, thirty-three states had done so in whole or in part by 1978. K.C. Davis, *Administrative Law* § 25.00 (1978 Supp.).

¹⁰¹See e.g., *Lawbreakers*, *supra* note 60, at 455-58; K.C. Davis, *Observation: An Approach to Legal Control of the Police*, 52 Tex. L.R. 703 (1974).

¹⁰²*Supra* note 68. We recognize, of course, that because of the Eleventh Amendment and other concerns of federalism, identical treatment may not be feasible, in particular in the area of the disciplinary mechanism.

¹⁰³Last year's Senate bills did this more clearly, by a lead-in clause excluding the exceptions of 28 U.S.C. § 2680(h); see e.g. *Senate Hearings*, *supra* note 2, part 2, at 453. The House bill was silent on the issue. *House Hearings*, *supra* note 2, at 1-3. S. 695 would instead add a paragraph at the end of that section, presumably to do the same thing, but the paragraph could be read as having the opposite effect, i.e., making the most important exceptions apply to constitutional torts. Sec. 9(a). H.R. 2659 does the same thing in Sec. 3(g), and is also ambiguous.

¹⁰⁴ K.C. Davis, *Administrative Law in the Seventies*, § 25.08-1 (1976). We have already mentioned, *supra* note 41, that COINTELPRO defamations are outside the present FTCA; if the courts find that they, or similar activities, do not rise to the level of "constitutional" torts, they would also be outside the amended FTCA.

¹⁰⁵ *F.B.I. Report*, *supra* note 1, at 35-38. See also testimony of Kathleen A. Imholz on behalf of the Committee on Federal Legislation to the Senate Judiciary Committee (statement dated October 24, 1979) and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee (statement dated October 30, 1979) on the absence of civil remedies in the Federal Bureau of Investigation Charter Act of 1979 (S. 1612 and H.R. 5030). The proposed charter, which was introduced in Congress on July 31, 1979, is the subject of a forthcoming report by the Committee on Federal Legislation.

¹⁰⁶ *Supra* note 4.

¹⁰⁷ See note 23 *supra*.

¹⁰⁸ Sec. 12, S. 695, § 7803(d); Sec. 8, H.R. 2659, 28 U.S.C. § 2684(d).

¹⁰⁹ This is the language of S. 695.

¹¹⁰ There are procedures for supplementing the record or remanding at the administrative review level, but this would be quite late in the proceedings, especially considering the layers of administrative and legal action that would have to be passed on the way to that level. The Chairwoman of the Merit Systems Protection Board has suggested that due process requires a better hearing. See *Prokop Testimony*, *supra* note 90, at 2-3.

¹¹¹ For example, intrusive investigatory techniques against newsman Joseph Kraft were justified, after the fact, on grounds of "national security". See D. Wise, *The American Police State: The Government Against the People*, at 3-30 (Vintage Books 1976); see also numerous examples in the *Church Committee Report*, *supra* note 1, and Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Temple University Press 1978).

¹¹² Ms. Prokop, the Board's Chairwoman, has stated that she believes the Board should also be the reviewing body for foreign service and public health service personnel. *Prokop Testimony*, *supra* note 90, at 7. *The Congressional Quarterly* reported in its issue of June 2, 1979, that the Board, which was created by the Civil Service Reform Act of 1978, has been inadequately funded to date. Page 1057.

¹¹³ See comments of Senator Abourezk, reprinted in *Senate Hearings*, *supra* note 2, part 2, at 866-68, on some of the additional complications concerning former employees, including former presidential appointees.

¹¹⁴ For example, in his recent book *The Bureau: My Thirty Years in Hoover's FBI*, (W.W. Norton & Company 1979), the late William C. Sullivan, number three man in the F.B.I. until 1971, describes his organization of a COINTELPRO against the Ku Klux Klan. *The Bureau* at 128. Monetary awards against the agents who carried out his instructions or against the United States would not likely have deterred that conduct.

¹¹⁵ Fed. R. Civ. P. 14(a).

¹¹⁶ *FTCA-1946*, *supra* note 29, at 21, fn. 62.

¹¹⁷ 12 U.S.C. § 3417(a).

¹¹⁸ Letter dated September 16, 1977, from Attorney General Bell to Vice President Mondale, *reprinted in Senate Hearings, supra* note 2, part 1, at 29.

¹¹⁹ *Senate Hearings, supra* note 2, part 2, at 358.

¹²⁰ *E.g., City of Pittsburgh v. United States*, 359 F. 2d 564 (3 Cir. 1966); *Glasspool v. United States*, 190 F. Supp. 804 (D. Del. 1961); *Reid v. United States*, 211 U.S. 529 (1909); *Glidden Co. v. Zdanok*, 370 U.S. 530, 572 (1962).

¹²¹ Sec. 13(a), S. 695; Sec. 10(a). H.R. 2659.

¹²² It is at least questionable whether an attempt to limit judicial review of the Attorney General's certification would be successful. *See* memorandum from the Congressional Research Service of the Library of Congress dated July 18, 1979, to the Senate Subcommittee on Administrative Practice and Procedure, *reprinted in Senate Hearings, supra* note 2, part 2, at 673-77.

¹²³ The present 28 U.S.C. § 2672 contains such a requirement for settlements in excess of \$25,000; the bills would expand the requirement to cover any "constitutional" tort.

¹²⁴ We have noted, but cannot address, a number of additional problems with this statute, such as the *Feres* exclusion, *supra* note 32, and the absence of a remedy for many intentional torts, *supra* note 104.

¹²⁵ *Church Committee Report, supra* note 1, at 338 (Recommendation 91).

¹²⁶ This language is the suggestion of Judge Jon Newman (now on the Second Circuit). In *Lawbreakers, supra* note 60, at 467, he suggested the following statute, modelled on § 1983, covering the acts of federal, state and local government employees:

"The employing department or unit of government of every person who, under color of any statute, ordinance, regulation, custom, or usage of the United States or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. The United States shall be entitled to intervene in any such action on behalf of the plaintiff or to bring such action on behalf of the party injured. In any suit brought pursuant to this statute, immunities and defenses available at common law, including the defense of good faith, are abolished. To establish liability, the plaintiff need establish by a preponderance of the evidence only that adverse action was taken against the party injured; liability can be defeated when the defendant establishes by a preponderance of the evidence that the adverse action taken against the party injured was lawful. Whenever a verdict is returned in favor of the party injured in a suit under this statute, the Court shall award, in addition to compensatory

damages determined by the trier of fact, a sum of \$ as
liquidated damages for the denial of a federally protected right.”

Senator METZENBAUM. Mr. Frank Smizik. Mr. Smizik appears on behalf of the access to justice project of the National Legal Aid and Defenders Association.

Mr. Smizik, we will be happy to put your entire statement in the record. The hour is 3 minutes to 11 and the Chair will have to adjourn promptly at 12. I will ask you to make your presentation in something like 5 to 10 minutes and then we will take a few questions.

STATEMENT OF FRANK I. SMIZIK, ATTORNEY, ACCESS TO JUSTICE PROJECT, NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION

Mr. SMIZIK. Thank you, Mr. Chairman. Thank you for inviting me here.

As a legal services lawyer for the past 9 years, I brought much litigation against the Department of Housing and Urban Development. I would like to relate presently what is going on in the city of Boston because I think it has a direct effect on this legislation today.

We brought a lawsuit against the city of Boston and a similar case against the city of Chelsea. They were consolidated and both cases involved the cities receiving several millions of dollars in both community development and urban development action grant moneys. They received these moneys despite the uncontroverted fact that both cities failed to build one new unit of family housing which is a violation of the act; that both cities failed to have strategies or even plans to combat extensive racial segregation; that both cities failed to adopt or implement even minimally effective affirmative action plans; that both cities failed to develop strategies to combat the problems of the lowest income neighborhoods and that both cities failed to provide plans to protect against displacement. All these were violations of the act—despite this, both cities received several millions of dollars from HUD without question. After extensive negotiation and filing of an administrative complaint, these lawsuits were filed in 1977. They were to prevent the city from receiving the money without providing for the very people that the act was intending to benefit—as the lowest income people.

Yet, over 2 years later, the First Circuit Court of Appeals is still wrestling with one issue and that issue is standing. As Judge Oaks said in the dissenting opinion in the *Hartford* case, standing is only another barrier in the way of a litigant who is attempting to challenge illegal Government action.

The District Court in Boston and in Chelsea held that if Boston were denied the funds, these funds could very well wind up in San Francisco thus no one would benefit. This could be true even if Boston were threatened with the loss of funds because they have failed to comply with the intent and purposes of the law; they may very well begin to comply with the law. In my own personal view, the act causes a substantial harm that the court did not even address. The circuit court—

Senator METZENBAUM. Let me just interrupt. Has anybody yet discussed with the Justice Department, you or others who are associated with you, the morality of raising the standing issue in the matters about which you are speaking?

Mr. SMIZIK. We haven't raised them per se, but we have done, we argue, of course, privately, out of court, that standing is a ridiculous issue in this matter and that the Government in the *Alabama* case admitted in their brief that there was standing. But it is a defense and the U.S. attorneys are not willing to give up a defense.

Senator METZENBAUM. What about HUD? HUD has a policy and you are saying that the policies are not being followed.

Why doesn't HUD direct their lawyers—direct the Department of Justice—not to raise the issue of standing. What these people are actually claiming are the very points that we ourselves believe should be the case. If they can prove their point, we are in agreement—the money should not be made available. Why doesn't that happen?

Mr. SMIZIK. I really can't answer that. That is an ideal world and I don't think HUD has a clear policy. I think they change very often and there are competing departments within HUD that argue.

Senator METZENBAUM. You mean to say that HUD doesn't have a policy to say that funds that are to be used to build houses for the poor shouldn't have to be used for the poor? Funds that are to be used for integrated housing shouldn't have to be used for integrated housing?

Mr. SMIZIK. Well, the act itself is schizophrenic. It is to give money to the city, but they are supposed to do things for the poor to get that money. The city gets the money but they don't do things for the poor and how does HUD tell a city like Boston—they did it in Philadelphia—but, generally, how does HUD tell a city like Boston, "you can't receive \$30 million this year because you haven't built any housing." It is a very difficult political question and that is really the issue—it is a political issue. We want the courts to deal with the legal issue.

Senator METZENBAUM. Well, Mr. Califano found that he could tell the University of North Carolina that if they didn't integrate, he was going to cut off their funding. For his reward, he got fired, but certainly they can do it.

Mr. SMIZIK. I agree with you. I have been at several meetings with the Assistant Secretary Embry and the Assistant Secretary has said that he doesn't want to use the method of cutting off the moneys because he feels that no one will benefit. That is his philosophy. I don't know how we will get enforcement unless they use strong methods.

Senator METZENBAUM. Please proceed.

Mr. SMIZIK. The first circuit just reached a decision in this case, this last week and the court held that there was standing—this is after 2 years—but the burden was still on the plaintiff to prove at the trial that they will benefit if the lower court rules on their favor on the merits. Quite honestly, this case could again go up—they said they left the question of standing open. This case could then go up again on standing and have another delay. This redressability issue is causing untold grief for low-income people.

It should not be a factor, really. It is a red herring as we used to say in law school. It is not dealing with the true issue. The true issue is whether or not low-income people are supposed to benefit under this Act; if they are, can they enforce the act.

In the meantime, as the plaintiff's lawyer, we have to go back to our clients and explain why they can't find a place to live in Boston; why they are being forced from their neighborhoods with money that was

intended to benefit them; and why they are not getting their share of the jobs that are being created for this program.

We had a very similar fight several years ago with the FHA 235 existing home program where several thousands of persons were sold homes that were defective. It took 3 or 4 years to determine that the people who bought these homes had actual standing to fight these cases. In the meantime, thousands upon thousands of persons in Philadelphia, Detroit, and Chicago lost their homes.

We believe that S. 680 is a start to remove these artificial barriers that are presented, created by the court. We believe that section 1 (a) and (d) eliminate two of the three prudential hurdles.

However, we think that there should be a section in there that would eliminate the concept that an aggrieved party can only assert their own mitigable rights and not that of a third party. Although exceptions have been made to the court, we think that there should be an affirmative denunciation of this prudential rule.

We also agree with what Mr. Morrison stated earlier in that the act should have an affirmative grant of standing so long as it doesn't abridge the Constitution and the case in controversy requirement. We believe that this Senate, that it is within this body's power to do so. They have done it in other laws, in the fair housing area, in the environmental area and there is no reason why it can't be done here.

As I stated earlier, there is redressability—a key issue in the *Boston* case and should be dealt with directly by 680. The present clause (c) is quite confusing; the term substantially and significantly are terms at common parlance are used interchangeably. The courts will use these words to create a new doctrine, I am sure, or just continue on with what they have been doing with the redressability argument.

Mr. METZENBAUM. Mr. Smizik. In your opinion, where does Congress authority to enact an affirmative grant come from?

Mr. SMIZIK. Well, I am not a constitutional scholar but I do think that you have done in the past—you have done in other acts, done in the fair housing area that someone is harmed—they have a right to sue. I don't see any difference here.

Senator METZENBAUM. Would you feel that the *Trafficante* case supports that position?

Mr. SMIZIK. That's right. Bellwood. Those cases all support the fact that you can do it through statute.

Senator METZENBAUM. Would your beneficiary standing approach involve the court in determining who the intended beneficiaries of the governmental programs are?

Mr. SMIZIK. Well, I think the legislative history of an act does that. If someone is injured, they should have a right to a hearing on the merits. I think standing is a constitutional concept. The act itself would give the person a claim or not.

Senator METZENBAUM. Mr. Smizik, unless you have some other great gem to share with us, we would like to move on, although both I and Senator Thurmond and possibly other members of the committee may want to submit some questions in writing to you.

Mr. SMIZIK. We would be happy to respond to that.

[Questions and answers referred to above follow:]

QUESTIONS OF SENATOR THURMOND AND RESPONSES OF MR. SMIZIK

Question. On August 16, 1978, former Dean of Harvard Law School and former U.S. Solicitor General Erwin N. Griswold testified before a Joint Committee hearing on S. 3005, a similar bill to S. 680, as follows:

"Well, Senator Metzenbaum, I don't think so many cases are being thrown out of court. I think that the need has been greatly exaggerated. Moreover, I think that the question of the burden on the courts is a very real one . . .

"I am now reading from a letter addressed to me by the general counsel of the Administrative Office of the U.S. Courts, Mr. Carl H. Imlay, as follows:

"This subject matter, dealing as it does with citizens' protests against government action, is so broad as to defy precise predictions of future impact. I can only relate general consideration."

"He [Imlay] then gives startling figures about the burdens of the Federal courts . . ."

Mr. Griswold then sets forth three major reasons of his opposition to the bill on pages 57 and 58 which I ask be printed as if read in full.

You may comment now or you may submit your answer in writing after reviewing a copy of this series of quotes.

Answer. Mr. Griswold first states that there is no need for S. 680 because persons can easily bring cases before the courts under present standing requirements. To the contrary, the present standing requirements place unreasonable and burdensome restrictions on the rights of citizens for two reasons. First, there can be no question that citizens with legitimate federal questions are being denied court access due to standing problems. A number of these cases are discussed in our written statement which was submitted at the hearings and a copy of which is attached hereto.

Second, the Court's rulings have been so erratic that citizens have no standards to determine whether they have standing. They must undergo lengthy litigation to determine standing before ever arguing the merits of their claim. This point is also fully developed in our written statement. The uncertain nature of the law of standing has made it very difficult for many persons, particularly those of limited means, to bring their claims in federal court and it has burdened the courts with wasteful and inefficient litigation on obscure and difficult procedural points.

Mr. Griswold next claims that enactment of S. 680 may clog the courts with new cases. We believe that there is no basis in fact for this assertion. As Chief Justice Burger himself explained as a Circuit Court Judge, the costs of litigation are satisfactory deterrents to a flood of lawsuits. *Office of Communications of United Church of Christ v. F.C.C.*, 359 F2d 994, 1006 (D.C. Cir. 1966). States such as New York and California which have recently expanded standing far beyond the limits of S. 680 to citizen-taxpayer standing have not experienced a flood of litigation. Further, the Omnibus Judgeship Act, which provides for more than 150 new judges, and the Magistrates Act passed this session will more than accommodate any increase in litigation. Those interested in lessening the number of federal court cases would do far better by eliminating diversity jurisdiction.

It is also important to note that the inconsistency of the Court's present opinions on standing has actually resulted in an increased burden on the courts, because cases are being brought to the circuit courts and Supreme Court on the question of standing alone. When no standing is found, years of litigation and court time become totally wasted. *Evans v. Lynn*, 537 F2d 571 (2nd Cir. 1975) (en banc), cert. denied 429 U.S. 1066 (1977) offers a good example of increased burden on the courts due to inconsistent rulings on standing. In that case, minority residents of Westchester County, New York challenged a federal grant by the Department of Housing and Urban Development and a local bureau, alleging a violation of the Civil Rights Act. Their complaint was filed in August, 1973. The District Court dismissed their complaint for lack of standing in May, 1974. One year later the Second Circuit reversed the District Court, but the defendants were then granted a rehearing *en banc*. This time (June, 1976) the Second Circuit decided that the plaintiffs did not have standing. Finally, in January 1977, the Supreme Court denied certiorari and the litigation ended. That was four years after the initial complaint was filed, four years spent litigating the issue of standing. See also, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). S. 680, by clearly defining standing, would eliminate these complicated procedural battles and allow a court to promptly and efficiently decide the merits of a case.

Mr. Griswold further claims that enactment of S. 680 would require courts to determine the limit of the "case or controversy" test. But this is precisely the exercise in which the Court is now engaging, with the erratic and inefficient results discussed above. By clarifying the law of standing, S. 680 will provide guidance to the courts regarding what is necessary for a finding of Article III standing.

Of course, S. 680 does not, as it could not and should not, abrogate the Article III requirements. It merely defines standing within Article III limits. Just as Congress defines the limits of the courts constitutionally granted Article III jurisdiction, it is fully within Congressional power to define standing within Article III limits.

Finally, Mr. Griswold claims that S. 680 will result in a usurpation of Congressional power by the Judiciary, by making public policy issues constitutional issues. But granting standing does not affect the merits of a claim or the other requirements of jurisdiction. Claims that formerly involved policy issues or political questions and *not* federal questions will still not involve federal questions, and therefore the courts will not have jurisdiction to adjudicate. The separation of power will remain unaffected.

[The portion of Dean Griswold's statement referred to earlier follows:]

PREPARED STATEMENT OF ERWIN N. GRISWOLD

My name is Erwin N. Griswold. I am now a lawyer here in Washington. I grew up in Ohio, and spent many years in Massachusetts before coming to Washington. My domicile and voting residence remain in Massachusetts.

I appear here this morning on behalf of the American College of Trial Lawyers. This is an organization of several thousand trial lawyers of substantial experience in trial practice, and maintaining high standards in the practice of their profession. I am a member of the College's Committee on Special Problems in the Administration of Justice, and also a member of its Subcommittee on Delays and Congestions in the Courts. The Chairman of the Committee, Thomas E. Deacy, Jr., of Kansas City, had hoped to be present today, but a conflicting engagement made that impossible. He has asked me to appear on his behalf.

After investigation and consultation, the Committee on Special Problems in the Administration of Justice of the American College of Trial Lawyers, on August 3, 1978, voted to oppose the enactment of S. 3005, and this recommendation of the Committee was approved by the Regents of the College on August 4, 1978. Thus in speaking here, I am presenting the fully authorized position of the College.

The reasons for the College's opposition to S. 3005 may be summarized as follows:

1. There is no evident need for the enactment of such a provision. The federal courts are full of cases involving public questions. Many cases have been brought by organizations, such as the Sierra Club, the NAACP, and even by so evanescent a group as SCRAP, Students Challenging Regulatory Agency Procedures, consisting of five students in a seminar at Georgetown Law School. See *United States v. SCRAP*, 412 U.S. 669 (1973). Such cases have also been brought successfully by individuals, as in *Flast v. Cohen*, 392 U.S. 83 (1968). There is nothing to indicate that there is, under present law, any unreasonable restriction on the right of citizens to raise before the federal courts the sort of questions which are appropriate for court decision.

2. There is no way to measure the impact of S. 3005 on the badly overcrowded federal courts in terms of the volume of cases which will be brought there for decision. It may not be very many. The Department of Justice has presented an analysis of certain cases decided by the Supreme Court, and has considered the effect of S. 3005 as applied to those cases. But this does not help in establishing the aggregate number of cases which may be brought under the stimulus of zealous parties and ingenious counsel.

There is lurking in this area an important constitutional question. Under the Constitution, the federal courts have jurisdiction only over "cases" and "controversies" and this is recognized in S. 3005. The precise limits of "cases" and "controversies" are not clear, and probably cannot be made wholly clear. Thus, if S. 3005 is enacted, the courts may be confronted with many cases, perhaps hundreds of cases, in which they will have to wrestle with the fringes of the "cases" or "controversy" doctrine. This will be largely fruitless litigation, but it will add heavily to the burden of the federal courts, since there are few questions in our law which require more historical research, more jurisprudential evalua-

tion, and more shades of difference and nice distinctions than the determination of the constitutional meaning of "cases" or "controversy."

3. The final reason for opposing S. 3005, in my mind, is perhaps the most important. The constitutional requirement of "case" or "controversy" is not a mere accident, nor occasion for verbal quibbles. On the contrary, it is an essential element in preserving the separation of powers between the three branches of government, which was so wisely established by the Founding Fathers, and the preservation of which is so important to the effective operation of our democratic government. The limitation of the jurisdiction of the federal courts to "cases" and "controversies" was intended to confine the courts to the resolution of problems which are appropriate for judicial consideration. Such questions include the resolution of actual controversies between individuals, or between an individual and the government. The broad public questions, questions of policy, affecting the society as a whole, or large segments of the society, should be resolved by the representatives of the people assembled in Congress. That is the proper allocation of responsibility in a constitutional system so firmly based on separation of powers as ours is.

We have already shifted too many things away from Congress, both to the courts and to the Executive branch. In my view, the enactment of S. 3005 would be another, and substantial, step in the process by which we are shifting the resolution of important public questions from the elected representatives of the people, that is, Congress, to the judiciary, who have tenure for life, and are appointed, not elected. Indeed, the judges are given great independence for the very purpose of protecting them from being influenced by popular views and public reaction. Moreover, putting these questions into the courts tends to make large numbers of *public* questions into constitutional questions, beyond the power of Congress to make changes, except with great difficulty, rather than keeping them as statutory questions, where an answer, once made by Congress, can be readily changed if it turns out to be unsatisfactory, or if public views on the question change.

I have twice emphasized the word "public" in what I have said above because I think that the questions to which S. 3005 is directed are, in large measure, essentially public questions, that is, questions involving large groups of people, of the sort with which Congress can appropriately deal, after suitable hearings and consideration. They are not the sort of private question, that is, controversy between one party and another, which the courts are set up to resolve. I know that the lines are not clear. The *Steel Seizure* case involved a great many people. Nevertheless, it was an actual controversy between a steel company and the government officer. Moreover, the essence of the decision was that it was a matter which should be resolved by Congress rather than by the President.

Question. From the previous hearing this quote appears significant: "But the judiciary's [the courts] reasons for exercising a limited amount of self-restraint have gone beyond what may appear to be the obvious practical difficulties of providing access to every citizen who objects to allegedly unlawful governmental action. Thus, the courts have been keen to avoid the possibility of being used as a surrogate for the legislative process. In the words of former Solicitor General Griswold, unlimited citizen access to the Federal Courts could lead to the creation of a Government by the Judiciary. This theme was perhaps best articulated by Justice Powell in *U.S. v. Richardson* where he stated at 418 U.S. 166 at page 184, as follows:

"It seems to me inescapable that allowing unrestricted—citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic government."

Answer. The question asks whether increased standing will alter the allocation of power among the three branches, giving too much power to the judiciary. In fact, the courts function largely to ensure that Congressional statutory mandates are followed and not ignored by those charged with enforcing them. By increasing the Court's ability to redress violations of Congressional enactments, Congressional power will, thus, be increased by S. 680.

Checks on agencies and localities that would ignore Congressional mandates are especially important today. Administrative agencies are burgeoning and so are all the rules they issue. By not allowing standing to challenge the rules, the courts are, in fact, allowing them to thwart the will of Congress and thus usurp that branch.

Question. It is contended that the pending bill would likely have the effect of inviting suits by groups desiring to contest or delay enforcement of an administrative action on the basis of some vague political or philosophical belief.

As a consequence, not only would the entire judicial system be more clogged than it already is, but finality of governmental actions would be substantially impaired. Please comment.

Answer. This question asks whether extended standing would increase suits by individuals contesting administrative action on the basis of vague political beliefs, resulting in delayed enforcement of administrative rules.

As stated before, courts cannot adjudicate claims on the basis of vague beliefs. There must be an actual controversy and there must also be a federal question to provide the jurisdictional basis. Further, it has long been established that courts cannot issue advisory opinions and S. 680 would not affect that rule.

Second, passage of S. 680 would not affect that finality of governmental actions. In order to delay a governmental action, a party must satisfy the traditional equitable requirements for temporary or permanent injunctive relief. S. 680 has no effect at all on this area of the law. It merely defines standing to comport more nearly with the constitutional requirements.

Question. It appears that at least one principle consistently maintained by the Supreme Court is well-grounded in Article III of the Constitution. In order to satisfy the "case or controversy" requirement, the Federal plaintiff must—at the minimum—have a "personal stake in the outcome of the controversy" and must, therefore, allege injury in fact. As stated in *Warth v. Selden*, 422 U.S. 490 [1975] regardless of the Congressional grant to standing:

"The Article III's requirement remains: The plaintiff still must allege a distinct and palpable injury by a large class of other possible litigants."

Thus, a Federal plaintiff must assert his own legal right than the rights of third parties, and his interest must be arguably within the zone of interests to be protected or regulated by the statute or Constitutional guarantee in question. Please comment.

Answer. This question asks whether third party standing or standing to protect an interest not arguably within the "zone of interests to be protected" by a given statute are barred by the Constitution, considering the requirement of injury for standing. The Court has consistently held that these two limitations on standing are prudential or court-determined requirements and are not constitutionally required. Indeed, the Supreme Court itself has allowed third-party standing, *see, eg. Griswold v. Connecticut*, 381 U.S. 479 (1975), and has specifically stated, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Selden*, 422 U.S. 470, 501 (1975). As long as the plaintiff alleges a "case or controversy", Congress may grant standing. *Id.*

Senator METZENBAUM. Thank you. Your testimony has been very helpful.

[The prepared statement of Mr. Smizik follows:]

PREPARED STATEMENT OF FRANK I. SMIZIK

INTRODUCTION

Mr. Chairman and Members of the Committee: My name is Frank I. Smizik. I have been a legal services attorney for nine years and now practice law with the Massachusetts Law Reform Institute. I am appearing today on behalf of the Access to Justice Project of the National Legal Aid and Defender Association. I very much appreciate this opportunity to present the views of the legal services community on S. 680, a bill which we believe has great potential to remove the artificial barriers which have served to keep many of our clients with meritorious claims out of the federal courts.

We strongly endorse Senator Metzenbaum's statement, made as he introduced this bill, that "... citizen access to the federal courts to redress unlawful governmental action is essential to the democratic process." We also agree, however, that "... this bill does not necessarily represent the complete answer to the standing issue. While the enactment of this bill would go a long way toward permitting citizens whose Constitutional rights have been violated to have their day in court, we are aware of the fact that a number of legal experts, including Justice Douglas, believe the scope of this legislation should be significantly expanded."

My testimony will focus on three basic aspects of the issue of standing. First, there is no question that the present law of standing works a significant and unjust hardship on many persons who seek to bring federal claims before the federal

courts. Second, Congress has ample constitutional authority to act to resolve many of the confusing and restrictive standing policies which have been announced by the courts. Finally, while S. 680 takes substantial steps toward relaxing several of the technical and gratuitous standing requirements which have closed the court house doors to deserving litigants, we urge the committee to amend the bill to make certain that the only restrictions placed on a litigant's standing are those found in Article III of the Constitution.

A. PRESENT CASE LAW DENIES MANY DESERVING LITIGANTS THE OPPORTUNITY TO BRING THEIR CLAIMS TO A FEDERAL COURT

The present law of standing is badly in need of clarification and repair. In recent years, the Supreme Court has seesawed back and forth in its analysis of what is required for a plaintiff to establish standing to sue in the federal courts. The court has consistently paid lip service to the proposition that the basic constitutional test for standing is that there be injury in fact which is fairly traceable to the action of the defendant or which is likely to be redressed by the requested remedy. It has applied this test, however, in an uneven and unpredictable manner.

In certain cases, the court has exhibited a willingness, which we believe is intended by Article III, to find a case or controversy where the defendant's conduct contributes to the plaintiff's injury, even though a favorable decision on the merits cannot guarantee that plaintiff will be made whole because third parties or independent causes have also contributed to the injury. In more cases, however, the Court has demanded that, prior to discovery or the full development of their case, plaintiffs show with virtually an absolute certainty that they will be made whole by the requested relief. For example, the Court denied standing to indigent persons unable to get hospital care who challenged an IRS revenue ruling allowing tax-exempt status to certain hospitals while demanding only minimal charitable activities in return. Although there can be no question of the enormous impact of the revenue ruling on the hospital's activities, the Court decided that there was not a sufficient likelihood that the plaintiffs would get the medical care even if there was a ruling in their favor. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

The Court also found the relation between the defendant's actions and the plaintiff's injury to be too attenuated to confer standing in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972). In that case a Texas criminal statute punished "parents" who did not contribute to their children's support. The mother of an illegitimate child who was receiving no support from the father challenged Texas' policy of refusing to prosecute fathers of illegitimate children to force compliance with the statute. The Court found that even if Linda received the relief she requested, prosecution of the father, it was far from certain that she would receive any support and thus find a remedy for her injury. As the dissent noted, this was a curious view of our system of criminal law, which is generally seen as a means of compelling certain behavior—in this case, parental support of children.

In contrast, the Court found a sufficient nexus to confer standing where five law students alleged that an ICC ruling raising freight rates would damage the environment which they enjoyed. *United States v. SCRAP*, 412 U.S. 669 (1973).

Standing decisions have become so difficult to characterize that they can only be described as outcome-determinative. The courts have applied the threshold requirement of standing to decide cases on the merits. As Mr. Justice Brennan observed in his dissent to *Warth v. Seldin*, 422 U.S. 490, 520 (1975), a case which denied standing to individuals and a builders' association seeking to challenge exclusionary zoning policies:

... the opinion, which tosses out of court almost every kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits.

Two years later, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), the Court granted standing in a virtually identical case, but true to Justice Brennan's analysis, denied the claim on the merits.

A disproportionate number of the decisions dismissing cases on the basis of standing have served to keep the claims of the poor and powerless out of courts. The plaintiffs in *EKWRO*, *Linda R.S.* and *Warth* were all underprivileged persons seeking redress from governmental action which had substantial impact on their lives. This very troublesome application of the standing doctrine has been true not only in the Supreme Court but in the lower courts as well. In those

courts, not surprisingly, the application of the standing doctrine reflects the chaotic, yet highly restrictive, lead of the higher court. Particular problems have arisen for those litigants who are the intended yet indirect beneficiaries of governmental programs. This was very much the case in *EKWRO* where there can be little question that the plaintiffs, persons in need of free medical care, were meant to benefit from tax laws giving benefits to charitable institutions who provide such care. Yet because it was not absolutely clear who would benefit from the enforcement of the governing law, that very class of persons was barred from bringing a claim.

Mr. Justice Brennan's observation concerning hostility to the merits in *Warth* has real life application to those of us involved in the day-to-day representation of the poor. My own experience has been in the housing field with Community Development Block Grant (CDBG) and Urban Development Act Grant (UDAG) challenges. The courts have used the doctrine of standing to avoid reviewing CDBG and UDAG grants even where there can be no question that money is being spent in direct violation of the controlling legislation. A brief discussion of the judicial record in this area is most helpful in illustrating the impact of the developing law of standing on legal services clients.

The controlling legislation earmarks substantial funds for our cities and metropolitan areas with the prime objective of benefiting low and moderate income persons. Unfortunately, too many cities have spent the funds according to their own agendas and little has gone to the persons actually intended as beneficiaries. In particular, CDBG funds have been used to benefit homeowners, most of whom are not low-income, and nothing has been done for the elderly, large families and renters, most of whom are poor. Minority and low-income persons, the very persons intended to be benefited have been displaced, and have not even been provided relocation assistance or alternative housing.

UDAG monies are closely related to CDBG funds, but are to encourage private investment in a community. They often lead to increased speculation in a community and much indirect displacement. Past performance in providing housing for low-income persons is a prerequisite for receiving UDAG monies but this is often not enforced by HUD.

Despite a clear pattern of non-compliance with the controlling legislation, several courts have denied standing to plaintiffs who have been refused benefits under these programs on the grounds enunciated in *EKWRO*. The courts have ruled that even if the plaintiffs were eligible to be recipients and even if they could prove the funds were being spent erroneously, their claims would not be heard because there was not absolute certainty that they would personally benefit if the money was spent properly.

As the Second Circuit ruled in *Hartford v. Town of Glastonbury*, 561 F. 2d 1032, 1051 (2d Cir. 1977) (en banc) in a very restrictive reading of *Warth*:

"Thus, we conclude that the plaintiffs have failed to trace their alleged injury to the allegedly unlawful conduct of the defendants and they have failed to demonstrate that the relief they seek would serve to redress that injury." *Hartford*, p. 1053.

The dissent was far more persuasive:

"Hartford has shown injury to itself and a probability of benefit from judicial interference. It should therefore be held to have standing. To deny *Hartford* standing means, in Chief Judge Kaufman's words, that it is unlikely that there could ever be a plaintiff who will be allowed access to the courts to challenge HUD's abdication of its Congressionally imposed duty." *Evans v. Lynn*, 537, F2d 571 (1975).

Unfortunately in two cases I am currently involved with, *NAACP v. Harris*, No. 79-1051 (12/1978, D. Mass.) and *Latinos Unidos De Chelsea En Accion, Inc. (Lucha) v. Harris*, No. 79-1114, (2/22/79, D. Mass.) (consolidated appeal pending), the court has adopted the majority opinion of the Second Circuit. The District court in *Chelsea* required that the plaintiffs show without any question that they would be made whole by the requested relief. Because the program at issue was national in scope and because it was possible that if the plaintiffs were victorious that the monies might be removed from their community, my clients were denied standing. Since no plaintiff could show with absolute certainty where those disputed funds might be channelled if it were proved that the municipalities were spending them illegally, this ruling, if affirmed, will immunize these programs from any judicial reviews. The municipalities will be given a carte blanche to spend substantial federal monies in whatever way they see fit.

The effects of these decisions have been far-reaching. They have hurt ongoing negotiations with other communities including Salem, Brockton, Holyoke and Boston where the relevant agencies are well aware of the procedural problems of getting these cases heard. Because there has not yet been a definitive ruling on standing in this area, and we believe that our clients have been injured within the meaning of Article III, we are therefore forced to resort more often to the courts. And, of course, the battles over standing become increasingly long and difficult as the chief defense is typically framed in a claim of the plaintiff's lack of standing.

The situation faced by those of us representing persons who are homeless or are confined to substandard, inadequate and often dangerous housing is further complicated by a spate of housing decisions applying the Supreme Court's decisions in a confusing and contradictory manner. We can rely on *Jaimes v. Toledo Metropolitan Housing Authority*, 432 F. Supp. 25 (D.C. Ohio, 1977) which granted standing to former residents of Toledo who now live in its suburbs, to compel HUD to approve Metropolitan disbursed housing in these suburbs, even if it was possible that suburbs themselves would not accept the necessary cooperation agreements. How can this be reconciled with *Hartford* and *Warth*?

In *Planning For People Coalition v. DuPage City, Ill.*, 70 F.R.D. 38 (N.D. Ill., 1976), individuals and an association with low-income members were granted standing to challenge exclusionary housing. However, the court denied standing to an association who merely wanted benefits of integrated living. Can this be reconciled with *Gladstone Realtors v. Village of Bellwood*, 474 U.S.L.W. 4377 (U.S. April 17, 1979) and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)?

The Third Circuit found standing for tenants in a non-subsidized housing project in *Ellis v. U.S. Department of Housing and Urban Development*, 551 F. 2d 13 (3d Cir. 1977). However, in *Sadler v. 218 Housing Corporation*, 417 F. Supp. 348 (N.D. GA 1976) the court denied standing to low-income residents of a subsidized housing project who sought to enjoin demolition of a housing project on the grounds that HUD had not adequately considered the impact on the housing market. Some consistency is obviously needed.

It is not only poor people who have found the courthouse door slammed in their faces. Residents of a federal irrigation district in California sued to enforce the requirement that irrigation benefits go only to properties of a maximum of 160 acres. The plaintiffs' goal was to break up the big concerns illegally benefiting from the public irrigation projects and make land available at prices they could afford. Yet, the court denied them standing because it was "a mere speculative possibility" that enforcing the law would put the price of land within their reach. *United States v. Imperial Irrigation District*, 559 F. 2d 509 (9th Cir. 1977).

Other courts have chosen to laboriously circumvent the Supreme Court's rulings as the only way to hear justiciable disputes which have been brought before them. In *Kennett Dairies, Inc. v. Farrow*, 580 F. 2d 1260 (5th Cir. 1978), a small dairy sued the federal government for awarding a procurement contract to a much larger dairy in alleged violation of a Congressionally mandated set-aside for small concerns. Under *EKWRO, Linda* and *Warth*, the court should have denied standing because there might have been any number of other reasons why the plaintiff dairy did not get the contract, and there was no reason to think he necessarily would have gotten it had the law been obeyed. Yet that would have been an unjust, absurd result. The court, to its credit, noted that competition standing in these cases was established in the Fifth Circuit and in a footnote said that despite the decisions of *Warth* and *EKWRO*, "we find nothing in those decisions . . . requiring any thoroughgoing reexamination" of that policy.

We believe that this situation has become totally untenable. Large amounts of judicial time and energy are spent trying to unravel the intricacies of the latest announcements on standing while many persons with legitimate and important claims are denied the opportunity even to be heard. It is time for Congress to act to insure that the federal courts are open to hear citizens' grievances and judges' time is spent, not on the technicalities of threshold issues, but on the merits of the cases before them.

B. CONGRESS HAS THE AUTHORITY TO CLARIFY AND EXPAND THE JUDGE-MADE LAW OF STANDING

Enacting legislation to clarify and expand standing requirements is well within Congress' power. The Supreme Court, even at its most ungenerous moments, has always recognized this power of Congress:

Congress may not confer jurisdiction on Article III federal courts to render advisory opinions . . . or to entertain friendly suits, or to resolve "political questions" . . . because suits of this character are inconsistent with the judicial function under Article III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue" . . . is one within the power of Congress to determine.

Sierra Club v. Morton, 405 U.S. 727, 732 N. 3 (1972).

There are two kinds of limits on standing. One kind is Constitutional, based on Article III's mandate that federal courts decide only "cases" and "controversies." The other set of limits are the so-called "prudential" limits, rules of self-governance fashioned by the courts. To begin by addressing the non-Constitutional requirements, there is no question that Congress can repeal all "prudential" limits on standing. The Supreme Court has explicitly acknowledged this on many occasions. See, e.g., *Village of Bellwood*, *supra*. The prudential tests which have been announced by the Court include the requirements that a party may not assert anyone's legal rights but his own, that a party must fall within the "zone of interests" sought to be protected by the law on which he bases his claim, and that a party may not assert an injury shared by a large class of citizens.

Turning to the Constitutional requirements for standing, even while Congress is limited by Article III, it has long been recognized that:

. . . Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

Congress has acted on numerous occasions in this fashion to define injury and thus create a "case of controversy" when its will has been thwarted. The courts have consistently deferred to these Congressional grants of standing. For example, § 810 of the Fair Housing Act grants standing to any "person aggrieved" by a discriminatory housing practice. In *Trafficante*, *supra*, the Court held that two residents of an apartment complex—one black, the other white—had standing to challenge the management's policy of not renting to blacks. Without the statute, the concurrence noted, it would have been inconceivable that plaintiffs, who already lived in the building, would have had standing to challenge the rental policy. The Court again affirmed the very broad definition of injury under the Fair Housing Act in its recent decision, *Gladstone Realtors, v. Village of Bellwood*, *supra*.

This is not an isolated example. Congress has also defined injuries in the Clean Air Amendments of 1970, 42 U.S.C. § 7604 (a), Endangered Species Act of 1973, 16 U.S.C. § 1540 (g), Federal Informers Act, 31 U.S.C. § 232, Noise Control Act, 42 U.S.C. § 4911, and Consumer Product Safety Act, 15 U.S.C. § 2073. They all grant standing to "any person" or "any interested person." None has ever been held to exceed Article III.

Under the same analysis, Congress has the authority to delineate how stringently the Article III causality and redressability requirements should be applied. Since Congress has the power to define the class of persons aggrieved by the improper enforcement of any legislative scheme and to thus create an injury where there might not otherwise be one, it necessarily follows that Congress can define the exact parameters of the case or controversy regarding the causality and redressability requirements. These requirements are nothing more than component parts of the Constitutional definition of injury.

In sum, we believe that Congress has clear Constitutional authority to define the class of persons injured by the non-enforcement of any of its Acts. In so doing, Congress has the authority to define those cases or controversies which are cognizable under Article III of the Constitution.

C. AN ANALYSIS OF S. 680

The bill currently before this committee, S. 680, takes several important steps toward relaxing and rationalizing the application of the standing doctrine. However, we are very concerned with the bill's failure to provide an affirmative grant of standing to persons injured by the non-enforcement of governmental programs. Since Congress can create injury—or more precisely, create interests whose infringement is an injury—in legislation focused on specific areas, it can likewise declare in general terms that anyone who is injured by the non-enforcement of a

governmental program has standing to challenge such non-enforcement. To clarify the meaning of "injury" the bill should state explicitly that when the enforcement of a law of the United States may benefit a person, that person is injured by the failure to enforce that law. Replacing the current piecemeal approach with a consistent policy would greatly assist courts, who must now struggle with difficult questions of redressability, proximate cause, and statutory intent at what should be the fairly uncomplicated stage of determining standing. It would also take the step, so critical to our democratic system, of insuring that persons who are harmed by the improper enforcement of a federal statute will have access to a judicial forum before which their claim can be heard.

Regarding the rest of the bill, we strongly support § 1591 (1) (a) and (d) which eliminate two of the potential standing requirements. Section (a), which eliminates the generalized grievance bar to standing, wisely recognizes the fallacy of confusing widespread injury with no injury. This section will insure that harms will not go unredressed simply because they are shared by many persons. Similarly, § (d) will clarify and simplify standing law by eliminating the zone of interest test. Once a plaintiff has alleged that a defendant has caused him "injury in fact," he should be able to bolster his case with any law on the books, regardless of whom Congress intended to help when it passed the law.

We see no reason, however, why the third prudential rule, which states that parties may assert only their own legal rights and not those of third parties, has not been eliminated as well. Although the court pays lip service to this rule, it has created many exceptions. For example, doctors have been permitted to raise legal claims of their patients, *Griswold v. Connecticut*, 381 U.S. 479 (1965) and organizations have been able to raise the claims of their members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Further, the court has specifically acknowledged that this is a prudential and not a Constitutional rule. We believe that once a plaintiff has satisfactorily established his own standing, he is a proper party and should be free to press whatever claims will help him prevail and gain full redress for his injury. We urge the committee to amend S. 680 to include a section prohibiting the use of all prudential limitations on standing.

We also support the bill's effort to codify and relax the requirements of causality and redressability. Section 1591 (1) (b) takes an important step in making clear that even though the defendant's conduct may not be the primary cause of the plaintiff's injury, if it contributes to the injury, it is sufficient to confer standing. This framing of the causality test is in total accordance with Article III and will eliminate much of the confusion created in recent judicial decisions.

Section 1591 (1) (c) appears to seek the same result regarding the redressability test but there are problems in the drafting of the section. By conferring standing where an injury may not be "substantially" likely to be remedied if it is "significantly" likely to be remedied, the bill invites a confusion in its application which nullifies its force as a corrective measure. By failing to define the difference between these two terms which are so close to each other in common parlance, the bill forces each court to concoct its own definitions. The major damage done by *EKWRO*, *Warth* and *Linda R.S.* has not only been the strict redressability rule they enunciated, but the erratic and unpredictable application of that rule. In legislation that seeks to bring predictability back into the law of standing, dismissal should not hinge on the application of these elusive terms. We urge the committee to include a section in the bill to make clear that no one will be barred from federal court as long as prevailing on the merits is likely to contribute directly or indirectly to redressing or preventing their injury.

Finally, we believe that Section 1591 (2) should be deleted from the bill. Standing to challenge an illegal revenue ruling should be determined by the same criteria as standing to challenge any other illegal government action. The goal behind S. 680, which we applaud, is to remove technical barriers to standing and allow citizens who have been injured by an action of their government to gain access to a federal court to have their claim heard on the merits. The exception for revenue rulings by its terms preserves the confusion and inequity endemic to the current law of standing. Once a plaintiff has shown an "injury in fact", he should have standing to assert all claims. A claim that he has been injured because of an illegal tax ruling can and should be dealt with on the merits where there are parties who can present an Article III case or controversy. Similarly, we believe that the exception of taxpayer standing from this act is misplaced. The exceptions preserved in this section are a blot on an otherwise coherent law.

CONCLUSION

With the modifications suggested, we believe that S. 680 will insure that persons with actual grievances against their government will have access to the judicial system to have their claims resolved. We urge prompt passage of this bill.

Senator METZENBAUM. Our next witness is Mr. Carrasco who appears before us as the legislative director, Equal Justice Foundation, Inc.

You might tell us, as you begin, who and what the Equal Justice Foundation is.

Mr. CARRASCO. I would be more than happy to, Senator.

**STATEMENT OF GILBERT PAUL CARRASCO, LEGISLATIVE
DIRECTOR, EQUAL JUSTICE FOUNDATION, INC.**

Mr. CARRASCO. I want to thank the committee for the opportunity of the Equal Justice Foundation to assist it in this very important legislation.

The Equal Justice Foundation is a nonprofit organization established to contribute to access to justice. Its primary objective is to facilitate the judicial process through elimination of procedural barriers which operate to deter underprivileged and civil rights litigants from litigating in the courts.

Senator METZENBAUM. Would you continue on and I will be back.

Mr. CARRASCO. Senator Metzenbaum stated in his opening statement that the testimony of the witnesses today would include proposals for remedial action. It is to this question we would primarily like to address ourselves today. Beginning with a brief analysis of S. 680 in its present form, as has been expressed by other witnesses, we are of the opinion that S. 680 is a very negative approach and is phrased in a piecemeal fashion. There are other ways to accomplish the very commendable purposes of the legislation as expressed in the "Findings and Policy." First, the section which addresses itself to the injury which is shared by all or a large class of persons is a section which we feel is very well addressed by S. 680. It eliminates the generalized grievance rationale as propounded in the *Reservists* and *Richardson* cases.

This prudential, as it has been called, limitation, is one which the Equal Justice Foundation in its opinion feels is essential for some standing legislation. The second section which deals with the primary cause of the injury is of minimal effect because of the problem of causation. Causation is a constitutional requirement, but the court has not expressed it as a requirement of primary causation. So to eliminate the requirement of primary causation would really have no effect on the causation factor at all.

The third section dealing with redressability, although perhaps constitutional in construction because of the remedy which would be buried by the significant part language—that is, the redress could be remedied, effected in part, although not completely. That would make it constitutional, but the effect of such an elimination, an elimination of—the language would be of minimal effect because it is not operated to deter parties from litigation. The substantially likely language

is a constitutional requirement, but it has not been qualified by the significant part language.

The last section of S. 680—the zone-of-interest test—has operated to deter litigants from access to the courts, but it has not been used very successfully in denying access.

Our proposals which I will sketch very briefly, seek to accomplish the objectives of S. 680 in a constitutional manner and in a very direct manner. It is comprised of three elements.

The first is a presumption of standing. Now, Justice Douglas has proposed a presumption of standing in his letter to the committee in the hearings last year, last Congress, S. 3005; however, Justice Douglas posited a conclusive presumption. We feel that a conclusive presumption would operate to infringe on the separation of powers concept because it would foreclose any inquiry into or with regard to article III, cases in controversy. We feel that a very good approach, however, would be an affirmative presumption of standing. This would operate to expedite the process of litigation and would foreclose extended expenditure of time on the issue of standing.

As Mr. Morrison pointed out, he litigated the issue of standing in *Duke Power* for 4 years. A presumption of standing, I think, would expedite this process in a very effective manner.

The second component of our proposal which is appended in the testimony which we have submitted is a limitation on the Federal courts inquiry to cases in controversies. That is, all the so-called prudential limitations would be foreclosed automatically and it would simply limit the Federal courts to denials of standing on the basis of constitutional requirements.

Third, is the beneficiary standing. Beneficiary standing, we feel, is essential to meaningful standing legislation. Beneficiary standing would derive its constitutional authority from the *Trafficante* and *Bellwood* line of cases in which Congress expressly legislated to remove prudential considerations from the issue of fair housing.

Now, *Trafficante* is recognized only addressed fair housing—a very specific substantive area of the law. However, if beneficiary standing were linked to rights and to entitlements under other congressional acts, then it would derive its power from article I, section 8, clause 18, and “Necessary and Proper” clause, as well as all of the power of enforcement clauses of the civil rights, amendments to the Constitution including the 13th, 14th, 15th, and 19th.

Additional power, perhaps, could be derived from the “Committee” clause and perhaps the taxing and spending power. This would supplement the power invoked under S. 680 as presently drafted because it is phrased in negative terms addressing the Federal court’s power under article III.

The Federal courts, of course, have primary authority to define what the Constitution means—what a case in controversy is, and to the extent that those questions are peripherally addressed by S. 680 in its present form, it would perhaps draw into question constitutional issues in litigation under this statute as presently drafted.

Senator METZENBAUM. Mr. Carrasco, may I ask a couple of questions?

Mr. CARRASCO. Certainly, Senator.

Senator METZENBAUM. Who currently has the burden of proof of standing or lack of standing?

Mr. CARRASCO. The plaintiff. The plaintiff must show, must present or show a case of controversy; however, for a summary judgment, the defendant, under *Jenkins v. McKeathen* and *Warth v. Seldin* has to raise the question, but I believe that is correct.

Senator METZENBAUM. How would creating an affirmative grant of standing change this?

Mr. CARRASCO. An affirmative presumption of standing would require the defendant to draw the question of case or controversy into serious question. The plaintiff would, therefore, be assumed to have standing and would go through the process of litigation without an extended amount of time being spent on the issue of standing.

Senator METZENBAUM. Would your approach extend standing to those who are intended beneficiaries of a law or constitutional provision?

Mr. CARRASCO. It would extend standing to beneficiaries to provisions of the Constitution or of the statutory law of the United States.

Senator METZENBAUM. Do you mean they extend standing to any individual who in fact may benefit from enforcement of the provision in question regardless of whether that individual is an intended beneficiary?

Mr. CARRASCO. Senator, that is an open question as to whether Congress would want to go that far; however, I think that Congress could achieve an additional amount of effect to its legislation through such a law. Allowage would affect a standing provision to the beneficiaries of all laws and would allow beneficiaries of those laws to secure their rights under them.

Senator METZENBAUM. Senator Thurmond, do you have any questions?

Senator THURMOND. Mr. Chairman, I have an opening statement and I would ask that it follow your opening remarks.

Senator METZENBAUM. Without objection, it is so ordered.

Senator THURMOND. We could just let him answer these for the record if we could do that.

Senator METZENBAUM. Very good.

Thank you very much, Mr. Carrasco. Mr. Carrasco, we may have some questions for you that we will submit in writing and we ask that you respond in writing.

Mr. CARRASCO. I will be happy to assist the committee in that way.

Senator METZENBAUM. Thank you very much.

Mr. CARRASCO. Thank you, Senator.

[The prepared statement of Mr. Carrasco follows:]

STATEMENT OF GILBERT PAUL CARRASCO,

LEGISLATIVE DIRECTOR, EQUAL JUSTICE FOUNDATION, INC.

BEFORE THE

COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE

ON

S. 680,

CITIZENS' RIGHT TO STANDING IN FEDERAL COURTS ACT

FRIDAY, OCTOBER 12, 1979

WASHINGTON, D. C.

Michael M. Sussman, Esq. Chairperson, Equal Justice Foundation
Susan Kellock, Executive Director, Equal Justice Foundation
1333 Connecticut Ave. N.W., 4th Floor
Washington, D. C. 20036

INTRODUCTION

Mr. Chairman and distinguished members of the Judiciary Committee, on behalf of the Equal Justice Foundation I would like to thank you for the opportunity to contribute to the Judicial System and the law of "Standing to Sue."

"Standing" relates to whether a plaintiff has enough of an interest in a matter to warrant allowing him or her to sue. It is designed to prevent people who have no real interest in prosecuting a suit from maintaining an action. Recently the courts have been narrowing the class of persons entitled to sue through an increasingly restrictive definition of "standing."***1

This procedural doctrine is of particular concern to the Equal Justice Foundation, since the reason for this organization's existence is to ensure equal access to justice without regard to litigants' social or economic status.

***When an individual is an "obvious party plaintiff"----i.e., he is a member of the class at which the statutory prescriptions are aimed----his standing presents little problem. Modern society, however, is characterized by the interconnections in its parts and the interdependence of its members. That being the case, a statute may have impact beyond those at whom it is directed...²

It is essential to the proper function of our system of justice for people to have access to their courts; however, litigants are frequently hindered in their ability to proceed to the merits of legitimate claims because of a systemic preoccupation with this obscure procedural technicality known as

the standing doctrine.

The urgent need for legislation to eliminate this tremendous waste of valuable time and resources has been expressed by eminent officers of both the Executive³ and Judicial⁴ branches. This need is also commendably stated in the "Findings and Policy" section of S.680.

While we embrace the objectives of S.680--increased access to the courts and abrogation of unnecessary barriers to redress--the means S.680 uses to accomplish these objectives are of questionable efficacy and pose substantial problems which require review and improvement. While recognizing that criticism without solution is of little use, we will proffer alternatives for the Committee's consideration.

THE CONSTITUTIONAL ELEMENTS OF THE STANDING DOCTRINE

S.680 isolates and overrides certain grounds which have been employed to deny litigants access to our judicial system. In legislating in this area, it is essential for Congress to recognize the dual nature of the standing doctrine.

...In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise...⁵

Congress has power to modify, supersede, or abrogate the "prudential" barriers to standing, but legislation which attempts to accomplish such objectives without respect to constitu-

tionally⁶ required elements of the law of standing is contrary to the fundamental principle of separation of powers.

***Apart from Article III jurisdictional questions, problems of standing, as required by this Court for its own governance, have involved a "rule of self-restraint." Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise...⁷

Thus, the "judicial power" only extends to "cases" and "controversies,"⁸ and Congress is without power or authority to enlarge federal jurisdiction beyond the parameters of Article III.⁹ Further, the constitutional aspects of the standing doctrine have been characterized as "Art. III minima,"¹⁰ and it "is emphatically the province and duty of the judicial department to say what the law is."¹¹

When Congress legislates, particularly on matters implicating the separation of powers, current judicial precedent should be closely scrutinized. Although many¹² of the Supreme Court's decisions do not clearly articulate whether they are based on constitutional or "prudential" grounds or a combination of both, there is general agreement as to the distinct constitutional elements which must be considered in legislating on the subject.

Most importantly, the plaintiff must state that (s)he has suffered injury.

***The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show

that he personally has suffered some actual or threatened injury...¹³

Secondly, the plaintiff must allege a causal relationship between the injury alleged and the defendant's challenged conduct.¹⁴

...The injury may be indirect, but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions...¹⁵

This causal connection may be demonstrated by a showing of "a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury," and thereby "satisfy the 'case or controversy' requirement of Art. III."¹⁶ This latter element is the result of the recent elaboration of a more expansive and restrictive "cases/controversies" requirement by the Supreme Court in such cases as Warth v. Seldin, supra, and Simon, Secretary of the Treasury v. E.K.W.R.O., supra.

The barriers to access to the courts have been further compounded by the Supreme Court's elaboration and use of the "prudential" limitations.¹⁷ In the law of standing, however, the constitutional requirements are the only limitations to which Congress must defer.¹⁸

***Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by the prudential standing rules." In no event, however, may Congress abrogate the Art. III minima...¹⁹

In addition to the authority Congress possesses in its supervisory rôle over the federal courts,²⁰ ostensibly that which would be invoked by S.680 in its present form, Congress may affirmatively confer standing²¹ to secure rights or entitlements through substantive legislation.²² Using this affirmative approach, Congress can implement its full panoply of power under Article I²³ and its enforcement powers under the Thirteenth,²⁴ Fourteenth,²⁵ Fifteenth,²⁶ and Nineteenth Amendments and empower litigants to indicate public policy through federal court litigation. This distinction provides the basis for the alternate approach to extending standing which we urge Congress to embrace.

SECTION-BY-SECTION ANALYSIS
OF S.680

As mentioned earlier, the preamble to S.680 ("findings and policy") is a compelling statement of the serious consequences which have ensued due to judicial "abdication"²⁷ of the responsibility to decide difficult, controversial issues "even at the instance of a party whose Art. III standing is clear."²⁸ Thus, the need to supersede ill-defined, wholly discretionary, "optional,"²⁹ "prudential" rules of standing is well-founded. However, the piecemeal approach taken by S.680 is of questionable merit. By eliminating only some of the "prudential" limitations, it seems to ratify and invite the expanded use of others.

The crucial section of S.680, 1591(1), attempts to eliminate four reasons for dismissing a suit for lack of standing. Although ostensibly these provisions would narrow the grounds the judiciary could use to deny litigants their day in court, in our view the bill does not go far enough to address critical problems in the law of standing. Moreover, one of the primary reasons for legislating on the subject is that current law lacks clarity and ease of application. In its present form, S.680 does little to remedy either of these problems.

The first "prudential" limitation which the bill would supersede speaks to injury which is "shared by all or a large class of persons" §1591(1). This section would preclude the denial of "standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure,"³⁰ a limitation which the Supreme Court has expressly acknowledged to be "prudential" and, therefore clearly within the power of Congress to overrule.³¹

The "generalized grievance" rationale was employed to deny standing in United States v. Richardson,³² where the court held that a taxpayer could not challenge the Constitutionality³³ of the C.I.A.'s secret budget. Although it is doubtful that §1591(1)(a) of S.680 would change the result in that decision,³⁴ it adds needed support to dicta in an earlier case.³⁵

...But we have already made it clear that standing is not to be denied simply because many people suffer the same injury....To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion.***³⁶

Congress may extend standing to a plaintiff alleging an injury suffered by many. There is the further question of whether it can extend standing to injury which is shared by all persons, as §1591(1)(a) provides.

...Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants....³⁷

In our judgment, §1591(1)(a) is Constitutional, even as it extends standing to an injury which is suffered equally and by all persons. For if a person is injured, he should be deemed to satisfy the Constitutional requirement, regardless of what has occurred to others.³⁸

The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection....³⁹

The second "limitation" addressed by S.680 is found in §1591(1)(b). It proscribes dismissal of a suit on the ground that "the defendant's conduct which forms the basis for the complaint is not or may not be the primary cause of the injury [sic] complained of." We are aware of no case which has been dismissed on this ground for lack of standing.⁴⁰ Rather,

the Supreme Court has required only "a causal link between such injury and the challenged conduct."⁴¹

In other words, the "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.***⁴²

That Simon⁴³ did not require sole or primary causation is substantiated by the Court's analysis⁴⁴ in distinguishing the case of United States v. Students Challenging Regulatory Agency Procedures (SCRAP),⁴⁵ where the line of causation was extremely attenuated. Hence, while the Equal Justice Foundation would endorse §1591(l)(b), we believe that it would have very minimal effect in improving the law of standing.⁴⁶

The third limitation which S.680 would supersede is set forth in §1591(l)(c). It provides that a "court...shall not dismiss an action...on the ground that the plaintiff lacks standing to sue because...the injury which plaintiff alleges to have suffered as a result of the defendant's conduct is not substantially likely to be remedied or prevented by a determination on the merits in the plaintiff's favor, if such determination may contribute in significant part to remedying or preventing such injury...."

As a matter of legislative drafting, this subsection compounds the uncertainty in the law of standing with its nebulous double-negatives coupled with phrases such as "substantially likely" and "significant part," and "will only breed further confusion and unnecessary litigation."⁴⁷

***The need for remedial standing legislation has long been apparent. The courts today appear to be hopelessly divided and confused as to the precise contours of the doctrine of standing, with the result that judges and litigants are forced to devote inordinate time and resources to settling technical issues which ought not be that difficult to resolve....⁴⁸

The bill should be amended so as to add more clarity to the standing doctrine.

In addition to these constructional problems, the subsection is of dubious effect in its impact on standing barriers. A literal reading of this obtuse language leads one to the conclusion that a court governed by it could not refuse to hear a case if compliance with a plaintiff's prayer for relief would result in redress of the grievance "in significant part," as opposed to complete redress. However, neither the Supreme Court, nor any other court of which we are aware, has explicitly denied a litigant standing for lack of complete redressability but, rather, has insisted only on the high probability that the injury be redressed completely.

***Moreover, the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire. A federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits.⁴⁹

We interpret this to mean that under current law a litigant who demonstrates a strong likelihood of redress meets standing requirements.

Moreover, if complete redressability is indeed one of "the Art. III minima," an attempt to dilute it through leg-

isolation would likely be ineffectual.⁵¹ Similarly, if §1591(1)(e) is construed to vary the likelihood of redress, as has been suggested,⁵² it might also spawn constitutional problems.⁵³

Because the Supreme Court has not been predictable on the standing issue, it may deem language which can be construed as threatening the core of constitutional requirements as an unconstitutional challenge to the separation of powers. Although other interpretations of this language are possible, it would be improvident for Congress to risk such a defeating interpretation by choosing unclear language.

The fourth and last standing limitation addressed by S.680 is the "zone of interests"⁵⁴ criterion. §1591(1)(d) would preclude dismissal on the ground that "the injury which plaintiff alleges to have suffered as a result of defendant's conduct is not within the zone of interests to be protected or regulated by the applicable statutes or constitutional provisions." This judicially-created "prudential" barrier has been a source of confusion and has prevented promising lawsuits from being heard on the merits; moreover, "the issues avoided have sometimes been substantial."⁵⁵

Congressional elimination of this "prudential" element of the standing doctrine will contribute to the improvement of justice in the federal courts. Moreover, since the Supreme Court has expressly characterized the "zone of interests" test as a "nonconstitutional standing requirement,"⁵⁶

Congress has plenary power to abrogate it.⁵⁷ The Equal Justice Foundation earnestly supports the accomplishment of this objective.

The last section of S.680 which bears comment is §1591(2), which disclaims any impact on "the standing or lack of standing of persons to sue as taxpayers" or "of persons to challenge agency action which affects the liability or status of another person under the revenue laws." The section seems to ratify the law of taxpayer standing, a separate doctrine posing substantial barriers⁵⁸ to access to the courts. Furthermore, it seems to approve the rationale of Simon,⁵⁹ a most unfortunate decision for the indigents who were denied standing when they sued to enjoin implementation of a Revenue Ruling which was allegedly violative of the Internal Revenue Code provisions governing charitable organizations.

The Equal Justice Foundation would support deletion of §1591(2). In addition, we would recommend that further study be undertaken to explore and address the specific and extraordinary problems of taxpayer standing.

ALTERNATIVE STANDING LEGISLATION:
SOME PROPOSALS FOR AMENDMENT

While there are some problems with S.680 in its present form, we believe there is a long-standing and profound need⁶⁰ "for Congress to restore the doctrine of standing to the fundamental constitutional purposes for which it was intend-

ed."⁶¹ The following proposals are posited to assist the Committee in accomplishing the objectives of S.680.

Appended to this commentary is our proposal. The Committee could implement the findings and policy of S.680 by striking §1591(1) and including three fundamental components in its stead: 1) an affirmative presumption of standing to sue; 2) a limitation on the standing inquiry of federal courts to the question of whether "cases/controversies" are presented, and an express grant of standing to sue to parties within the compass of Article III of the Constitution; and 3) an express grant of standing to sue to any person or organization who (or that) is a direct or indirect beneficiary of a right, entitlement, privilege, or immunity provided by the Constitution, treaties, or laws of the United States, to secure such right, entitlement, privilege, or immunity. Such an affirmative approach would effectuate directly the goals of S.680.

A Presumption of Standing

The complex procedural rule of standing needs a procedural device to expedite⁶² its determination. All too often, especially in actions involving public law, litigants are confronted with a pro forma standing defense by government defendants.

A device which would greatly contribute to the procedural problem of standing is the presumption. Presumptions are designed both to facilitate proof and to promote social policy.⁶³

A presumption may be defined to be an inference required by a rule of law to be drawn as to the existence of one fact from the existence of some other established basic fact or combination of facts. Such rules usually grow out of the collective experience of mankind which has observed the regular and repetitive existence of a certain factual situation arising from the existence of an underlying or basic pattern of other facts....⁶⁴

Although an affirmative presumption of standing to sue would give rise to an inference that Article III is satisfied and that the plaintiff is properly before the court, we do not suggest a conclusive presumption.⁶⁵ To provide a conclusive presumption "is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."⁶⁶ A conclusive presumption of standing would foreclose any judicial inquiry into Article III, and thereby might infringe on the separation of powers.⁶⁷

The strength of the presumption can still be varied, however. Of course, the stronger the presumption, the more effective it will be in allowing standing to plaintiffs. An appropriate criterion, it is suggested, would require a defendant to draw the existence of a "Case" or "Controversy" into serious question to overcome the presumption and to justify the expenditure of judicial time on the issue of standing.

The beneficiary of the presumption introduces evidence of the basic fact (goes into court). The presumption shifts the risk of non-persuasion (burden of proof). Once the court finds the basic facts, it must find the

presumed fact unless the opposing party convinces him by a preponderance of the evidence that the presumed fact does not exist.⁶⁸

An affirmative presumption of standing would merely give Congressional recognition to the fact that generally a litigant who goes to the time and expense of bringing suit in federal court has ample interest in the litigation to state a "Case" or "Controversy" and, therefore, should have his/her day in court without unnecessary delay and expense. Fears that such a presumption will cause adjudicative "processes to be inundated are rarely borne out."⁶⁹

...The plaintiff (or the organization actually funding and conducting the litigation, if legal rules force the use of nominal plaintiffs) must feel strongly enough about the issue in question to pay the bills, and that both cuts down the flood and gives at least a partial measure of his "stake" in the outcome...."If plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation...." The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom.⁷⁰

The argument that legislation which facilitates standing to sue will open the floodgates of litigation makes little sense when it is discovered that presently a very substantial percentage of judicial time is devoted to litigating the issue of standing.⁷¹ In our view, this time should be used for litigation on the merits instead of contesting whether litigants have actual grievances. Often proponents of this "floodgates argument" would rather deny these plaintiffs

access to the courts, a solution which is disingenuous and unfair.

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights--the poor, the underprivileged, the deprived minorities. The very life-blood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.⁷²

By expediting the judicial process, a presumption of standing will decrease the costs of litigation and increase the availability of federal judicial resources. To curtail the standing inquiry through the presumption will allow suits, often of a substantial substantive nature,⁷³ to move more directly to the merits.

...The fact that the result is serious does not, of course, make the issue "justiciable." But resolutions of any doubts or ambiguities should be toward protecting an individual's stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard....⁷⁴

Elimination of "Prudential" Standing Limitations

The objectives of S.680 would be facilitated in a manner indubitably consistent with Article III by limiting the Federal Courts' standing inquiry to the question of whether the

litigant has presented a "Case" or "Controversy." The Equal Justice Foundation is in agreement with the conclusion of the exhaustive study of the Senate Committee on Governmental Affairs:

Congress should expressly declare in the statute that standing to sue should not be denied on the basis of non-constitutional or prudential standing requirements established by the judiciary.⁷⁵

Senator Kennedy, the Chairman of this Committee, has also expressed the view that one should have standing if (s)he satisfies the requirements of a "Case" or "Controversy," a view we commend and endorse.

...In my judgment, standing should be grounded solely in Article 3 of the Constitution, and not in nebulous concepts of judicial expedience. I therefore believe that Congress should act to eliminate all prudential standing tests and to restore the doctrine of standing to its limited constitutional dimension.⁷⁶

To grant standing to litigants who meet the requisites of the Constitution is a far more effective method of superseding the "prudential" standing limitations than is the approach taken by S.680 in its present form.

If dismissal for lack of standing were simply limited to the ground that the plaintiff failed to satisfy Article III, the "prudential" limitations superseded by S.690 as presently drafted would be eliminated, but without the concomitant constructional problems. Thus, the objective of §1591(1)(a) would be effected: "Where the harm asserted amounts only to a generalized grievance shared by a large

number of citizens in a substantially equal measure,"⁷⁷ there would be standing, as the court has expressly stated that a denial of standing on this ground derives "from general prudential concerns."⁷⁸

Any "prudential" aspects of the limitations addressed by §§1591(b) and (c) would also be overturned.⁷⁹ The "zone of interests" test would be nullified as well, so the concern of §1591(d) would be achieved.⁸⁰

Furthermore, eliminating all standing barriers not mandated by Article III overrides "the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves."⁸¹

...When a governmental prohibition or restriction imposed on one party causes specific harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. E.G., *Roe v. Wade*, 410 U.S. 113,124 (1973). But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.***⁸²

But if the plaintiff does state a "Case" or "Controversy" within the meaning of Article III, the fact that he asserts deprivation of a third party's rights in addition to his own should not operate to deny him standing and, effectively, deny him redress.⁸³

Elimination of the "third party" "prudential" limita-

tion will allow standing in cases where the litigant has a legitimate grievance himself, but also wishes to assert the rights of others who cannot assert themselves.⁸⁴ It will also circumvent inappropriate denials of standing in cases which the Attorney General brings to redress the rights of third persons.⁸⁵ Where a "Case" or "Controversy" is presented, the rationale of the "third party" rule, that the parties be true adversaries and that there be effective advocacy, is simply not apposite.

If the inquiry were limited to whether a party presents a "Case" or Controversy," standing for organizations could be more easily established. The test for such "associational" or "representational" standing, as it has been called, is comprised of three elements.

Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.***86

Additionally, the Supreme Court has stated organizations must meet the requirement of Article III, as must all other litigants,⁸⁷ but has not specified whether any of the three⁸⁸ requirements of associational standing are Constitutionally based. There may be reason to believe that component (a) is related to "injury in fact" and, therefore, required by Article III, but (b) appears clearly "prudential" and (c)

falls within the traditional third-party rationale. Thus, two barriers to associational standing could be eliminated by the proposed provision.

When the concerns of (c) are present, Professor Tribe has suggested alternatives to the denial of standing, i.e., the Court can appoint amici curiae to provide fuller representation of various interests or it can remand to the relevant administrative agency to consider those interests.⁸⁹ Professor Tribe's analysis is preferable to dismissal, especially when one considers that if an organization is interested enough to spend the time and resources⁹⁰ to bring suit and otherwise makes out a "Controversy" within the meaning of Article III, it should get a hearing on the merits. Furthermore, it is far more likely that an indigent, for instance, would secure redress for a cognizable injury if his resources were supplemented by those of an organization;⁹¹ and the additional expertise which associations contribute to the judicial process amply justifies the facilitation of representational standing.

Beneficiary Standing

The problems addressed by S.680 could be remedied most effectively by an affirmative Congressional grant of standing. Such a grant would give direct or indirect beneficiaries of rights, entitlements, privileges, or immunities provided by the Constitution, treaties, or laws of the United States, standing to sue to secure such rights, entitlements, privileges, or immunities.

Analyzed from the perspective of the separation of powers, "beneficiary standing" is on much firmer ground than is a comprehensive legislative definition of "injury," a term has been defined by the Supreme Court in the context of Article III.⁹² Since the "beneficiary standing" provision here posited seeks to secure presently extant rights, the full panoply of Congressional power is available to support its validity.⁹³ Moreover, it would seem to comport with the intent of the framers with respect to Article III.⁹⁴

"Beneficiary standing," of some form, has been endorsed by prominent members of the academic⁹⁵ and public interest⁹⁶ communities. It is one of the specific recommendations for legislation included in the Study on Federal Regulation prepared by the Senate Governmental Affairs Committee.⁹⁷

***Also in broadening citizen access to Federal courts this Congress will be recognizing the many benefits to our country from suits brought by private attorneys general, who are ordinary citizens seeking to enforce the requirement of the law. First, such suits augment the enforcement efforts of federal officials. Second, they allow citizens to assume part of the responsibility for the effective operation of their government....⁹⁸

An affirmative grant to citizens of beneficiary standing would increase the effectiveness of laws Congress enacts and would ensure that the benefits of the Constitution are accorded to the people.

For example, a citizen asserting beneficiary standing could have a hearing on the merits in cases such as Richardson⁹⁹ and Schlesinger.¹⁰⁰ In Richardson Justice

Douglas, dissenting, analyzed the history of the constitutional provision at issue with perspicuity:

...The mandate runs to the Congress and to the agencies it creates to make "a regular Statement and Account of the Receipts and Expenditures of all public Money." The beneficiary--as is abundantly clear from the constitutional history--is the public....¹⁰¹

But the Court did not agree.

...It is therefore open to serious question whether the framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen....¹⁰²

The Court denied standing in Schlesinger on similar grounds:

The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries....The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing....¹⁰³

However, if the framers had been consulted, it would have been clear that "it cannot be presumed that any clause in the Constitution is intended to be without effect."¹⁰⁴

***The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions.¹⁰⁵

Congress should enact a provision conferring beneficiary standing and thereby restoring citizens' ability to reap the benefits of their Constitution, and the laws of the land.

While S.680, in §1591(1)(c), ostensibly addresses the Simon¹⁰⁶ decision, it has been suggested that a grant of beneficiary standing would accomplish the objective of S.680 without the concomitant Constitutional problems.

...As beneficiaries of these Code provisions, plaintiffs would have standing to challenge the revenue ruling as contrary to the intent of Congress that economic inducements to serve indigents be required for hospitals receiving favorable tax treatment....Thus, while the relief sought may not ensure their admittance to hospitals, it would restore the inducements to hospitals to admit indigents and thereby, at least theoretically, increase their opportunity to receive medical services. By adopting this approach, the Court would satisfy the basic standing requirement underlying Article III....This definition avoids the difficulty of establishing a causal nexus between the IRS action and private action....Thus regardless of the ruling's impact on the actions of the regulated entity, plaintiffs have standing to challenge the ruling because it adversely affects a right or benefit conferred by Congress.***107

Just as there should be a remedy for every wrong, there should be a mode for securing the entitlements afforded by law. Beneficiary standing provides such a vehicle and it would alleviate problems of standing substantially.

***The challenge to the legal system in this collectivist age is to facilitate and encourage individual initiative through the courts to assure that constitutional and statutory rights are respected, that government agencies do their job, and that corporations function within the law....108

The time for private attorneys general has come.

On behalf of the Equal Justice Foundation, I would like to extend my sincere thanks for the opportunity to contribute to this issue which is so important to those who are being turned away from our courts. If we can be of any assistance to the Committee in further formulating this essential legislation, we are willing take an active role. We commend the Committee for its concern and believe that, with some necessary amendments, S.680 will ensure equal access to justice.

FOOTNOTES

¹Program for the First Session of the 96th Congress, Senate Committee on the Judiciary, 96th Cong., 1st Sess., at 13 (1979).

²B. Schwartz, Constitutional Law: A Textbook 35 (2d Ed. 1979).

³"...I support legislation which will give citizens broader standing to initiate suits against the government in appropriate cases. The government has too often routinely invoked the 'standing' defense when it is challenged in court...." The President's Message to the Congress Recommending Measures to Increase Consumer Participation in Government, 13 Weekly Comp. of Pres. Doc. 495,497 (April 6, 1977).

⁴Letter from Justice William O. Douglas to Senators Ribicoff, Kennedy, and Metzenbaum concerning standing, Joint Hearings on S.3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 5 (1978); Id., at 74 (Statement of Hon. James L. Oakes, Circuit Judge, U.S. Court of Appeals, Second Circuit); see also Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

⁵Warth v. Seldin, 422 U.S. 490,498 (1975).

⁶The 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; -- 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." Article III, Section 2, Clause 1, United States Constitution (House Document No. 93-215).

⁷Association of Data Processing Service Organizations, Inc. v. Camp, Comptroller of the Currency, 397 U.S. 150,154 (1970) (citations omitted).

⁸"Cases" have been distinguished from "Controversies," but the distinction is of minor significance. The latter rubric is less comprehensive and includes only suits of a civil nature. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 239 (1937).

⁹Muskraat v. United States, 219 U.S. 346 (1911).

¹⁰Gladstone, Realtors v. Village of Bellwood, -- U.S. --, 47 U.S.L.W. 4377, 4379 (April 17, 1979).

¹¹Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

¹²E.g., Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83 (1968); Hunt, Governor of North Carolina v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977).

¹³Gladstone, Realtors v. Village of Bellwood, -- U.S. --, 47 U.S.L.W. 4377, 4379 (April 17, 1979).

¹⁴Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978).

¹⁵Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977) (citations omitted). That this causal link can be considerably attenuated and, nevertheless, satisfy Article III, is illustrated by United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

¹⁶Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 79 (1978); Accord, Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 36, 45-6 (1976); Gladstone, Realtors v. Village of Bellwood, -- U.S. --, 47 U.S.L.W. 4377, 4379 (April 17, 1979).

¹⁷See, infra.

¹⁸Of course, this is not to say that there are not other Constitutional aspects of justiciability, outside the law of standing, beyond the purview of Congress, e.g., mootness, ripeness, political questions, advisory opinions. See Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83, 94-5 (1968).

¹⁹Gladstone, Realtors v. Village of Bellwood, -- U.S. -- 47 U.S.L.W. 4377, 4379 (April 17, 1979).

²⁰ Article III; Article I, Section 8, Clause 9, United States Constitution.

²¹ Id., Article I, Section 1.

²² Traffidante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F. 2D 994 (D.C. Cr. 1966); See also Consumer Product Safety Act, 15 U.S.C. §2073; Toxic Substances Control Act, 15 U.S.C. §1619; Water Pollution Control Act, 33 U.S.C. §1365; Clean Air Act Amendments of 1970, 42 U.S.C. §1957H-2.

²³ Section 8, Clause 18 (Necessary and proper clause), United States Constitution.

²⁴ Id., Section 2.

²⁵ Id., Section 5.

²⁶ Id., Section 2.

²⁷ Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).

²⁸ Singleton v. Wulff, 428 U.S. 106, 123 (Powell, J., with whom Burger, C.J., Stewart, and Rehnquist, J.J., join, concurring in part and dissenting in part).

²⁹ Broderick, "The Warth Optional Standing Doctrine: Return to Judicial Supremacy?," 25 Cath. Univ. L. Rev. 467, 517 (1976): "...The departure is that the federal courts may reserve to themselves for decision on an ad hoc basis whether or not to consider allegations that basic rights have been violated by governmental action--even when jurisdiction to consider such allegations has been established in a 'case or controversy.'***"

³⁰Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978).

³¹Ibid.

³²418 U.S. 166 (1974).

³³Article I, Section 9, Clause 7 provides, in part, that "...A regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." (House Document No. 93-215).

³⁴The special requirements for taxpayer standing were not satisfied. United States v. Richardson, 418 U.S. 166, 175 (1974); see Flast v. Cohen, 392 U.S. 83, 101-3 (1968). However, the court did indicate that Congress has the power to "grant standing to taxpayers or citizens, or both, limited, of course, by the 'cases' and 'controversies' provisions of Art. III" to enable such a challenge. United States v. Richardson, 418 U.S., at 178 n.11.

See also Schlesinger, Secretary of Defense v. Reservists Committee to Stop the War, 418 U.S. 208, 227-8 (1974), where the Court denied both taxpayer and citizen standing. In its discussion of the latter, the interest of the litigants in the claimed violation of the Incompatibility Clause of Article I, Section 6, Clause 2, of the Constitution, by reservist Members of Congress was deemed "held in common by all members of the public." Id., at 220. Although the Court suggested that such generalized interests are "too abstract to constitute a 'case or controversy,'" Id., at 227, the ratio decidendi has subsequently been characterized as "prudential." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978).

³⁵United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

³⁶Id., at 687-8 (Stewart, J., delivered the opinion of the court, Part II of which, quoted here in part, was joined by Brennan, Blackmun, Douglas, and Marshall, JJ.).

³⁷Warth v. Seldin, 422 U.S. 490, 501 (1975).

³⁸"...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...." Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83, 99 (1968).

³⁹Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1808); Id., at 147: "...It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury, its proper redress...."; cf. Schlesinger, Secretary of Defense v. Reservists Committee to Stop the War, 418 U.S. 208, 229 (1974) (Stewart, J., concurring).

⁴⁰It has been suggested that the language of §1591 (1) (b) "would change the result in the Linda R. S. case." 124 Cong. Rec. S. 6498 (Daily Ed. April 27, 1978) (Statement of Sen. Matzenbaum). In that case, the mother of an illegitimate child brought a class action to enjoin the "discriminatory application" of a provision of the Texas Penal Code providing that "any parent who" fails to support his "children" is subject to prosecution, but which by state judicial construction applied only to married parents. Linda R. S. v. Richard D., 410 U.S. 614, 615 (1973). The court appeared to rest its holding on two grounds: lack of causation, i.e., failure "to allege a sufficient nexus between her injury and the government action which she attacks, "and lack of redressability. Id., at 617-9. It does not, however, mention "primary cause."

⁴¹Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 78 (1978).

⁴²Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-2 (1976). In its analysis of §3000(1)(b) of S.3005 (the standing bill which was introduced in the 95th Congress) the equivalent of §1591 (1)(b) in S.680, the Department of Justice concluded that Simon "amounts to a 'sole causation' requirement." Letter and staff memorandum on the impact of standing legislation from Patricia M. Wald, Assistant Attorney General, Justice Department, to Senator Metzenbaum, Joint Hearings on S. 3005 Before

the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate 95th Cong., 2d Sess., at 131 (1978). With all due respect, we do not read the Court's decision in Simon as requiring "sole causation" or even "primary" causation.

Moreover, if the Justice Department were correct in its analysis of the requirement of causation in Simon, abrogation of such a limitation through legislation would not be consistent with the principle of separation of powers. Because the element of causation is an element of "the minimum requirement of Art. III," Congress cannot properly legislate to eliminate or dilute it, as it can override the "prudential" limitations. Warth v. Seldin, 422 U.S. 490, 505 (1975); notes 17 and 18 and accompanying text, *supra*; note 53, *infra*; Gladstone, Realtors v. Village of Bellwood, 47 U.S.L.W. 4377, 4379 (April 17, 1979); compare United States v. Richardson, 418 U.S. 166, 193 (1974) (Powell, J., concurring): "...The court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing. E.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Flast v. Cohen, 392 U.S. at 130-133 (Harlan, J., dissenting); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 212 (1972) (White, J., concurring)...."

⁴³ Ibid.

⁴⁴ Id., at 45 n. 25. There, the court once again spoke in terms of "injury that fairly can be traced to petitioners' challenged action."

⁴⁵ 412 U.S. 669 (1973). The citizen group plaintiffs personally used the forests, streams, mountains, and other resources; that use was disturbed by nonrecyclable materials; the adoption by the Interstate Commerce Commission of a new rate structure encouraged the use of such raw materials, usually transported by rail; thus, the environment was adversely affected contrary to law and to the detriment of plaintiffs.

⁴⁶ A similar conclusion was reached by the A.C.L.U. in its analysis of the language of §1591(1)(b). Testimony of Pamela S. Horowitz, Legislative Counsel, American Civil Liberties Union, Washington, D.C., Joint Hearings on S.3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 114-5 (1978).

⁴⁷ Statement of Daan Braveman, Associate Professor of Law, Syracuse University College of Law, Representing the Legal Services Attorneys Court Access Group, Joint Hearings on S.3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 51 (1978).

⁴⁸ Introduction of S. 3005 by Senate Metzenbaum, Kennedy, and Ribicoff, Joint Hearings on S. 3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 134-5 (1978) (statement of Sen. Kennedy); 124 Cong. Rec. S. 6501 (Daily Ed. April 27, 1978). K. Davis, Administrative Law in the Seventies §22.06, at pp. 518-9 (1976): "One who tries to find a rational explanation for the contrariety of holdings is driven to the question whether the motivation for the holdings on standing lies in the Court's inclination or disinclination to decide particular substantive issues...."

⁴⁹ Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 45-6 (1976). This is where the redressability formula, the verification mechanism for the causation factor, first emerged.

⁵⁰ Gladstone, Realtors v. Village of Bellwood, -- U.S. -- 47 U.S.L.W. 4377, 4379 (April 17, 1979).

⁵¹ While the Constitutional aspects of the standing doctrine may be unsettled or in a state of flux, we feel that the appropriate means to modify or question current judicial precedent which derives from interpretation of the Constitution by the Supreme Court is through litigation, not legislation. See Note 11 and accompanying text, supra.

52 "...Under the proposed 'citizens' right to standing in Federal Courts Act, A plaintiff need only show some likelihood that his injury will be redressed, or cured, by a favorable ruling.***" 124 Cong. Rec. S 6498 (daily ed. April 27, 1978) (Statement of Sen. Metzenbaum).

53 "...Congress is presently considering legislation that would remove causation and redressability from the federal courts' standing requirements. See S. 3005, 95th Cong., 2d Sess., 124 Cong. Rec. S 6498-99 (daily ed. April 27, 1978). The proposed bill, however, erroneously interpreted Eastern Kentucky as resting upon prudential considerations, rather than Article III requirements. See 124 Cong. Rec. S 6497 (daily ed. April 27, 1978) (remarks of Sen. Metzenbaum). Although Congress has the power to remove prudential limitations, it cannot remove considerations of constitutional dimension.... Accordingly, Congress lacks the power to remove the strictures of Eastern Kentucky from the federal courts' standing requirements...." Note, "Standing for Public and Quasi-Public Interest Tax Litigants." 1978 Wash. U.L.Q. 571, 584 n. 91 (1978).

54 "It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question..." Association of Data Processing Service Organizations, Inc. v. Camp, Comptroller of the Currency, 397 U.S. 150, 153 (1970).

55 Letter from Paul Negelski, Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice, Department of Justice, to Senator Metzenbaum concerning conclusive presumption and the zone of interest test. Joint Hearings on S. 3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 10 (1978); see also Appendix: Plaintiffs Who Failed the Zone of Interests Test: U.S. Courts of Appeal, 1974-1978, Id., at 11-2.

56 Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 n. 19 (1976).

⁵⁷ See text accompanying note 19, supra.

⁵⁸ See Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83, 101-3 (1968). It is not clear whether these requirements are "prudential" in character or constitutionally based. See Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 78-80 & n. 25 (1978).

⁵⁹ Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

⁶⁰ "...We suggest that it is one of the critical items on the Congressional agenda to do something about the Doctrine of Standing to make sure that persons with genuine constitutional grievances do have some forum within which to redress those grievances.***" Statement of Burt Neuborne, Professor of Law at New York University, Hearing on Causes of Popular Dissatisfaction with the Administration of Justice, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 2d Sess., at 61 (1976).

⁶¹ Introduction of S. 3005 by Senators Metzenbaum, Kennedy, and Ribicoff, Joint Hearings on S. 3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 135 (1978) (statement of Sen. Kennedy); 124 Cong. Rec. S 6501 (daily ed. April 27, 1978).

⁶² An increasing amount of time and resources of both litigants and the judiciary is being spent on the issue of standing. In one recent case, four days of hearings were held by the trial court on the questions of standing and ripeness alone. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978). "...Well over half the current energy of Federal judges deciding constitutional cases is devoted to deciding whether to decide them. If judicial resources are scarce, such an allocation of energy is not rational.***" Statement of Burt Neuborne, on behalf of the American Civil Liberties Union, Hearings on State of the Judiciary and Access to Justice Before the Subcommittee on Court, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., at 115 (1977).

⁶³ R. Lempert & S. Saltzburg, A Modern Approach to Evidence: Text, Problems, Transcripts, and Cases 886 (1977).

⁶⁴ I. S. Gard, Jones on Evidence: Civil and Criminal, §3.1, pp. 125-6 (6th ed. 1972) (emphasis in original; footnote omitted).

⁶⁵ Justice Douglas has suggested a conclusive presumption of proper standing for all citizens who file suit in Federal Courts against their Government. Letter from Justice William O. Douglas to Senators Ribicoff, Kennedy, and Metzenbaum concerning standing, Joint Hearings on S. 3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 5 (1978).

⁶⁶ V. J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §2492, pp. 453-4 (2d ed. 1923).

⁶⁷ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶⁸ R. Lempert & S. Saltzburg, A Modern Approach to Evidence: Text, Problems, Transcripts, and Cases 884 (chart X-1, #2) (1977). Congress could also apply the lower standard codified in Federal Rule of Evidence 301 (1974): "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

⁶⁹ Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1006 (D.C. Cir. 1966) (Burger, J.). For example, litigation has not mushroomed under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.), which abrogated "prudential" barriers to standing.

⁷⁰Scott, "Standing in the Supreme Court--A Functional Analysis," 86 Harv. L. Rev. 645, 673-4 (1973) (footnote omitted).

⁷¹See note 62, *supra*, see also Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83, 112 (1968) (Douglas, J., concurring).

⁷²Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977). This article by Justice Brennan is excerpted in Appendix 2 of the Hearings on State of the Judiciary and Access to Justice Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., 292, 297 (1977).

⁷³See note 55 and accompanying text, *supra*.

⁷⁴United States v. Richardson, 418 U.S. 166, 202 (1974) (Douglas, J., dissenting, in 5-4 decision).

⁷⁵III Senate Committee on Governmental Affairs (formerly Government Operations), Study on Federal Regulation (Public Participation in Regulatory Agency Proceedings), 95th Cong., 1st Sess., at 41 (from "Judicial Standing") (Washington, D.C.: U.S. Government Printing Office, 1977); Joint Hearings on S 3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 153 (1978).

⁷⁶Introduction of 3005 by Senators Metzenbaum, Kennedy, and Ribicoff, Joint Hearings, Id., at 135 (Statement of Senator Kennedy).

⁷⁷Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978).

⁷⁸Ibid.; and see text accompanying notes 30-9, *supra*.

⁷⁹See text accompanying notes 40-53, supra.

⁸⁰See text accompanying notes 54-57, supra.

⁸¹Warth v. Seldin, 422 U.S. 490, 509 (1975) (denying Rochester residents and taxpayers standing on this ground, thus vitiating their challenge to Penfield's exclusionary zoning policy, which resulted in higher Rochester taxes to support low-income housing for persons who might otherwise live in Penfield). "...Nothing in Article III, in the canons of sound judicial administration, or in the judicial precedents, required so harsh and bizarre a result." L. Tribe, American Constitutional Law §3-21, p. 97 (1978).

⁸²Id., at 505.

⁸³See note 29 and accompanying text, supra.

⁸⁴E.g., Scodari v. Alexander, 69 F.R.D. 652 (E.D.N.Y. 1976) (criminal investigatory agents of Internal Revenue Service, alleging that forced disclosure of informants' identities would impair their ability to function effectively in a professional capacity and injure their reputations, could not assert the rights of the informants, and were denied standing on the basis of the "third party" rule). Of course, the informants could not reasonably be expected to assert their own rights in such a situation. In Singleton, Chief, Bureau of Medical Services, Department of Health and Welfare of Missouri v. Wulff, 428 U.S. 106 (1976), the Supreme Court was evenly divided on the question of third-party standing. There two physicians brought an action for injunctive relief and a declaration of the unconstitutionality of a Missouri statute that excludes abortions that are not "medically indicated" from the uses for which Medicaid benefits are available to needy persons.

Justices Blackmun, White, and Marshall would have permitted the doctors to assert their patients' rights. Id., at 113-8. Justice Powell, in a concurring and dissenting opinion joined by Justices Rehnquist, Stewart, and Chief Justice Burger, while recognizing Congress' power to confer it, would have denied third-party standing. Id., at 122, 124-5 n.3. Justice Stevens was "not sure." Id., at 122.

(FOOTNOTE 84 CONTINUED ON FOLLOWING PAGE).

84 (CONT.)

This case illustrates how inappropriate it would be to deny third-party standing. A woman cannot safely secure an abortion without a physician's aid, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The physician has a confidential, professional relationship with his patients and so should be able to litigate the constitutionality of the State's interference with, or discrimination against, the abortion decision. Moreover, there are obstacles to the woman's assertion of her own rights; for example, the desire to protect her privacy may deter her from bringing suit herself. See also Tileston v. Ullman, State's Attorney, 318 U.S. 44, 46 (1943) (per curiam).

⁸⁵ E.g., United States v. School District of Ferndale, Michigan, 400 F. Supp. 1122 (E.D. Mich. 1975) (Attorney General denied standing "to raise claims based on alleged denials of Fourteenth Amendment rights of other persons," i.e., racially discriminatory practices in elementary schools). Id., at 1129; cf. United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977) (Attorney General could not sue to enjoin certain practices and policies of Maryland mental health administrators that were allegedly in violation of the constitutional rights of mentally retarded citizens, where the United States was expending various funds at institution in question); and see S. 10, 96th Cong., 1st Sess. (1979).

⁸⁶ Hunt, Governor of North Carolina v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

⁸⁷ "****Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy...." Warth v. Seldin, 422 U.S. 490, 511 (1975) (citations omitted); but see Health Research Group v. Kennedy, No. 77-0734, 47 U.S. L.W. 2586 (D.D.C. Mar. 13, 1979): "The associational standing doctrine represents a very limited exception to the fundamental Article III requirement that the plaintiff before the court 'be himself among the injured.'" Id., slip op. at 6.

⁸⁸In Health Research Group, the Court, in denying standing, insisted on the additional requirement of "some sort of substantial nexus between the injured party and the organizational plaintiff--a nexus normally to be provided by actual membership or its functional equivalent measured in terms of control." Id., 47 U.S.L.W. at 2586, slip op. at 10. However, Judge Sirica did not make it clear whether this is required by Article III or was merely a "prudential" concern.

⁸⁹L. Tribe, American Constitutional Law §3-29, p. 114 (1978); see also Scott, "Standing in the Supreme Court--A Functional Analysis," 86 Harv. L. Rev. 645, 681 (1973).

⁹⁰See text accompanying note 70, supra.

⁹¹"...The individual is almost certain to be plowed under, unless he has a well-organized active political group to speak for him....I would not be niggardly therefore in giving private attorneys general standing to sue." Flast v. Cohen, Secretary of Health, Education, and Welfare, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).

⁹²See note 11 and accompanying text, supra. Of course, this is not to say that Congress does not have ample power to define "injury" in a particular, substantive area, and to confer standing to redress that injury. E.g., Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); see also, e.g., Consumer Product Safety Act, 15 U.S.C. §2073; Toxic Substances Control Act, 15 U.S.C. §2619; Water Pollution Control Act, 33 U.S.C. §1365.

⁹³In addition to Congress' supervisory power over the Federal Courts under Article III and Article I, §8, cl. 9, its substantial powers under Article I, §8, CL. 18 (Necessary and Proper Clause), the Fourteenth Amendment (§5 "Power to Enforce"), the Thirteenth Amendment (§2 "Power to Enforce"), the Fifteenth Amendment (§2 "Power to Enforce"), and the Nineteenth Amendment ("Power to Enforce"), also support such "beneficiary standing."

⁹⁴The "authority of the judicial department" was intended to be "carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature." The Federalist on the New Constitution No. 81, at 376 (Hallowell ed. 1842) (A. Hamilton).

⁹⁵Statement of Daan Braveman, Associate Professor of Law, Syracuse University College of Law, representing the Legal Services Attorneys Court Access Group, Joint Hearings on S. 3005 Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Governmental Affairs of the Senate, 95th Cong., 2d Sess., at 51 (1978).

⁹⁶Statement of Ralph Nader, accompanied by Girardeau Spann, Acting Director, Public Citizen Litigation Group, Washington, D.C., Id., at 83, 91.

⁹⁷III Senate Committee on Governmental Affairs (formerly Government Operations), Study on Federal Regulation (Public Participation in Regulatory Agency Proceedings), 95th Cong., 1st Sess., at 41 (Washington, D.C.: U.S. Government Printing Office, 1977); excerpted in Joint Hearings, Id., at 153: "****Therefore we propose that the following legislation on standing be adopted by Congress: 1. When a statute has been designed primarily to benefit the general public, any member of the public has standing to sue to enforce the provisions of that statute...."

⁹⁸124 Cong. Rec. S. 6498 (daily ed. April 27, 1978) (Senator Metzenbaum).

⁹⁹United States v. Richardson, 418 U.S. 166 (1975). There, the secret C.I.A. budget was challenged. See notes 32-4 and accompanying text, supra.

¹⁰⁰Schlesinger, Secretary of Defense v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). There, membership in the reserves by Members of Congress was challenged; see note 34, supra.

¹⁰¹United States v. Richardson, 418 U.S. 166, 201 (1974) (Douglas, J., dissenting); see also, Id., at 200 n. *; "'The people may use the constitutional mode of redress,'" quoting Livingston.

¹⁰²Id., at 178 n. 11 (Burger, C.J., for 5-4 majority).

¹⁰³Schlesinger, Secretary of Defense v. Reservists Committee to Stop the War, 418 U.S. 208, 227 (1974) (Burger, C.J.).

¹⁰⁴Marbury v. Madison 5 U.S. (1 Cranch) 137, 174 (1803).

¹⁰⁵The Federalist on the New Constitution No. 80, at 364 (Hallowell ed. 1842) (A. Hamilton).

¹⁰⁶Simon, Secretary of the Treasury v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). There, several low-income individuals and organizations representing such individuals brought a class action on behalf of all persons unable to afford hospital services, against the Secretary of the Treasury and the Commissioner of Internal Revenue, claiming that Revenue Ruling 69-545, which announced and Internal Revenue Service policy of extending favorable tax treatment to hospitals that did not serve indigents adequately, "encouraged" hospitals to deny services to indigents, and that it was invalid in contravention of the Internal Revenue Code and the Administrative Procedure Act. They were denied standing to sue.

¹⁰⁷Note, "Standing for Public and Quasi-Public Interest Tax Litigents," 1978 Wash. U.L.Q. 571, 585-7 (1978). Some courts have employed the beneficiary rationale and circumvented Simon sub silentio. Id., at 586-7 and n. 109, citing, E.g., Safir v. Kreps, 551 F.2a 447, 454 (D.C. cir. 1977) (Merchant Marine Act, 46 U.S.C. §1227 (1976), allowed shareholders in a steamship company to demand that the Maritime Subsidy Board, Maritime Administrator, and Secretary of Commerce recover subsidies paid to potential competitors of the shareholder's company; plaintiffs alleged financial injury from the failure of agency to recover improperly paid subsidies); National Association of Neighborhood Health

Centers, Inc. v. Mathews, 551 F.2d 321, 329 (D.C. Cir. 1976) (Hill-Burton Act, 42 U.S.C. §§291-910-1 (1976), allowed health centers to challenge HEW cut-off and restriction of funding for their health services; plaintiffs alleged failure to receive federal funding because HEW regulation violated the Act); see also Ellis v. HUD, 551 F.2d 13, 16 (3d Cir. 1977).

¹⁰⁸Statement of Charles R. Halpern, Executive Director, Council for Public Interest Law, Hearing on the Causes of Popular Dissatisfaction with the Administration of Justice Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 2d Sess., at 117-8 (1976) (emphasis in original).

APPENDIX

BILL TO EXPAND STANDING IN FEDERAL COURTS

To strengthen the rights of citizens to sue in Federal Courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Citizens Right to Standing in Federal Courts Act".

FINDINGS AND POLICY

Sec. 2. The Congress finds and declares that --

- (a) the ability of members of the public to have access to the Federal Courts to obtain redress for unlawful governmental action is essential to the democratic process, both to enable members of the public to protect their own interests and to allow redress of injuries that affect many members of the public in relatively equal measure;
- (b) substantial uncertainty surrounds the specific requisites for standing to sue in the Federal Courts, forcing both the Courts and individual litigants to devote an inordinate amount of resources to the resolution of this issue;
- (c) unduly restrictive standing requirements have prevented resolution of meritorious lawsuits, and have resulted in the dismissal of complaints alleging

serious violations of the Constitution and laws of the United States without consideration of their merits, even where plaintiffs have shown injuries sufficient to enable satisfactory presentation of relevant issues in a concrete and adversary context; (d) it is a more efficient and productive use of limited judicial resources to reach prompt resolution of meritorious lawsuits alleging violations of the Constitution and laws of the United States by officers and agencies of government rather than utilizing those resources for the interpretation of unduly restrictive or complex standing requirements.

Sec. 3. (a) Part IV of title 28 of the United States Code is amended by redesignating chapter 97 as chapter 99 and by inserting immediately after chapter 95 the following new chapter:

"CHAPTER 97 -- COURTS OF THE UNITED STATES: STANDING

"Sec. 1591. Standing to sue in Federal Courts.

"§1591. Standing to sue in Federal Courts

"(1) In any action brought in a Court of the United States by any citizen or resident of the United States or any domestic partnership, corporation, association, or other organization, there is an affirmative presumption of standing to sue, and no action shall be dismissed on the ground that a party lacks standing to sue except

as required by Article III, §2, of the Constitution of the United States.

"(2) Any citizen or resident of the United States or any domestic partnership, corporation, association, or other organization who (or that) is a direct or indirect beneficiary of rights, entitlements, privileges, or immunities provided by the Constitution, treaties, or laws of the United States, shall have the right to bring an action in a Court of the United States to secure such rights, entitlements, privileges, or immunities.".

Sec. 4. The table of chapters of Part IV of title 28 of the United States Code is amended by striking out the item relating to chapter 97 and inserting in lieu thereof the following:

"97. Courts of the United States: standing.....1591.

"99. Jurisdictional immunities of Foreign States...1602."

Sec. 5. (a) This section shall become effective immediately and shall apply to all civil actions brought in or removed to Courts of the United States.

(b) If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provisions to other persons not similarly situated or to other circumstances shall not be affected thereby.

Enactment of this bill, including the amendments proposed by the Equal Justice Foundation, has been endorsed by the National Resource Center for Consumers of Legal Services.

Senator METZENBAUM. Our last witness is Karen Christensen. We are very happy to hear from you, Ms. Christensen.

You appear here, as I understand, on behalf of the American Civil Liberties Union.

Ms. CHRISTENSEN. Yes, Senator.

**STATEMENT OF KAREN CHRISTENSEN, LEGISLATIVE
COUNSEL, AMERICAN CIVIL LIBERTIES UNION**

Ms. CHRISTENSEN. I want to thank you on behalf of the American Civil Liberties Union for the opportunity to testify this morning. As you will recall, the ACLU testified last year in support of similar standing legislation and we appear again this morning to endorse the goals served by S. 680, although to recommend a few changes.

As with all of the witnesses who have appeared before me this morning, we are unanimous in agreeing that there is a need for standing legislation. The current state of the law in standing is confused and conflicting and we describe the decisions in the standing area as creating a virtual checkerboard of decisions on which a litigant must risk chance and perhaps repetitive litigation to make sure that he will be able to present the merits of the case before the Federal court.

Certainly this committee does not agree that that state should be allowed to persist. The recent Supreme Court decisions in the standing area, the *Duke Power* case and *Bellwood* case, although in both instances standing was granted to the plaintiffs, do not clarify the law in any meaningful extent, and they do not obviate the need for legislation. They simply add to the confusing checkerboard of decisions.

Senator METZENBAUM. Ms. Christensen, I want to interrupt for a moment. In your testimony, you make a point that many of these standing cases that are thrown out are cases which have been brought by small businessmen for challenging questionable Government regulations. I think that sometimes the issue of standing is considered to be one only that affects the indigent and the poor and so, perhaps, consumer-oriented cases; but I wonder if you would address yourself to the small businessmen and their need to have some change in the law in order to have an opportunity to challenge Federal regulations?

Ms. CHRISTENSEN. Mr. Chairman, I think that you are correct. This standing legislation is not directed to any one category or class of plaintiffs; it is the problems that are faced by litigants are faced across the board. It may be a civil rights litigant; it may be a small business litigant. Everyone is equally confronted with the position that the Government is taking that the prudential limitations must be applied and that the access to the courts is limited.

In the cases which we refer to in our statement, we are saying that citizen groups, Members of Congress and businessmen have all been denied standing. In the cases which refer to businesses, have been referring to business organizations which have been challenging various Federal regulations as affect their competitors, where certain Federal laws were not enforced as to their competitors and, therefore, they suffered a competitive disadvantage. To that extent, the impact of this legislation will be to aid not just low-income people; not just civil liberties plaintiffs, but all citizens.

I think it is important to note that the Senate Governmental Affairs Committee, several years ago, in a study of Federal regulation, made the recommendation that standing be—requirements be liberalized and made the finding at that time that prudential limitations of standings should be eliminated by Congress, and this was not to benefit just any one category of complainants.

Going back, the need for the legislation still exists. There is a very definite burden of citizens and I think that the injury to citizens that this committee should take note of is that there is a loss of faith and confidence in the democratic system, and the judicial system. I think that your reference in your opening statement to the letter from the counsel in the *EKWRO* case very much exemplifies that sense. There is some criticism that liberalizing standing might lead to more extensive judicial supervision in the affairs of citizens and I think that really the issue is quite contrary—that citizens must have the sense the courts are available to them to provide redress of their grievances so that the courts are there and to present their legitimate claims. By the courts not being there—the courthouse doors being shut—they are very definitely injured.

We believe that Congress does have the authority to enact S. 680 as it is presently written and as it would be written through the modifications which we suggest. Specific sources of congressional authority would, of course, be article I, the "Necessary and Proper" clause as well as section 5 of the 14th amendment.

In enacting this legislation, we are not saying to the courts that you will have no further role in the determination of standing. The courts will, in fact, be left with the question of and the determination of whether injury actually exists and S. 680 will not do away with that constitutional limitation.

It is our recommendation, as far as the specifics of this legislation, that we concur with previous witnesses that the legislation would be strongest if it were to specifically eliminate all prudential limitations. The court, most recently in the *Bellwood* decision, has said that the Congress, in effect, has the authority to eliminate all prudential limitations. The Senate Governmental Affairs Committee, in its report several years ago, made that same recommendation and we would encourage the committee to explicitly state that courts shall not apply any prudential limitations in determining whether a plaintiff has standing so that the merits of the claim can be presented.

One point which has not been mentioned—the section on taxpayer standing in S. 680 does maintain some of the problems in the area of standing law. We would hope, because you have indicated by use of the *EKWRO* case, that this is a problem that you wish to address. We would hope that this section on taxpayer standing be clarified, at the least, so that the *EKWRO* case might possibly be remedied by this legislation. I know that the Tax Division of the Department of Justice believes that tax matters, not only in the context of standing, but in attorney fees and other areas of legislation, tax matters need to be carefully crafted to address this special need for tax legislation. We have no quarrel with that, but we believe that a comprehensive standing bill can be carefully drafted by this committee that will also include redress in the area of taxpayer standing.

Finally, we believe that, as far as modifying the current draft of S. 680, that an affirmative grant of standing to an individual or organization which benefits directly or indirectly from the enforcement of Federal laws or a provision of the U.S. Constitution should be included in S. 680.

Our statement goes through the authority and the foundations for such a provision and we think that this would go far to clarify the law of standing.

A final technical recommendation would be that the legislation include an effective date so that it is clear that this would apply to all pending actions. As Mr. Morrison and several of the previous witnesses have indicated, cases now in courts now go through literally days of trial and sometimes years of litigation on whether or not standing exists. If this legislation is to have the fullest impact, we believe that those questions in pending litigation should be resolved.

Senator METZENBAUM. Ms. Christensen, is the restrictiveness of the courts' opinions the problem or is it there unpredictability which causes the greatest problems or is it both?

Ms. CHRISTENSEN. I would agree that it is both. Certainly the restrictive notions in the area of standing is not just in this one particular area of the Supreme Court's attitude on citizens' access to the courts. We would differ with their attitudes on other Federal doctrines, such as exhaustion of remedies and several other areas which Congress is now taking a look at and hopefully will produce some remedial legislation. So the restrictive notion is there and in the courts but the other part of it is just the uncertainty because, as is clear from the pattern of cases which the witnesses have gone through, sometimes there is standing and sometimes there isn't. It appears to be very result-oriented. I am not sure that I ascribe to the cynical view which Mr. Morrison described if the plaintiff is going to lose they have standing. I agree with him that that may not be true, but sometimes there is certainly the appearance of a result orientation that we would not approve of.

Senator METZENBAUM. Do you believe that the prudential rules of standing are necessary to keep the courts from deciding issues of public policy more appropriately left to Congress?

Ms. CHRISTENSEN. Absolutely not. I think that in most cases, the public policy question has already been spoken to and that what we are talking about here are enforcement of Federal laws in which there is a clear congressional mandate, and that it is not a matter of judicial stepping in to an area which is uncertain. It is a matter of citizens trying to get the Federal Government, whether it is the FDA or the IRS or anyone of the Federal Government agencies, to enforce clear congressional policy.

We also believe in that regard, as I had stated earlier, that it is important for citizens to believe that they can go somewhere because they go to the agency and they can't get any help there, and they come to Congress and deal with a process which is not always responsive to individual needs, and assumedly, the democratic system was set up with the process of having the courts available to offer them that sort of individual redress.

Senator METZENBAUM. Couldn't a court still utilize the doctrine of taxpayer standing to deny standing in an *EKWRO* type situation, regardless of whether the status quo provision is in the bill?

Ms. CHRISTENSEN. Yes; it is probably true and under the existing law in standing, and one of the reasons why we suggest that rather than simply clarify the language, by taking off the second clause of the section on standing that perhaps the Congress may take a look at this and adopt, in a Federal statute in the way that many States have adopted in State statutes, an affirmative taxpayer standing provision. I think last year, in testifying on S. 3005, Mr. Nader testified and gave a list of the numerous States which have already enacted taxpayer standing. He testified that in none of those State situations did an enactment of a taxpayer standing provision ever burden the court or lead to civil lawsuits, or any of the other problems which have been speculated.

Senator METZENBAUM. Ms. Christensen, we may have some additional questions which we will submit to you in writing. We appreciate your testimony. I think Senator Thurmond may have some questions and other members of the committee, may, as well.

Ms. CHRISTENSEN. I will be pleased to respond.

[The prepared statement of Ms. Christensen follows:]

Prepared Statement of Karen Christensen

On behalf of the American Civil Liberties Union, I want to thank you for this opportunity to comment on S. 680, "Citizens Right to Standing the the Federal Courts Act."

The ACLU is a nonpartisan organization of over 200,000 members dedicated to protecting individual rights and liberties guaranteed by the United States Constitution. Improving access to the federal courts has been a priority on our legislative agenda for some time. We are wholly supportive of this Committee's efforts to improve the operation of the federal judicial system and to remove the barriers which deny citizens access to the federal courts. The ACLU wholeheartedly endorses the goals of S. 680 to clarify the doctrine of standing which now poses a substantial barrier to persons seeking to challenge allegedly unlawful government action.

Over the past several years this Committee has embarked on a legislative campaign to achieve an efficient and well functioning federal judiciary. In the 95th Congress, the work of this Committee resulted in the addition of 152 new federal judges.

Already in the 96th Congress, the Senate has approved several measures recommended by this Committee which seek to improve and update the American judicial system -- expansion of the civil and criminal jurisdiction of federal magistrates (S. 237); creation of mechanisms for informal dispute resolution (S. 423); relieving the United States Supreme Court of mandatory jurisdiction (S. 450). The Committee has reported favorably legislation to change the appellate structure of the federal courts (S. 1477). In addition, other remedial measures are being considered by the Committee, such as the abolition of diversity jurisdiction and the elimination of the jurisdictional requirement of amount-in-controversy in federal question cases (S. 697) and use of arbitration in certain civil cases (S. 373). Reforming the judicial doctrine of standing is a necessary and important aspect of

- 2 -

this balanced approach to create a fair and efficient court system with a reasonable workload while guaranteeing an opportunity for citizens to present the merits of their claims to a federal judge without unnecessary technical barriers or procedural delay.

The Senate has also approved a bill (S. 265), reported favorably by this Committee, which provides for the award of attorney fees to individuals and small businesses who challenge government activity. The rationale underlying S. 265 also supports clarification of the law of standing. Where the government acts in an unreasonable or harassing manner, or where an agency fails to enforce a federal law, a citizen, small business or organization should have the ability to challenge the government.^{1/} Having expanded the opportunities for recovery of attorney fees, this Committee must act to assure that the same citizens, small businesses or organization will have standing to bring the lawsuits.

Substantial congressional attention has been focused on the issue of standing.^{1a/} Previous studies and hearing records indicate that the doctrine of standing consists of confusing legal precedents. This lack of consistency and clarity has necessitated extensive litigation on the threshold issue of whether the parties have standing to be in court and to present the issues for judicial determination. The results

^{1/} As an organization, the ACLU is sensitive to the need to protect individuals from unreasonable or harassing government activity and is supportive of legislation which would prevent such action and provide redress, including attorney fees, for instances in which government actions are in bad faith or contravene important national policies. To achieve this purpose we believe such legislation should make clear that fees will be awarded only when the government's position in litigation is unreasonable.

^{1a/} "Study of Federal Regulation" Ch. 3, vol. 3, July 1977, Government Affairs Committee; Joint Hearings before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary and the Committee on Government Affairs, 95th Congress, 2d session (1978) (Hereinafter Joint Hearings.)

- 3 -

represent an enormous expense for litigants and an unnecessary expenditure of judicial resources. Meritorious lawsuits have been dismissed on highly technical consideration. Individuals and organizations are unable to protect their rights and the government has been enable to act in violation of the Constitution and federal laws with impunity.

I. What are the dimensions of the need for legislative action to clarify the doctrine of standing?

Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." Historically, standing has been viewed as a necessary threshold question mandated by Article III. The court must determine whether the plaintiff has such a personal stake in the outcome of the controversy so as to adequately present the issues.^{2/} While some constitutional scholars challenge the historical foundation for this constitutional core of the law of standing,^{3/} the standing inquiry has been summarized thusly:

"In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial intervention."^{4/}

^{2/}
Baker v. Carr, 369 U.S. 186 (1962).

^{3/}
See, Joint Hearings at 95-114 (testimony and statement of Prof. Raoul Berger). "In sum, at the adoption of the Constitution, the English practice encouraged strangers to attack unauthorized action. Such suits were therefore 'cases or controversies' to which 'judicial power' extended...Underlying these 'stranger' cases is the premise that the public interest is best served when illegal action is checked, even in a suit by a stranger." Joint Hearings at 103.

^{4/}
Flast v. Cohen, 392 U.S. 83, 101 (1968).

- 4 -

* * * *

"The gist of the question of standing (is) whether the party seeking relief has alleged a personal stake in the outcome of the controversy as to assure that concrete adverse-ness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.^{5/}

In addition to the constitutional requirements of "personal stake" and issue presentation, the Supreme Court has, in recent years, interposed new obstacles in the path of those seeking access to the courts. Recent Supreme Court decisions have grossly distorted the historical and functional underpinnings of standing. The Court has applied so-called "prudential" limitations to standing which are not required by Article III and unrelated to "personal stake" and issue presentation. Prudential limitations involve considerations which often go to the merits of the plaintiff's claims. Thus, the case may be prematurely "tried" at the outset without a full presentation of facts and law.

It is ironic that the "prudential" limitations on standing which were developed to foster efficiency and judicial economy have become a major source of wasteful and expensive litigation. "Prudential" limitations applied by the Supreme Court have meant that a plaintiff will not have standing if the injury asserted is a "generalized grievance" (such as where a constitutional violation affects many citizens equally);^{6/} if the legal interests of a third

^{5/} United States v. Richardson, 418 U.S. 166 (1964) (concurring opinion)

^{6/} See, e.g., Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). The Court denied standing to citizens to challenge the practice of allowing members of Congress to serve in the Armed Forces Reserves on the ground that it violated the Incompatibility of Offices clause of Article I. The Court declared that "standing to sue may not be predicated upon an interest...which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." at 220.

party are asserted (even where it would be impossible or absurd to require the third party to identify himself);^{7/} and if a plaintiff's injury does not fall within the "zone of interests" to be protected or regulated by a federal law or constitutional provision.^{8/} Blurred and distorted distinctions between these prudential limitations and Article III considerations have created confusing precedents and erected artificial barriers to citizen access to the courts.^{9/} As a result, questionable government activity escapes

^{7/} See, e.g. Scodari v. Alexander, 69 F.R.D. 656 (E.D.N.Y. 1976). Treasury Department agents challenged the legality of an IRS policy requiring them to disclose the identity of their confidential informants. The court would not permit them to assert the constitutional rights of the informants because of the third party rule, even though it was clear that the informants could not be expected to appear in court to challenge the policy on their own.

^{8/} See, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). This test has been the subject of much criticism and confusion in the lower courts and has been virtually ignored by the Supreme Court since its enunciation.

^{9/} As Justice Douglas observed, in response to the Court's disposition of Warth v. Seldin, "Standing has become a barrier to access to the federal courts...[c]ases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need." Warth, supra at 519.

Justice Brennan has stated: "...but a solution that shuts the courthouse door in the face of a litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem..." Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489, 498 (1977).

Judge Oakes testified last year "...we are, or should be, in the business of deciding federal claims, whether they arise under a statute, a regulation or the Constitution itself. And there should be no artificial barriers to our deciding them. If a person has a demonstrable personal injury, he is entitled to his day in court, even though others have the same personal injury, even though causation is in doubt, and even though the remedy is not easily conceived or its effects readily foreseeable." Joint Hearings at 45.

judicial scrutiny and citizens are left without a remedy for constitutional wrongs.

The highly technical doctrine of standing has been applied and expanded by the Supreme Court in a way which "complicates the law of standing and creates ^{10/}unfortunate precedents that may cause injustice in later cases." In fact, the Court appears to address the standing issue anew each time it is presented with a difficult case. Sometimes, the issue is ignored when it appears that the plaintiffs would be denied standing were past tests to be applied. ^{11/} Other times the issue is relegated to a footnote discussion so that the Court can reach the merits of the case. ^{12/} A once "definitive" test for standing, such as the "zone of interests test", ^{13/} may be ignored for several years and perhaps implicitly overruled when a new "definitive" test is laid out. ^{14/} Finally, the Supreme Court has begun to characterize as constitutional some elements previously considered to be prudential such as "causation" or "redressability", thus

^{10/} Davis, Administrative Law of the Seventies, 1978 Supp. Ch. 22, at 197.

^{11/} Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976).

^{12/} Regents of California v. Bakke, 438 U.S. 265, fn. 14 (1978).

^{13/} Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

^{14/} Duke Power Co. v. Environmental Study Group, 438 U.S. 59 (1978).

- 7 -

building new barriers to court access. As a result, it is perhaps fair to say that there is no doctrine of standing at all, but a checkerboard of Supreme Court decisions. The litigant must rely on luck and chance to land on a safe square from which to present his claims of statutory or constitutional violation.

Restrictive decisions on the issue of standing have imposed substantial and unwarranted burdens on citizens and the courts. There is a drain on the resources of the plaintiffs and defendants as well as the judicial system; the confidence of citizens in the availability of the judicial system is undermined; substantive rights are effectively diminished, and the unlawful activity of government is placed beyond the reach of judicial review.

Vast amounts of time and effort are expended in attempting to establish standing. In Warth v. Selden^{15/} 3 1/2 years of litigation were essentially wasted when the Supreme Court determined that the parties lacked standing to challenge allegedly discriminatory zoning practices. Similarly, in Evans v. Lynn^{16/} after a trial in the district court and two appellate court hearings (including one en banc proceeding), the challenge of minority residents of Westchester county to HUD and Bureau of Recreation grants used for discriminatory community development programs was dismissed without final resolution of the claims presented. Four days of trial

^{15/}
422 U.S. 490 (1975).

^{16/}
537 F.2d 571 (2d Cir. 1975), cert denied 429 U.S. 1066 (1977).

- 8 -

were devoted to the questions of standing and ripeness in Duke Power Co. v. Environmental Study Group^{17/} where citizens sought to challenge the constitutionality of the provisions of the Price-Anderson Act which limit the liability of a nuclear power plant in the event of an accident.^{18/}

As these cases indicate, the confused state of standing law resulted in a substantial drain on judicial resources. In addition, repetitive litigation is encouraged when a plaintiff dismissed on standing grounds files a new suit joining new plaintiffs or changing the approach of the pleadings in the hope of finding the seemingly magical combination which will allow the case to go forward.

Enactment of S. 680 would help to solve the wasteful expenditure of judicial resources occasioned by unduly restrictive and complex standing requirements. Therefore, even if this legislation permits more individuals to have their claims adjudicated, a net savings of time and effort for courts and litigants is likely.^{19/}

^{17/}
438 U.S. 59 (1978).

^{18/}
Plaintiffs in Duke Power were allowed standing. A denial of standing would have left intact the opinion of lower courts that the Price-Anderson Act was unconstitutional, thereby effectively halting the development of nuclear energy.

^{19/}
Federal district judge James L. Oakes testified regarding S. 3005, the predecessor of S. 680:

"I do not think that there is going to be any new flood of cases that this bill would create ...instead of having to argue about standing and go back and forth on that issue, we would wind up deciding a case on the merits, assuming the initial barriers to getting into court are met." Joint Hearings at 79.

Virtually every individual, business and organization seeking to challenge government action may be burdened by restrictive standing decisions which preclude a proper hearing on the merits of one's claim. For example, business enterprises have been denied standing to challenge questionable government activity on a number of occasions. Challenges to both overreaching regulation and other forms of government activity have been frustrated and have produced substantial advantages to a plaintiff's competitors.^{20/} Standing has been used to keep Members of Congress,^{21/} taxpayers,^{22/} and citizen organizations^{23/} out of the courts.

Congress must take action to clarify the law of standing and to assure that persons with legitimate claims of injury may seek a judicial remedy.

^{20/} See, e.g. Ellsworth Bottling Co. v. U.S., 408 F.Supp. 280 (W.D. Okla. 1975); Northwestern Public Service Co. v. FPC, 520 F.2d 454 (D.C. Cir. 1975); Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), cert denied 424 U.S. 966 (1976).

^{21/} Metzenbaum v. Brown, 448 F.Supp. 538 (D.D.C. 1978); Public Citizen v. Lockheed Aircraft Corp., No. 74-535 (D.D.C. 1975, Jan. 8, 1975).

^{22/} United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

^{23/} Sierra Club v. Morton, 405 U.S. 727 (1972); Health Research Group v. Kennedy, No 77-0734 (D.D.C. Mar. 13, 1979).

II. Does Congress have the authority to make changes in prudential limitations and other aspects of the law of standing?

Congress can provide full and necessary relief to the federal courts by eliminating all prudential limitations on standing and by clearly stating the right of citizens to be governed in strict accordance with the laws and Constitution of the United States. The Supreme Court has indicated on a number of occasions that Congress has the power to eliminate prudential considerations.^{24/} In its most recent discussion of standing, the Court stated that "Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one who otherwise would be barred by the prudential standing rules."^{25/}

^{24/} Data Processing, supra, at 154 ("Congress can, of course, resolve the questions of [prudential restrictions] one way or another, save as the requirements of Art. III dictate otherwise."); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209 (1972) ("...the words used ['a person claiming to be aggrieved' under the Civil Rights Act of 1964] showed a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."); Linda R.S. v. Richard D., 410 U.S. 614, 617 note 3 (1973) ("But Congress may enact statutes erecting legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); Warth v. Seldin, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes erecting legal rights, the invasion of which creates standing..."); Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO), 426 U.S. 26, 41 note (22) (1976) ("...in recognition of Congress' power to create new interests the invasion of which will confer standing.")

^{25/} Gladstone Realtors v. Village of Bellwood, ___ U.S. ___, 47 U.S.L.W. 4377, 4379 (April 17, 1979).

- 11 -

Congressional action must be within the contours of Article III jurisdictional requirements.^{26/} Congress may act to assure that courts impose only those standing limitations which are necessary to meet the minimum requirements of Article III.^{27/} Congress has exercised this authority previously by allowing citizens to sue on behalf of the public in areas where specific national policies are being enforced.^{28/} Clearly the same compelling rationale behind these federal statutes exists for other federal laws and for provisions of the Constitution.

As to the Constitutional pre-requisites of standing, Congress cannot take action which will eliminate the requirement that a plaintiff show some minimal injury and causal relationship in order to establish standing. The Supreme Court has recognized a substantial power in Congress to define and to create rights, the violation of which will constitute injury sufficient to satisfy the Article III threshold requirement. In this way Congress can work within the framework established by the Court, and yet still retain a role in the reform of the standing law which goes beyond elimination of prudential considerations.

^{26/}
Muskrat v. United States, 219 U.S. 346 (1911).

^{27/}
Other sources of Congressional authority to modify standing law are Article I (Necessary and Proper clause) and Section V of the 14th Amendment.

^{28/}
Civil Rights Act of 1968, Title VIII (Fair Housing Act of 1968), 42 U.S.C. §3601 et seq.; Toxic Substances Control Act, 15 U.S.C. §2619; Consumer Product Safety Act, 15 U.S.C. §2073; Clean Air Act Amendments of 1970 42 U.S.C. §1957h-2; Noise Control Act, 41 U.S.C. §4911; Federal Water Pollution Control Act, 33 U.S.C. §1365.

- 12 -

An examination of Supreme Court decisions sheds light on the nature of the injury and causal relationship sufficient for the requirements of Article III and illustrates the breadth of Congressional power in this area. Under these decisions the injury may be actual or threatened only;^{29/} it may be "economic or otherwise";^{30/} it may involve a personal interest, such as freedom of religion;^{31/} it may be an environmental or aesthetic injury;^{32/} it may be shared with others;^{33/} and most importantly for present purposes "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing..."^{34/} Highly attenuated causal chains have also

^{29/} Warth v. Selden, supra at 499; Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

^{30/} Data Processing, supra at 152.

^{31/} School District v. Schempp, 374 U.S. 203 (1963).

^{32/} Sierra Club v. Morton, 405 U.S. 727 (1972).

^{33/} U.S. v. SCRAP, 412 U.S. 669 (1973).

^{34/} Warth v. Selden, supra at 501.

- 13 -

been found adequate to meet Article III requirements.^{35/}

Together, these cases indicate that the Supreme Court has conferred standing on plaintiffs who showed only the slightest injury and a highly attenuated causal relationship. Unfortunately, the Supreme Court has not applied these standards with any consistency. The substantial variation in standards applied both underscores the need for legislation and illustrates the substantial distance which Congress can travel to define rules of standing without overstepping the minimum requirements of Article III.

^{35/}

For example, in U.S. v. SCRAP, *supra*, the Supreme Court granted standing to plaintiffs challenging the adoption of a new rate structure by the Interstate Commerce Commission on the grounds that "a general rate increase would allegedly cause increased use of non-recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in National Parks in the Washington area." SCRAP at 688.

See also, Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (1977); Duke Power, *supra*.

By directing the Supreme Court to restore the standing doctrine to its minimal constitutional dimensions, Congress would be acting consistently with its constitutional authority to determine federal court jurisdiction. For this reason, concerns about whether such congressional action would unduly strain the judicial function are clearly misplaced. As the Court itself has pointed out, such concerns are irrelevant in the face of a congressional mandate. Indeed, Justice Harlan, who was a primary exponent of the view that "public actions...may involve important hazards for the continued effectiveness of the federal judiciary because they strain the judicial function and press to the limit judicial authority," repeatedly emphasized that these hazards "would be substantially diminished if public actions had been pertinently authorized by Congress..."^{36/}

III. How can S. 680 be strengthened to assure citizens of standing to challenge government activity?

Like its predecessor, S. 3005, one of the commendable goals of S. 680 is to remove the confusion surrounding the law of standing. In our view, this may best be accomplished by language which expressly eliminates all prudential limitations and which explicitly spells out congressional intent to create "beneficiary standing."

^{36/}

Flast v. Cohen, 390 U.S. 83, 130, 132 (1968) (dissenting opinion).

- 15 -

As presently worded, S. 680 lists several prudential limitations which the courts are directed not to apply in determining the standing of plaintiffs.^{37/} Limiting the scope of the bill to these four proscriptions invites the courts to devise new prudential limitations. In order to prevent the creation of new discretionary limitations which would circumvent the intent of S. 680, we recommend that the Committee also include an explicit prohibition on dismissal for lack of standing on the basis of any prudential limitation.

Sections (1)(b) and (1)(c) address the issues of "causation" and "redressability" which have been used by courts in determining standing. Congressional guidance in these areas is important so that the federal courts will be able to exercise their jurisdiction without premature inquiry into the merits of the plaintiffs. These sections clearly indicate that inquiry into the level of causation and the possibility of total redress is to be limited.

^{37/}
§1591(a)-(d) .

- 16 -

A commendable change which has been made in S. 680 is the addition of subsection (1)(d) concerning the "zone of interest" prudential limitation. As we noted previously, this limitation has been generally ignored by the Supreme Court over the past years, and it has caused substantial confusion in the lower federal courts.^{38/} Elimination of this discretionary test is an important and helpful step in clarifying the rules of standing.

The language of section (2) concerning taxpayer standing should be clarified. While this section is apparently intended to state that S. 680 does not address the issue of taxpayer standing, the broad language used to state this intent may lead to some confusion. The second phrase of section (2), "shall not affect the standing of or lack of standing of persons to challenge agency action which affects the liability or status of another person under the revenue laws", detracts from the utility of provisions of section (1)

^{38/} The D.C. Circuit Court of Appeals concisely summed up the confusion:

The zone test was announced and applied in 1970... In applying the zone test...the Court has not attempted a detailed explanation of the purpose, meaning, or scope of the standard. The deficiencies, ambiguities, and unresolved questions inherent in the zone test have been the subject of voluminous criticism. There has also been confusion in the application of this prudential standard in the courts. Some courts have chosen to ignore the zone test; at least one circuit has chosen forthrightly to state its opposition to the test. Perhaps the most common pattern is to announce in conclusory terms that the zone standard has or has not been satisfied.

Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 138-39 (1977).

- 17 -

which address problems raised by such cases as Simon v. Eastern^{39/}
Kentucky Welfare Rights Organization.

This Committee has several options available to correct this deficiency. It may simply eliminate section (2) and not address the law of taxpayers standing; it may amend section (2) to include more narrow language; or it may use this occasion to more fully address and clarify the law of taxpayer standing.^{40/} The ACLU would support inclusion of a taxpayer standing provision in S. 680.

^{39/}
 426 U.S. 26 (1976).

^{40/}
 See p. 9 supra. See Joint Hearings, Testimony of Ralph Nader at 94 ("need for taxpayer standing is very strong."); testimony of Military Audit Project at 70 ("this disclaimer will exacerbate the problems that face citizens who seek redress through the courts for unlawful or wasteful spending of their tax dollars"); National Taxpayers Legal Fund statement at 277 (encourages inclusion of taxpayers as a recognizable entity).

Finally we encourage this Committee to take full advantage of this opportunity to clarify the law of standing in a way which will strengthen citizen rights. We recommend that S. 680 be amended to include a provision which is an affirmative grant of standing to any individual or organization which benefits, directly or indirectly, from the enforcement of a federal law or a provision of the Constitution of the United States. Such a grant would ensure that citizens receive the full measure of protection and benefit available under federal laws. It will also guarantee that challenges can be raised when laws enacted by Congress are not being implemented by the government. The clear message that such a provision will send to the courts is that Congress intends that enforcement of federal laws will not be hindered by technical barriers which keep those with legitimate claims out of the court.

The suggested modifications will contribute to a clearly stated congressional policy regarding the doctrine of standing to bring suit. This legislation, as modified, would set forth clear rules for courts to follow in determining when to exercise their jurisdiction. In bringing litigation, plaintiffs would still have to meet constitutional jurisdictional requirements. It is also important to note that lowering the barriers to access to the courts by enunciating clear rules of standing will not require the courts to adjudicate cases when it is improper or impracticable to do so. The doctrines of abstention, political question, mootness, ripeness, and the prohibition against advisory opinions will be left intact by this reform of the standing doctrine.

- 19 -

Conclusion

The civil liberties lawyer who is protesting violations of the Constitution, women and minority groups who seek to challenge government funding of discriminatory programs, small businesses which seek to invoke the protections of federal legislation and countless other people in other situations require that the law of standing be clarified so that their claims can be heard in court. A statute directing the courts to focus the standing inquiry where it belongs -- on whether there will be a concrete presentation of the issues -- will go far towards assuring these people access to the courts.

We look forward to working with you in this critical area and we commend you for your efforts to assure that citizens have access to the federal courts to obtain redress for unlawful governmental action. We believe that S. 680, with the suggested modifications, is an important and necessary step toward achieving meaningful access to justice.

The ACLU would like to express its appreciation to Paul Zieff, Legislative Associate, for his assistance in preparation of this statement.

Senator METZENBAUM. We are grateful to you for the continued interest in the ACLU in this legislation and thank you personally for appearing here today.

That concludes our hearing for today.

[Whereupon, at 11:34 a.m., the hearing was adjourned.]

S. 680

IN THE SENATE OF THE UNITED STATES

Mr. METZENBAUM (for himself, Mr. KENNEDY, and Mr. RIBICOFF) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To strengthen the rights of citizens to sue in Federal courts for unlawful governmental action.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Citizens' Right to Stand-
4 ing in Federal Courts Act".

FINDINGS AND POLICY

6 SEC. 2. The Congress finds and declares that—

7 (a) the ability of members of the public to have
8 access to the Federal courts to obtain redress for un-

1 lawful governmental action is essential to the demo-
2 cratic process, both to enable members of the public to
3 protect their own interests and to allow redress of inju-
4 ries that affect many members of the public in relative-
5 ly equal measure;

6 (b) substantial uncertainty surrounds the specific
7 requisites for standing to sue in the Federal courts,
8 forcing both the courts and individual litigants to
9 devote inordinate amounts of their resources to this
10 issue;

11 (c) unduly restrictive standing requirements have
12 prevented the prompt resolution of meritorious law-
13 suits, and have resulted in the dismissal of complaints
14 alleging serious violations of the Constitution and laws
15 of the United States without consideration of their
16 merits, even where plaintiffs have shown injuries suffi-
17 cient to enable adequate presentation of relevant issues
18 in a concrete and adversary context;

19 (d) it is a more efficient and productive use of lim-
20 ited judicial resources to reach prompt resolution of
21 meritorious lawsuits alleging violations of the Constitu-
22 tion and laws of the United States by officers and
23 agencies of Government rather than utilizing those re-
24 sources for the interpretation of unduly restrictive or
25 complex standing requirements.

1 stantially likely to be remedied or prevented by a de-
 2 termination on the merits in the plaintiff's favor, if
 3 such determination may contribute in significant part to
 4 remedying or preventing such injury; or

5 “(d) the injury which plaintiff alleges to have suf-
 6 fered as a result of defendant's conduct is not within
 7 the zone of interests to be protected or regulated by
 8 the applicable statutes or consitutional provisions.

9 “(2) This section shall not affect the standing or lack of
 10 standing of persons to sue as taxpayers and shall not affect
 11 the standing or lack of standing of persons to challenge
 12 agency action which affects the liability or status of another
 13 person under the revenue laws.”.

14 (b) The table of chapters of part IV of title 28 of the
 15 United States Code is amended by striking out the item relat-
 16 ing to chapter 97 and inserting in lieu thereof the following:

“97. Courts of the United States: standing 1591.
 “99. Jurisdictional immunities of Foreign States..... 1602.”

17 SEC. 4. If any provision of this Act or the application
 18 thereof to any person or circumstances is held invalid, the
 19 remainder of the Act and the application of the provisions to
 20 other persons not similarly situated or to other circumstances
 21 shall not be affected thereby.

Letters

DEPARTMENT OF JUSTICE,
Washington, D.C.

Hon. HOWARD M. METZENBAUM,
*Chairman, Committee on the Judiciary, Subcommittee on Citizens Shareholders
Rights and Remedies, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I am enclosing for your consideration a memorandum, prepared by the Department of Justice Staff attorneys in the Office for Improvements in the Administration of Justice and reviewed by the Office of Legal Counsel, which analyzes the potential effect on several recent court decisions of the draft statute on standing which we have discussed with members of your staff. The memorandum has also been reviewed by the Office of Management and Budget, which has no objection to its transmittal to you.

We have appreciated the opportunity to review in advance your standing proposal. Our reading of the legislation indicates to us that the modifications which this Department has recommended have been adopted. Accordingly, as presently drafted, the proposed statute incorporates principles which we are prepared to support in the form of legislation.

We look forward to working with you on this important project.

Sincerely,

PATRICIA M. WALD.
Assistant Attorney General.

Attachment.

STAFF MEMORANDUM ON THE IMPACT OF STANDING LEGISLATION

The draft "Citizens' Rights to Standing in Federal Courts Act" identifies three grounds upon which federal courts should not deny standing to sue in federal civil actions. This memorandum compares the results in seven leading cases recently decided on grounds of standing with the results which could be expected had the "Act" been in effect at the time of judgment.¹ In analyzing each case we have identified and considered the grounds upon which the court expressly relied in denying standing to sue. Where the memorandum finds the draft statute to apply, we conclude that the reason given by the court would be removed by the statute as a basis for denying standing. It does not follow that the case would be litigated on its merits. In several cases, other aspects of the doctrine of standing and justiciability may also be relevant, but are not discussed in this memorandum because they are not treated in the court's opinion.

I. THE ACT

The Act has four major features:

1. It applies to civil actions against governments, their agencies, or their officials;
2. For violations of the laws or Constitution of the United States;
3. It provides that standing cannot be denied in those actions on three grounds:
 - (a) that plaintiff's injury is shared by all or a large class of persons ("generalized grievance" or abstract injury"); or
 - (b) defendant's conduct may not be the primary cause of plaintiff's injury ("causation"); or
 - (c) judgment on the merits for plaintiff is unlikely or uncertain to cure the plaintiff's injury ("remedy").
4. The draft disclaims any effect on the law of taxpayer standing.

Each of the three forbidden grounds has been, or has seemed to be, a developing trend in standing analysis. The Act would prevent dismissals based on those grounds, but would not further structure the court's analysis of standing issues except as they necessarily depend on arguments within the three disfavored grounds.

The Act also provides that in all federal civil cases (not merely those against governments, etc.), objections to standing must be raised prior to judgment in the federal court of first impression. If not raised, prudential objections to standing are lost. The policy behind this provision is that judgment in the court of first impression itself constitutes an interest sufficient to warrant continuance of the action on its merits, rather than on procedural issues.

II. THE CASES

The seven cases will be discussed individually. In each case, standing was denied to one or more named or unnamed plaintiff. Because the cases are familiar to most persons concerned with standing legislation, each discussion will be limited to identification of the parties, claims, results as decided, and projected results under the Act. Where the claims of one or more plaintiffs were dismissed on non-standing grounds, these grounds will also be identified. Where a result under the Act differs from that reached by the court in the reported decision, a brief statement of the reason for projecting that difference will also be set out.

A. *Simon v. E.K.W.R.O.*

Five organizations and a number of individuals brought suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. Plaintiffs, seeking to represent the interests of low-income persons and welfare recipients in receiving cost-free hospital services, claimed that the Secretary's adoption of a revised revenue regulation violated both the Internal Revenue Code and the Administrative Procedure Act. The regulation arguably reduced the level of charitable (cost-free) services which a hospital might extend and still qualify for tax benefits as a charitable organization under the IRC. Plaintiffs claimed

¹ The cases are: *Simon v. Eastern Kentucky Welfare Rights Organizations*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Public Citizen, Inc. v. Simon*, 539 F.2d 211 (D.C. Cir. 1976); *Codari v. Alexander*, 69 F.R.D. 652 (E.D.N.Y., 1976).

that this reduction, in turn, encouraged hospitals in eastern Kentucky to alter their rules and to reduce the level of services offered the poor.

The Supreme Court held that all plaintiffs lacked standing to raise the issue against the named defendants. Its decision turned on a finding that the injury alleged—deprivation of hospital services—was only speculatively related to the alleged violation by defendants. 426 U.S. at 42-43. It based this conclusion on two grounds: first, that plaintiffs had failed to show the alleged injury was fairly attributable to the challenged action, rather than to other factors. 426 U.S. at 44 (citing *Warth* at 507), note 1 *supra*. Secondly, the Court seemingly measured the degree of injury by looking to the effect of a remedy. 426 U.S. at 43, 45 n. 25. It found that it would be "speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services." *Id.*, at 43.²

Neither ground would be permitted under the draft Act in non-taxpayer cases. The first amounts to a "sole causation" requirement forbidden by proposed section 3000b, while the second "remedial" ground would be prevented by proposed section 3000c. Thus the basis relied on by the majority would be removed under the draft statute. However, a further ground of denial (that plaintiffs sought to challenge the tax liability of a third party) which was not expressly relied on in the Court's opinion might form another ground for denying standing. See, e.g., the concurring opinion of Justice Stewart at 426 U.S. at 46. The draft statute does not affect the present law of standing to challenge agency action which affects the tax liability of third parties.

B. *Warth v. Seldin*

Warth is a case complicated by a variety of plaintiffs and claims. Plaintiffs sought to prevent enforcement of a zoning ordinance of the town of Penfield, New York. They claimed that the ordinance had the purpose and effect of excluding low-and-moderate-income persons from living in Penfield, because it discouraged or prevented construction of inexpensive housing in the town. There are five groups of plaintiffs. Group 1 consisted of Metro-Act on behalf of its members. Metro-Act was a non-profit corporation with social concerns in the housing field. Group 2 contained several individual taxpayers and residents of Rochester, a nearby city, who argued that Penfield's exclusionary policy resulted in higher Rochester taxes to support low-income housing for persons who might otherwise live in Penfield. Group 3, a subdivision of both Groups 2 and 4, was one Ortiz, a low-income or minority-group taxpayer of Rochester. Group 4 represented low-income or minority-group Rochester residents. Group 5 included Home Builders, an association of construction firms which sought to intervene on the grounds that Penfield prevented them from building low-income projects, and Housing Council, an interest group which sought to join plaintiffs. One member of Housing Council had evidently sought a permit to build low-to-moderate-income housing in Penfield, but the request was no longer active.

The Supreme Court found that all members of Groups 1 through 4, and Home Builders, were without standing to challenge enforcement of the Penfield ordinance. As to Housing Council, the Court found that—because the request of its member was no longer active and had not been formally denied—there was no concrete, live, dispute. The Court's decision as to Housing Council, then, was in effect a finding that the controversy was moot. 422 U.S. 490, 517.

Members of Group 3 and Group 4 (low-income/minority resident/taxpayers of Rochester) were denied standing on the grounds that they had alleged no injury. 422 U.S. at 503. The Court measured the absence of injury by noting that plaintiffs had failed to allege that the relief requested would be effective in removing the harm alleged—inability to find housing in Penfield. 422 U.S. at 501-508.

Members of Group 2 (Rochester residents/taxpayers) were denied standing on the ground that they sought to represent the rights of third parties, a traditional prudential ground for denial. 422 U.S. at 509-510. Metro-Act was denied standing both on this third-party rule and on the ground that no injury had been alleged to its members. 422 U.S. at 512, 514. Home Builders was denied the right to proceed on both its claim for damages and for prospective relief, for different reasons.

² The detailed "injury" analysis of *E.K.W.R.O.* and *Schlesinger*, part C *infra*, is required only in the absence of a recognized statutory or constitutional injury. Where plaintiff can point to an identifiable statutory protection not drawn from the APA itself, that injury need not be subject to the remedial analysis. See, e.g., *United States v. Schatz*, 412 U.S. 699 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

The Court reasoned that there was no certainty that an award of the monetary damages claimed would effectively remedy the underlying claims of the Association's members. Based on this "remedial" analysis, it denied standing to the Association to represent its members' monetary interests. On the claim for prospective relief, enjoining enforcement of the ordinance, the Court noted that Home Builders' members had no specific, identified project which would be prevented by enforcement. Evidently, then, the case was "unripe" because of the absence of a controversy. 422 U.S. at 516 (The Court does not cast the analysis in ripeness terms, however.)

Under the draft Act, Groups 3 and 4 (low-income/minority residents/taxpayers of Rochester) could not be denied standing on the grounds set out in the Court's decision. The Court found that plaintiffs had alleged no recognized injury which was fairly traceable to defendants. In so doing, the Court measured the absence of injury by analyzing the effect of a remedy in plaintiff's favor, if granted, using the test which would be forbidden by draft section 3000c. Similarly, the result on Home Builders' monetary claim rests on the same "remedial" analysis, and could not be supported under the Act.

C. Schlesinger v. Reservists Committee to Stop the War

Schlesinger involves both taxpayer and citizen claims to standing. The taxpayer claims were denied, and this result would not be affected by the draft Act. On the citizen claims, an Association of Reservists and five individual members brought a class action on behalf of all U.S. citizens for a declaratory judgment that membership in the Reserves by Members of Congress violates Article I, section 6, cl. 2 of the Constitution, the "incompatibility of officers" clause. They claimed that this violation injured them as citizens by imposing inconsistent duties on those persons holding dual office, thus depriving citizens and members of the Reserves of the objective service due from both Congress and Reserve officers.³

The Court characterized this claim as an "abstract injury", a kind of generalized grievance which was shared with all other citizens:

"... standing to sue may not be predicated on an interest of the kind alleged here which is held in common by all members of the public, because of the necessary abstract nature of the injury all citizens share." 418 U.S. at 220.

It required greater specificity of injury and pleading, and a "particular" rather than general, widespread, or abstract injury. *Id.* at 22-223.

This result depends on the Court's decision to deny standing based on an injury which is widely shared in relatively equal measure by all or most members of the public. The arguments made in favor of that decision relate to the Court's need for concrete factual settings in which to decide difficult constitutional issues, and a desire to avoid "unnecessary constitutional adjudication," 418 U.S. 221-223, and are not rooted in the constitutional requirement that a case present an actual "case or controversy." (*But see Justice Stewart's* concurrence at 418 U.S. 228-229, expressing the view that the "generalized grievance" rule is a constitutional element of standing analysis.) As a result, the reasons given by the Court would be removed as a basis for judgment if decided under the draft Act, section 3000a. That section is expressly intended to evidence a Congressional finding that widespread public injuries do not lose their public importance, and that a violation of law or the Constitution is not converted from injury into unreviewable reality because it injures all citizens equally.

D. United States v. Richardson

An individual taxpayer brought suit for a declaratory judgment of the unconstitutionality of the Central Intelligence Agency Act, claiming that those portions of the Act which authorize the Agency to account for expenditures solely on the certificate of the Director violate portions of the Constitution requiring an annual statement and account of public monies. Because plaintiff rested his claim solely on his asserted status as a taxpayer, the Court's finding that he lacked standing to assert a generalized grievance would not be affected by the draft Act. Had the claim been rested on other, non-"taxpayer" grounds of standing, the result would be otherwise. Draft section 3000a.

³ Only one Member of Congress, Senator Tower of Texas, held a noncommissioned post in the Reserves. Several other Members held commissioned rank in various State militias, organized National Guard. Officers in the National Guard are not officers of the United States and until called to active duty in the federal service. See 418 U.S. at 207n.2.

E. Linda R. S. v. Richard D.

Linda, an unwed mother, had been unsuccessful in urging the child's alleged father to provide financial support. Both resided in Texas, which then had in force a statute making it a criminal violation for a "parent" to refuse support to or to abandon a child. Texas courts had consistently interpreted this statute to apply only to married parents, and to impose no duty on unmarried ones. Linda brought a class action in federal court seeking to enjoin the local district attorney from allegedly discriminatory application of the Texas statute when the D.A. refused to prosecute the alleged father, basing his decision on the judicial interpretation of the Texas statute. The Supreme Court found that Linda lacked standing to sue the D.A. on those grounds, because it saw no relationship between the alleged injury (lack of support for the child) and the alleged discriminatory government action (failure to bring a criminal prosecution against the child's father). 410 U.S. at 618. It reached this conclusion by analyzing the effectiveness of granting the remedy requested: a jail term for the child's father would not necessarily result in payment of child support. *Id.* Therefore, the Court found that Linda had failed to show the father's failure to support was a consequence of the D.A.'s refusal to prosecute him for violation of the Texas statute.

The result would be reversed under the draft Act. The Court's decision rests on a finding that the injury alleged was not substantially likely to be remedied or prevented by a determination on the merits in Linda's favor.⁴ This basis for denying standing would be forbidden by draft section 3000c. Consequently, Linda would not be denied standing to sue the D.A. for non-enforcement, on these grounds.

F. Public Citizen, Inc. v. Simon

Plaintiff organization, a body of taxpayers, and an individual named plaintiff brought suit against the Secretary of the Treasury claiming that the Secretary had approved payment of federal salaries to purely political campaign workers on the President's campaign staff during an election for that office, in asserted violation of Article I, section 9, cl. 7 of the Constitution (the appropriations clause), and 31 U.S.C. 628 (1970) (an implementing statute). Plaintiffs rested their standing solely on their status as taxpayers, attempting to extend the test of taxpayer status in *Flast v. Cohen*. Because the draft Act does not alter the rules of standing for federal taxpayers, the D.C. Circuit's denial of standing would not be altered by the Act.

G. Scodari v. Alexander

Several revenue agents of the Internal Revenue Service (IRS), and one unnamed informant sought to enjoin the Commissioner of Internal Revenue from enforcing a new IRS policy requiring agents to identify their confidential informants to internal auditors. The audit was intended to verify the legality of payments to the informants and the propriety of the informants' services in return. The agents claimed standing based on asserted injury to their physical, professional, and mental well-being resulting from the claimed discouraging effect which the new policy would have on their relationship with established informants. The court found that agents has asserted no recognized justiciable injury, only a subjective concern about government action. 69 F.R.D. 652, 657. It is unclear whether this analysis rests on the "generalized grievance" rule which is forbidden by draft section 3000a, but the question would be open if the draft Act were in effect. The court, however, also denied standing to assert the rights of third parties (absent informants), and held that the agents were not within the zone of interests of the regulation in question. *Id.* at 660-661. The draft Act does not remove a court's authority to refuse to find standing based on such "third-party" or "zone-of-interest" rules, and these results would not be altered by adoption of the Act.

The court also refused to allow the unnamed informant to proceed, pointing out that his action—assertedly based on a contract assuring confidentiality for his identity—should have been brought in the Court of Claims. *Id.* at 662. This result, however cast, is not a standing decision, but a jurisdictional one based on statute.

⁴ The Court assumed, evidently, that the only result of a decision to prosecute would be incarceration. Child-support prosecutions are often brought for the express purpose of forcing errant parents to choose between jail and support (which violates the right to life, liberty, and property).

III. SUMMARY

The projected results of decision in these seven cases are mixed. In three cases (*Warth, Schlesinger, Linda R.S.*), it appears that all or part of the particular grounds of decision relied upon in the Court's opinions could not be supported following adoption of the draft Act. While standing would not be assured in these cases under the Act (other grounds for denial might still be put forward), the ground rules for denial would be substantially altered.

In three other cases (*Richardson, Public Citizen, Scodari*), it appears that the court's decision would not be affected. However, the result would have been altered in two of these cases as well, but for that portion of draft section 3000 which disclaims any effect on the rules of taxpayer standing. In one other case (*E.K.W.R.O.*), the Act would prevent reliance on the particular grounds of decision which form the basis for the Court's opinion, but it appears that—because the plaintiffs avowedly sought to challenge the tax liability of third parties not named as defendants—the Court would continue to hold that plaintiffs lack standing to sue in federal court.

MR. METZENBAUM. Mr. President, I ask unanimous consent that the measure that I am introducing, be jointly referred to the Committee on the Judiciary and the Committee on Governmental Affairs. The matter has been cleared with the respective minority members of both committees.

THE PRESIDING OFFICER. Is there objection?

MR. STEVENS. Mr. President, reserving the right to object, I understand that that statement is correct, that the ranking Republican members of both committees have been consulted. I do not object.

THE PRESIDING OFFICER. Is there objection to the request of the Senator from Ohio? Without objection, the bill will be received and jointly referred.

MR. KENNEDY. Mr. President, the legislation which Senator Metzenbaum, Senator Ribicoff, and myself are today proposing addresses one of the most fundamental issues facing the courts of this Nation: The right of citizens to take legal action challenging unlawful activities of their Government.

The bill constitutes a growing recognition on the part of many Members of Congress and of the administration itself that Federal courts—led by the Supreme Court—have been erecting unwarranted judicial barriers to the initiation of important and meritorious lawsuits. These barriers often lack constitutional or statutory foundation, and operate to deny citizens access to the Federal courts for the vindication of their rights.

It has been a fundamental tenet of American jurisprudence since the creation of this Republic that there should be no important right without a corresponding remedy. Legal rights—whether conferred by the Constitution, by statute, or by judicial interpretation—are meaningless without some means of judicial enforcement. Yet, the recent resurgence of standing as a barrier to the maintenance of important litigation has created precisely this anomalous situation: There are indeed rights which the court have effectively said there can be no remedy.

The nonconstitutional aspects of the doctrine of standing—the so-called “prudential” limitations—reflect, we are told, principles of sound management of scarce judicial resources. There are cases which the courts have said they should not hear—cases in which the parties are not sufficiently adverse, or which lack the requisite concreteness necessary for the framing of effective remedies. These are often legitimate considerations; courts should not squander their time on issues which cannot be resolved in a judicial framework.

Yet there is a serious question in my mind whether such issues can or should be resolved under the rubric of standing. Standing is a threshold consideration: Is the plaintiff an appropriate person to maintain the lawsuit? The “prudential” considerations which the courts have been attempting to subsume under the doctrine of standing—whether the causation of the injury complained of is too attenuated, whether the grievance is too “generalized,” whether an appropriate remedy can be fashioned, whether the plaintiff is asserting the rights of third parties, whether the plaintiff's injury is in the “zone of interests” sought to be protected by a particular statute, and others yet to be devised—cannot often be determined at the outset of litigation. Indeed, there is the more fundamental question whether the Federal courts ought to be refusing to hear otherwise meritorious claims on these grounds at all.

The need for remedial standing legislation has long been apparent. The courts today appear to be hopelessly divided and confused as to the precise contours of the doctrine of standing, with the result that judges and litigants

are forced to devote inordinate time and resources to settling technical issues, which ought not be that difficult to resolve. As a former chairman of the Judiciary Committee's Subcommittee on Administrative Practice and Procedure, and the sponsor during the 94th Congress of legislation to clarify the law of standing to bring legal actions seeking judicial review of agency decision, I am well aware of how complicated the law of standing has become. Indeed, this conclusion has been cogently documented by a recent study unanimously endorsed by the Senate Government Affairs Committee, under the leadership of Senators Ribicoff and Percy. The time has come for Congress to restore the doctrine of standing to the fundamental constitutional purposes for which it was intended.

I believe, Mr. President, that the legislation we are proposing establishes a solid framework for consideration of this issue by the Congress. The product of extensive discussions between its Senate sponsors and the Attorney General, it represents an important step in resolving some of the difficult policy questions involved in the standing question. I want especially to commend Patricia Wald, Assistant Attorney General for Legislative Affairs, for the leadership she has provided in facilitating consideration of this issue by the Department of Justice and by other executive and administrative agencies. She has made many invaluable contributions to the formulation of an effective standing bill.

While I am in full accord with the principles embodied in the Citizens' Right to Standing in Federal Courts Act, I would urge that the committee consider the issue of standing in its broadest context. In my judgment, standing should be grounded solely in article 3 of the Constitution, and not in nebulous concepts of judicial expedience. I therefore believe that Congress should act to eliminate all prudential standing tests and to restore the doctrine of standing to its limited constitutional dimension.

Mr. Ribicoff. Mr. President, I am pleased to join with my distinguished colleagues, Senators Metzenbaum and Kennedy, in introducing the Citizens' Right to Standing in Federal Courts Act.

The principal purpose of this bill is to enhance the ability of citizens to obtain judicial review of allegedly unconstitutional or unlawful government action. The bill does this by eliminating certain technical and nonconstitutional restrictions on the judicial standing. As my colleague, Senator Metzenbaum, has pointed out, Congress has undisputed authority to take this action.

Specifically, the bill provides that standing may not be denied in lawsuits alleging unlawful government action on these three grounds:

That plaintiffs injury is shared by all or a large class of persons; or
Defendants' conduct may not be the primary cause of plaintiff's injury; or
Judgment on the merits for plaintiff is unlikely or uncertain to cure the plaintiff's injury.

It should be noted that this bill has no effect on the constitutional requirement for judicial standing, nor does it alter the present restrictions on taxpayer standing.

This legislation results from a joint effort between the Department of Justice and the sponsors of the bill. The bill, in draft form, was the subject of careful review and revision within the Department of Justice. We have incorporated all of the suggested changes proposed by the Department. The Justice Department has indicated its support of the measure in principle. In April 1977, the President recognized the need for this kind of legislation in his consumer message. At that time, President Carter declared:

"I support legislation which will give citizens broader standing to initiate suits against the government, in appropriate cases. . . . Recent court decisions have greatly restricted their ability to do so."

The same conclusions were reached in the Governmental Affairs Committee's "Study of Federal Regulation." Volume III of our study, which was conducted pursuant to Senate Resolution 71 and published in July 1977, contains a detailed discussion of the law of judicial standing. As a principal finding, the committee study concluded:

"The Supreme Court in recent years has taken an increasingly restrictive view of the standing requirements that make it difficult for citizens to obtain a judicial review of allegedly unlawful government action. At present, some of the Supreme Court's decisions in this area constitute a considerable barrier to citizen participation in the regulatory process."

Recommendation No. 1 of Volume III stated that, "Congress should ease the requirements of standing in order to provide greater public access to the Federal

courts for review of regulatory agency decisions." More specifically, the committee study proposed that Congress should "expressly declare in the statute that standing to sue should not be denied on the basis of nonconstitutional or prudential standing requirements established by the judiciary." Effective citizen participation in the regulatory process, in my opinion, requires formal access to the courts.

The measure we introduce today reflects those recommendations. Thus, it is a further step toward implementation of the recommendations of our study on Federal regulation.

Judicial standing to sue in court is essentially a permission to bring the action. Standing does not concern the merits of the issues to be raised. Rather, it focuses on the persons who wish to have those matters decided by the court. It is a threshold question; namely: Is the plaintiff in a lawsuit entitled to initiate that action against a named defendant?

At present, the law of judicial standing is not as clear as it ought to be. Judicial stand, as the late Mr. Chief Justice Warren observed, is one of the "most amorphous [concepts] in the entire domain of public law." I view the bill we introduce today as a starting point for a full and informed public discussion of the important issues of judicial standing. It is my intention that, in the course of hearings on this measure, significant issues and concerns will be fully developed and addressed. With that in mind, I am pleased to join my colleagues in introducing this bill.

U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE,
Washington, D.C., February 15, 1979.

Hon. HOWARD M. METZENBAUM,
U.S. Senate,
Washington, D.C.

DEAR SENATOR METZENBAUM: This letter is a response to your request for the Department's position regarding amendments to a bill introduced in the last Congress, S. 3005 ("to broaden the rights of citizens to sue Federal courts for unlawful government action"). Two of the proposals concerned legislative abolition of (1) the so-called "zone of interests" test and (2) limitations on litigants' capacity to assert the rights of third parties. The Department will support the first amendment, but opposes the second. There follows a summary of considerations that were influential in reaching these determinations.

The Department sees no reason to retain the zone of interests test. The test prevents even plaintiffs concretely injured by illegal government action from obtaining redress unless they can demonstrate that they are "arguably within the zone of interests to be protected or regulated" by applicable statutes or constitutional guarantees. Since announcing this standard, in an opinion liberalizing federal standing doctrines, the Supreme Court has virtually ignored it and has never used it to deny standing to anyone. A survey by our office of 1974-1978 published opinion in the Courts of Appeal, reported to you in my letter of November 3, 1978, revealed that the zone test has been frequently discussed (113 cases), but has seldom influenced outcomes. By the most generous count, the test was applied to deny plaintiffs the right to litigate particular claims only thirteen times in the interval examined. Even these actions—to the extent unmeritorious—apparently could have been defeated through application of other doctrines. The scholarly response to the zone test has been uniformly negative; often cited are the confusion and unnecessary expenditure of time it engenders in federal courts. Finally, the Supreme Court has explicitly adverted to the unconstitutional statute of the test, leaving no doubt as to the legitimacy of legislative abolition.

Regarding the proposed amendment dealing with assertion of third party rights, the Department believes that the judicial limitations that have emerged in this area should not be altered by statute. The third-party rule is riddled with judge-made exceptions that seem generally to prevent the appearance of injustice in particular cases, and the barriers that remain serve nontrivial functions. Radical changes in third party standing doctrine could (1) affect many motions in criminal cases to suppress evidence seized in violation of the Fourth Amendment; (2) promote an unjustified surge of prisoner petitions; and (3) in general, open the way to advancement of claims completely unrelated to plaintiff's injuries.

Recently, you requested that the Department also indicate its views on an alternative version of section 3000(2) of the bill, to read as follows:

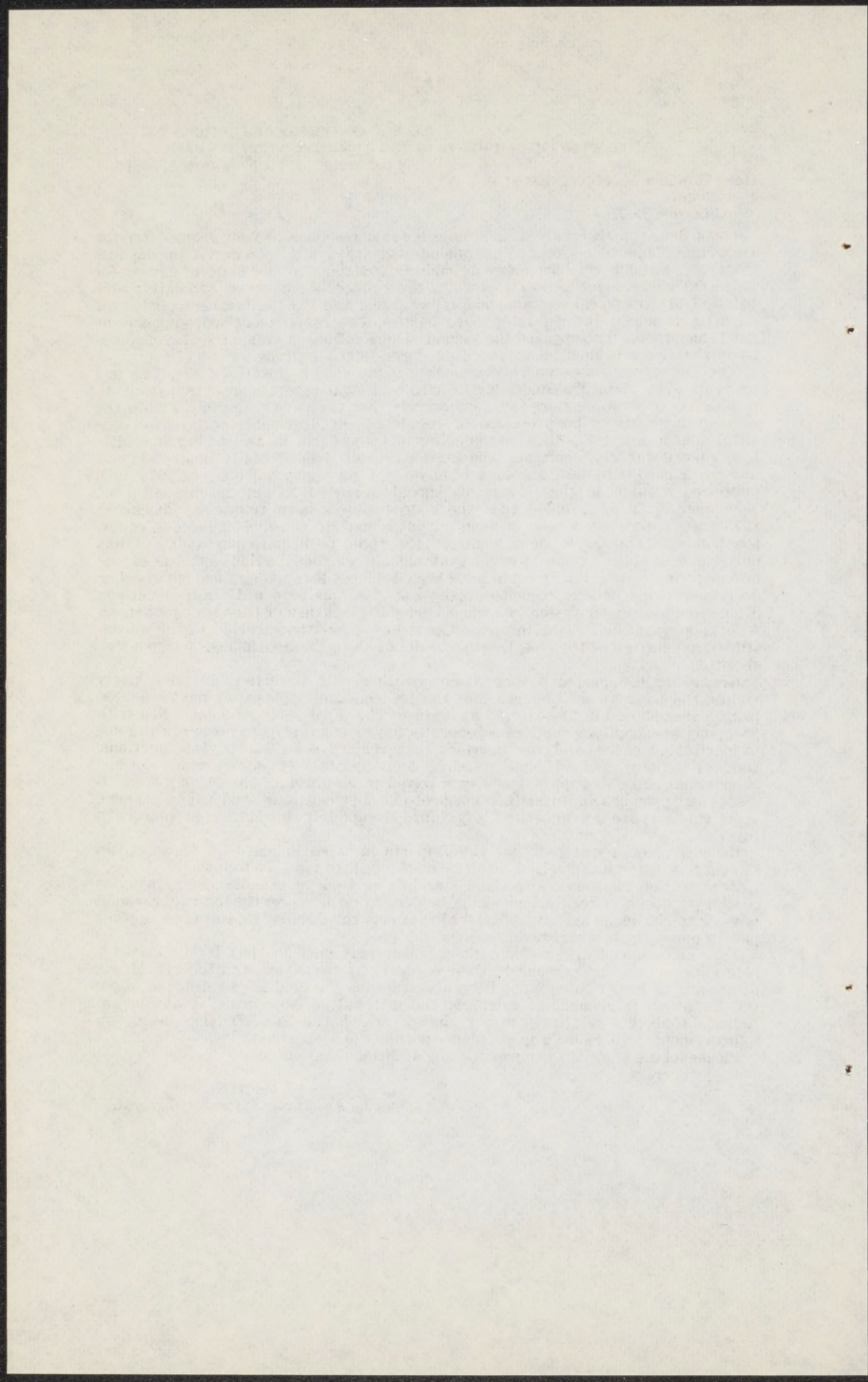
This section shall not affect the standing or lack of standing of persons to challenge rulings or regulations which implement or interpret the internal revenue laws or to challenge agency action which affects the liability or status of another person under the internal revenue laws.

This amendment differs from the present text only in that it eliminates a reference to suits by persons in their capacity as taxpayers and incorporates a disavowal of intent to enhance litigants' standing "to challenge rulings or regulations which implement or interpret the internal revenue laws." I do not anticipate that this relatively minor change, which the Tax Division deems an improvement, will cause any problems within the Department.

Please let me know if I can provide any additional assistance.

Sincerely,

PAUL NEJELSKI,
Deputy Assistant Attorney General.



ADDITIONAL PREPARED STATEMENTS

PREPARED STATEMENT OF MARILYN G. ROSE

I am Marilyn G. Rose, an attorney with the Center for Law and Social Policy in Washington, D.C. I would like to thank the Committee for the invitation to testify on S. 680.

The Center for Law and Social Policy is a public interest law firm, funded since 1969 with foundation monies to represent people and interests not usually represented by the private bar because the cost of litigating those causes cannot be covered by our market economy or by voluntary legal services. Our clients are the intended beneficiaries of much of the civil rights, social welfare, environmental, and health and safety legislation which Congress has promulgated during the past two decades. Most of our litigation involves allegations that some federal agency has failed to enforce one of these statutes. While often we may sue multiple private parties who are benefiting from the failure of the federal agency to enforce obligations which arise from a particular statute, more often we attempt to obtain redress by an order against the derelict federal agency itself. The decision to sue only the federal agency is a product of an evaluation how to achieve an effective result at the least cost. It is also a recognition that our legal system operates on a concept of voluntary obedience, that a federal agency determines the conduct of private parties which voluntarily obey the directive and interpretations of law of those who administer the statute. Thus, an order against a federal agency to enforce a statute or a declaratory judgment that a statute has been incorrectly interpreted by the federal agency has the effect, albeit indirect, of changing the behavior of parties regulated by that statute.

It is in that context that I am here to testify in support of S. 680. In particular, I am here to testify from my experience as counsel for plaintiffs in *Simon v. Eastern Kentucky Welfare Rights Organization et al.*, 426 U.S. 26 (1976). In that case, one of the cases to which Senator Metzenbaum referred in introducing S. 680 on March 15, 1979, the Supreme Court made a "game" out of pleading, imposed excess cost upon plaintiffs and burdens on federal district courts needlessly, but did not at all advance the constitutional requirement that plaintiffs have that personal stake in the outcome which assures concrete adverseness.

Let me explain my conclusions in a discussion of *EKWRO* and its successor, *Lugo v. Blumenthal*, presently awaiting oral argument in the Sixth Circuit. These cases involve the standards required of nonprofit hospitals in order that they be eligible for the benefits of "charitable" status under the Internal Revenue Code. From 1913 until 1969, the Internal Revenue Service required hospitals to provide some reasonable volume of free (or charity) care in order to be classified as charitable institutions. Proposals of the American Hospital Association to eliminate that requirement failed enactment in the Tax Reform Act of 1969, but nevertheless IRS announced a change of position and eliminated the requirement in late 1969.

In July 1971, on behalf of *EKWRO* and a number of other organizations and individuals residing in 12 different states, we filed suit against IRS in the U.S. District Court for the District of Columbia. We alleged that the individuals and individual members of organizations were, or at relevant times had been, in need of hospital care, that they were not covered by any public and private health insurance, and that they had been turned away from particular hospitals because they could not pay for that care. The health consequences to them were alleged to be "dire." In one instance we alleged that one man had died and hospital records demonstrated that he had been previously denied admission because he could not pay a preadmission deposit. We also alleged that the particular hospitals which refused admission to plaintiff were classified as "charitable" by the Internal Revenue Service, but were encouraged to deny free service by the action of IRS eliminating the requirement that a charitable hospital give some free services.

IRS filed a motion to dismiss, which included a challenge to the standing of plaintiffs. In 1972, that challenge was denied by the District Court. In late 1973, when the District Court issued its decision on the merits, it discussed at length

its conclusion that the plaintiffs had standing to sue, that they had suffered "injury in fact." IRS was then contesting plaintiffs' standing on a "causation" basis, alleging insufficient nexus between the action of IRS removing the requirement and the injury which plaintiffs suffered, i.e., the denial of needed hospital care. The District Court rejected that argument, and, on the merits, found that IRS had violated its obligations under the Internal Revenue Code by, in effect, amending the requirement for charitable hospitals without statutory authorization.

With respect to the standing-to-sue issue, the District Court, while recognizing that an iron-clad nexus between the tragic situations in which plaintiffs found themselves and hospital behavior towards indigents could not, in all probability, be provided, reviewed the evidence presented on cross-motions for summary judgment and found that the crucial significance with which hospitals regarded their charitable status supported a conclusion that "the relaxation of the requirements for charitable classification would necessarily effect hospital policy . . . upon which such status had been earlier dependent." 370 F. Supp. 325.

IRS appealed. IRS spent very little time on the standing issue on the appellate court level, indeed reducing any challenge to plaintiffs' standing to a footnote on page 67 of its 71 page brief. In late 1974, the Court of Appeals reversed the District Court on the merits, 2-1. The appellate court also gave the standing issue little heed, finding that plaintiffs had standing in a footnote comment (506 F2d 1278, 1282, fn. 6). In the spring of 1975, we applied for certiorari on the merits. IRS cross-petitioned for certiorari on a number of procedural issues which did *not* include the finding that plaintiffs had standing.¹ Certiorari was granted on both petitions in May 1975. As initial petitioners we filed the first brief, and addressed the merits and the procedural issues raised by IRS in its cross-petition. IRS raised standing as a distinct issue in its responding brief, citing *Warth v. Seldin* (which had been issued in June 1975) for the proposition that plaintiffs

"rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief."

We contested the matter in our reply brief.

The Supreme Court ignored all other issues upon which it had granted certiorari and decided that plaintiffs lacked standing to sue, holding that the complaint was insufficient to withstand a motion to dismiss because: (1) speculative inferences are necessary to connect the injury of plaintiffs to the challenged actions of petitioners, and (2) the complaint suggests no substantial likelihood that victory would result in increased services to indigents rather than a likelihood that the hospitals would give up their charitable status. The fact that plaintiffs had alleged that these hospitals received substantial donations deductible by their donors was found to be an insufficient allegation to "establish" the proposition that those hospitals are dependent upon such contributions. The latter was characterized as "speculative" at best.

In the course of its comments that it was speculative whether the remedy which plaintiff sought (return to the prior ruling) would cure the injury which they alleged (access to hospitals by indigents), the Supreme Court alluded to the fact that the hospitals were not defendants. The Court then itself speculated that it was just as plausible that these hospitals might elect to forego favorable tax treatment to avoid an "undetermined financial drain." Thus, in *Lugo* we turned to "correct" the pleading and proof problem which the Supreme Court found in *EKWRO*.

Lugo involves a number of migrant farmworkers or their dependents who were denied access to a number of hospitals in northwestern counties of Ohio in the summer of 1974. The hospitals were named as parties-defendant, as were governmental officials (the Secretary of the Treasury and the Commissioner of Internal Revenue). In order to withstand the defects found in *EKWRO* we had to plead, and then prove at the motion to dismiss stage, that the particular hospitals would not forego their charitable status rather than give a reasonable

¹ IRS was, and still is, concerned with other jurisdictional issues which it contends bar the action, including sovereign immunity and prohibitions which bar taxpayers from litigating claims involving federal taxes outside the refund and deficiency judgments methods of challenging IRS action. Those issues were decided adversely to IRS in the Court of Appeals.

amount of free care.² To do so required extensive discovery upon the hospitals to obtain financial statements and audited cost reports over a period of years and their reports to IRS. The hospitals were reluctant to reveal this information, in particular the identity of the contributors, and were unable to state, categorically, that all contributors deducted their contributions from their own taxes. In the latter regard the hospitals, to avoid discovery being instituted against the contributors, stipulated that contributions to them were deductible under the charitable provisions of the Code, that "some" of the contributions were presumably motivated by the fact that they were deductible, and that the benefits accruing from the hospitals' tax status contributed to their ability to pursue the purposes set forth in their Articles of Incorporation. We presented an economic analysis to demonstrate that each of the hospitals would be in an economically more advantageous position by affording a reasonable amount of free care and retain its charitable tax status rather than pay taxes on revenues which exceeded costs, lose charitable contributions, and lose or be forced to repay a number of governmental construction grants which were dependent upon continued status of the institution as a charitable institution. The development of this record was not easy, but, over IRS's contentions that our economic analysis was still "speculative" and the stipulation with the hospitals inadequate, the District Court accepted our theory. On appeal to the Sixth Circuit the IRS is still contesting the standing of the plaintiffs.

What does the record in *EKWRO* and *Lugo* indicate? First, it demonstrates a needless waste of financial and legal resources to establish whether a federal agency has breached a duty which it owes to members of a particular class of persons whom Congress has determined to benefit.³ That itself should constitute "legal injury", sufficient for constitutional purposes, and your legislation is designed to so declare. Secondly, it demonstrates that other parties may be forced to expend resources to defend their conduct, although they are acting in conformance with the legal interpretation of the governmental agency regulating them. Third, it demonstrates added burdens on the entire federal judiciary system, making pleading more of a game between attorneys and assuring at least one more round of procedural decision making before the merits of a controversy can be reached. In the latter regard, it should be noted that while the Justice Department had not eliminated challenges to standing of plaintiffs in actions against federal agencies in the years between *Association of Data Processors v. Camp*, 397 U.S. 159 (1970) and the decisions in *Warth* and *EKWRO*, Justice was much more judicious in the use of that procedural defense.

Another case where I encountered problems with standing illustrates this latter point quite well. In *National Association of Neighborhood Health Centers v. Mathews*, D.D.C. 74-52, we had already won one cause of action on cross-motions for summary judgment (an impoundment issue), engaged for over a year in discovery, and filed a motion for summary judgment on the other issues, when *Warth v. Seldin* issued. The Justice Department opposed our motion for summary judgment on the merits and filed a motion to dismiss challenging plaintiffs' standing, an issue which it had not raised in the prior twenty months. Some twenty-two months after we initiated the case and expended the resources on discovery, the District Court summarily dismissed, citing *Warth v. Seldin*. Fortunately, we obtained summary reversal in the U.S. Court of Appeals for the District of Columbia, and won a significant portion of the case on the merits on remand. In a second appeal in which we challenged as inadequate the remedy and the merits were not in issue, we again confronted a challenge to our standing, this time with citation of *EKWRO*. The Court of Appeals reaffirmed its earlier finding of standing (see 551 F2D 321, 327-29). Our resources were thus, twice, subjected to challenges to our standing albeit the Justice Department did not consider the causation issue sufficiently viable to raise for 20 months, until after *Warth* issued, and the remedial issue sufficiently viable for 30 months until after *EKWRO* issued.

Further, in granting summary reversal for NANHC, our leading plaintiff organization, the Court of Appeals predicated standing upon findings that three

² The prior position of IRS was that charitable hospitals give free service within their financial ability; no one, including the plaintiffs in both cases, has ever suggested that such services be given without reasonable limitation.

³ We do not suggest that "zone of interests" be required, but only use it here because it does exist in *EKWRO* and *Lugo*.

particular members of that organization, whose interests had been most specifically detailed, would have increased opportunities to benefit from our interpretation of the law in question. Subsequently, these particular members did not in fact benefit, although other members of NANHC did benefit. But, ironically, another organization denied standing by the District Court, and for which we did not receive summary reversal (and thus, by agreement, dropped from the case so that we would not expend additional resources on continuing the regular appeal) did in fact benefit from our subsequent victory on the merits for NANHC. With due deference to Justice Powell, those events suggest that the difference between "speculation" and "probability" of future consequences is a matter of degree, separated by too fuzzy a line to pose as a legal standard.

Do the plaintiffs in these cases have the sufficient adverseness to satisfy the case and controversy requirements of the Constitution? Between 1970 and 1975 no one would have doubted it. I still believe that they do, but because of *Warth* and *EKWRO* Congress must remedy the denial of access to the Courts which these decisions present. S. 680 represents an affirmation of justice to persons in the position of these plaintiffs. On June 2, 1976, I called Eula Hall, the chairperson of the health committee for Eastern Kentucky Welfare Rights, to tell her that the Supreme Court concluded that EKWRO's members, denied admission to charitable hospitals, did not have standing to contest the action of IRS reinterpreting charitable adversely to the poor after 40 years. Mrs. Hall responded that she was not surprised, that she did not expect justice, but she felt sorry for me, not just because I had worked so hard on the case, but that I believed the system worked. S. 680 helps restore the faith that our system does indeed work.

PREPARED STATEMENT OF PROF. CHARLES ALAN WRIGHT,
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Members of the Committee, at your invitation, addressed to the Director of the Administrative Office of the United States Courts, I am submitting this statement in regard to S. 680, a bill to "strengthen the rights of citizens to sue in Federal courts for unlawful governmental action."

My statement is made on behalf of the Judicial Conference of the United States, which has assigned me to study this legislation in my capacity as a member of the Subcommittee on Federal Jurisdiction of its Committee on Court Administration. I serve on this subcommittee by appointment of the Chief Justice of the United States, in addition to my usual work as Professor of Law at the University of Texas Law School.

In 1979 you referred S. 680 to the Director of the Administrative Office with a request for the views of the Judicial Conference concerning it. This bill was subsequently considered by the Committee on Court Administration. At its September 19, 1979, meeting the Judicial Conference received the report of the Court Administration Committee and voted to inform the Congress as follows (see the Report of Judicial Conference Proceedings for 1979 at pages 70-71):

1. The Conference opposes enactment of S. 680 in its present form.
2. The Conference noted that there are questions as to the constitutionality of several provisions in the bill.
3. In any event, it is recommended that this bill be reconsidered in the light of several recent Supreme Court decisions, including *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), *Orr v. Orr*, 440 U.S. 268 (1979), and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).
4. The Conference believes that prudential standing rules should not be treated in an "omnibus" approach, as in S. 680, but instead particular problems should be addressed by amendment to the relevant statutes or by the incorporation of standing provisions in newly enacted substantive statutes.
5. The complete elimination of all prudential rules as to standing might require the courts to decide questions which could be decided more appropriately in a constitutional democracy by the national legislature.

EFFECTS OF S. 680 IN SUMMARY

This bill would for the first time enact a statute specifically addressing the concept of standing to bring a lawsuit. The doctrine of standing has until now been a matter wholly enunciated by the courts through decisionsal law.¹ The statutory approach of S. 680 is apparently intended to result in liberalizing the existing law on standing as interpreted by the Supreme Court. That its sponsors envision this result seems clear from their remarks upon the introduction of the bill in the Senate.²

The heart of this bill is found in its section 3, which would amend title 28 of the United States Code by redesignating present chapter 97 as chapter 99 and by adding a new chapter 97 with respect to standing to sue in the courts of the United States. This new chapter would consist of a single section, 28 U.S.C. § 1591, which would apply only to actions brought against the United States, a state or local governmental entity, the District of Columbia, or any officer or agency thereof, based wholly or partly upon an act or omission alleged to be in violation of the laws or Constitution of the United States. Section 1591 would provide as follows:

- (1) A court of the United States shall not dismiss such an action on the ground that the plaintiff lacks standing to sue because of any of the following theories:
 - (a) that the injury alleged is shared by all, or by a large class of persons; or
 - (b) that the defendant's conduct may not be the primary cause of the injury complained of; or

¹ Some of these decisions have construed statutes providing for judicial review of agency action, such as section 10 of the Administrative Procedure Act (5 U.S.C. § 702) and the various administrative agency enabling acts affording the courts specific subject-matter jurisdiction in this regard. See generally *Schiavo v. Helstoski*, 492 F.2d 413, 421-422 (3rd Cir. 1974). Other cases have interpreted statutes concerning a particular subject area as sources of standing to persons aggrieved in a manner found to be within the intended coverage of the statute, amounting to an injury sufficiently direct to create a case or controversy under Article III of the Constitution. E.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100-109 (1979).

² 125 Cong. Rec. S2821-2824 (daily ed. Mar. 15, 1979).

(c) that the injury alleged is not substantially likely to be remedied or prevented by a determination on the merits in the plaintiff's favor (if such determination may "contribute in significant part" to remedying or preventing such injury); or

(d) that the injury alleged is not "within the zone of interests to be protected or regulated by the applicable statute or constitutional provisions."

(2) This section does not address or apply to the standing of persons to sue as taxpayers or the standing of persons to challenge agency action which affects the liability or status of another under the revenue laws.

The doctrine of standing has classically been considered by the courts as a burden that must be overcome by the plaintiffs preliminarily to the resolution of the case on its merits. Where the plaintiffs' standing was denied by the defense in its answer to the complaint or via a motion to dismiss, or was raised by the court sua sponte, and the plaintiffs were unable to establish their standing to bring suit, the case could then be dismissed by the court in its preliminary stages and without the expenditure of vast judicial resources.³ If S. 680 were to become law, this preliminary resolution of the standing issue might require increased judicial scrutiny in the class of cases to which it would apply.

More fundamentally, however, the objections of the Judicial Conference to this legislation are based upon the view that it does not properly acknowledge the relationship between the so-called prudential aspects of standing and the constitutional requirement in Article III for the existence of a case or controversy as a prerequisite to judicial review and ruling. I will endeavor to show in this statement that the significant decisions of the Supreme Court in the standing area have in fact been compelled by the constitutional limitations upon justiciability. I believe it will also become manifest by this showing that the federal courts, in their interpretation of the "case or controversy" requirement, have been sensitive to the need for a judicial forum to litigate certain grievances that affect the population in general and might otherwise evade effective review. Thus this bill simply is not needed to provide access to the federal judicial process for parties who can demonstrate some personal injury and a stake in the outcome of a controversy stemming from a more generalized grievance. I respectfully suggest that it is preferable to allow the law of standing to continue to develop as a decisional doctrine without legislative intervention, in the absence of any overriding legislative purpose that is being demonstrably unmet at present.

THE JUDICIAL DOCTRINE OF STANDING

The doctrine of standing has been defined as one element of justiciability.⁴ As such, it has been recognized as having two distinct aspects. The first of these is, of course, constitutional.⁵ The second has been commonly described as the "prudential" aspect of standing, which consists of "discretionary doctrines aimed at prudently managing judicial review of the legality of public acts."⁶ The sponsors of S. 680 assert that this bill is intended to eliminate certain prudential doctrines of standing, which have been formulated in four decisions of the Supreme Court to be discussed in greater detail hereafter, without interfering with those aspects of the standing doctrine based directly upon constitutional requirements and thus capable of alteration only via constitutional amendment.⁷

I believe, however, that the changes that this bill would make in federal standing requirements may well be unconstitutional, entirely apart from the question whether it is wise to interfere with the courts' use of prudential standing doctrines. Indeed the distinction between the constitutional and prudential aspects of standing has never been well defined, and the Supreme Court has said that these prudential aspects are a "rule of self restraint" formulated by

³ See 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 3531 at 199-200 (1975). The complaint need only allege facts sufficient to provide standing under Article III, and such facts are, of course, open to contest at trial. See *Gladstone Realtors v. Village of Bellwood*, 41 U.S. 914, 115 (1979).

⁴ Id. at 221, and 230-233.

⁵ "Justiciability is the term of art employed to give expression to [the] dual limitation placed upon federal courts by the case and controversy doctrine," deriving from Art. III, sec. 2 of the Constitution as a limitation upon the federal judicial power. Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 92-82, 92nd Cong., 2d Sess. 633 (1972).

⁶ 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 3531 at 176 (1975).

⁷ See 125 Cong. Rec. at S2823 (remarks of Senator Kennedy).

the courts that is complementary to and not always clearly distinguished from the constitutional limitations of Article III. *Barrows v. Jackson*, 346 U.S. 249, 225 (1953).⁸ The Constitutional power of the Congress to alter the established requirements of standing was considered in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), wherein it was held that Congress may define standing as broadly as permitted by Article III of the Constitution.⁹ It is first necessary to consider the nature of the limits thus imposed upon the congressional power to alter standing requirements by legislation.

Standing is distinguishable from the overall concept of a court's jurisdiction because it focuses, not upon the issues that may be adjudicated, but upon the question of which parties may be permitted to raise such issues in court for judicial resolution.¹⁰ The requirement for standing to sue has been classically stated as the need for the plaintiff in a civil action to establish a prime facie case of injury to some form of legally protected right. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 23, 40-44 (1951). The Supreme Court held in this case that these organizations had standing to contest their designation by the Attorney General as Communist on a list of so-designated groups prepared and distributed by him under the authority of an executive order. The opinion of Mr. Justice Burton in announcing the Court's judgment stated:

"... The touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right." 351 U.S. at 140-41.

This constitutional requirement to show an injury or grievance in fact has been variously described in judicial decisions. One of the most common analyses speaks in terms of achieving the necessary adverseness between the parties and a stake in the outcome to ensure vigorous litigation and the resultant sharpening of the issues appropriate for judicial decision under the "case or controversy" requirement of Article III. Mr. Justice Frankfurter in a concurring opinion in the *Joint Anti-Fascist Refugee Committee* case, supra, wrote that "adverse personal interest" would ordinarily be "sufficient to meet constitutional standards of justiciability" in cases in which specific subject-matter jurisdiction is given to the courts by act of Congress. 341 U.S. at 151.

A relationship has also been recognized between the Article III requirement of a case or controversy as the predicate for judicial action and the guiding constitutional conception of a separation of governmental powers.¹¹ In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court summarized the "gist" of the various considerations and tests of standing as amounting to whether there is "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[.]" 369 U.S. at 204. In holding that voters have standing to challenge a state statute apportioning the legislature so as to afford representation to counties without regard to their proportion of the state's population, the Court recognized that the standing inquiry had frequently been extended by courts to a consideration of the merits in order to verify whether the particular plaintiffs had actually been injured by a deprivation of legal rights. It determined that no such preliminary inquiry as to the merits of the case is necessary, so long as the plaintiffs' allegations are such as to entitle them to any relief which might be granted by the court upon an eventual finding of legally cognizable injury. 369 U.S. at 208.

Subsequent to the decision in *Baker v. Carr*, a significant expansion has occurred in the constitutional basis for standing through a judicial extension of standing to organizations seeking to uphold the rights of their members and others¹² to vindicate interests not formerly recognized by the courts. This trend

⁸ *Accord, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80-81 (1978). *Cf. Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

⁹ *Accord, id.* at 100 and 109. In *Scenic Hudson Preservation Conf. v. Federal Power Comm.*, 354 F.2d 608 (2nd Cir. 1965), it was said that "a 'case' or 'controversy' which is otherwise lacking cannot be created by statute . . ."

¹⁰ *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

¹¹ *Id.* at 92, 96. The decision in the *Flast* case seems to conclude that the separation of powers is not the ultimate rationale for the standing doctrine. 392 U.S. at 100-101.

¹² In *Griswold v. Connecticut*, 381 U.S. 479 (1965), it was held that the Executive Director and Medical Director of the Planned Parenthood League of Connecticut, who had been convicted of violating a state criminal statute prohibiting assistance to married persons in obtaining contraceptive devices, had standing, in a suit to enjoin the enforcement of such statute, to raise the constitutional right to privacy of the married people whom they had counseled.

was presaged in respect to judicial review of administrative agency action by the decision of the Court of Appeals for the Second Circuit in *Scenic Hudson Preservation Conf. v. Federal Power Commission*, 354 F.2d 608 (2nd Cir. 1965), cert. denied, 384 U.S. 941 (1966), in which it was held that "(t)he 'case' or 'controversy' requirement of Article III, § 2 of the Constitution does not require that an 'aggrieved' or 'adversely affected' party have a personal economic interest." 354 F.2d at 615.¹³ The Supreme Court discussed the extension of standing to parties claiming injury of a noneconomic nature to interests which are widely shared in *Sierra Club v. Morton*, 405 U.S. 727 (1972). In denying standing to the Sierra Club in proceedings against Interior Department officials with respect to the use of a national park, Mr. Justice Stewart in a plurality opinion acknowledged the existence of a trend toward recognizing that injuries other than economic harm may form the basis for judicial review and that injuries which are widely shared are not necessarily insufficient for this purpose. This opinion further stated:

"... It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." 405 U.S. at 739.

This modern view of the constitutional requisites for standing to redress generalized noneconomic injuries affecting major segments of the public was applied by the Supreme Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), upholding the lower court's denial of an attack upon the standing of several environmental groups, including an unincorporated association of law students, to enjoin enforcement of Interstate Commerce Commission orders allowing railroad carriers to collect surcharges on freight rates. This decision distinguished the *Sierra Club* case on the ground that the Sierra Club had failed to allege that it or its members would actually be affected by the development of the national park which was sought to be enjoined. "Here, by contrast, the appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area." 412 U.S. at 687. The court strongly reiterated the conclusion that standing may not be denied simply because many people have suffered the same injury:

"... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." 412 U.S. at 688.

Nor was the Supreme Court deterred in the *SCRAP* case by the somewhat attenuated nature of the line of causation between the plaintiffs and the injury claimed as the basis for their standing to sue. It was contended that members of the plaintiff environmental groups would be affected in their enjoyment of natural resources in the Washington area because a general freight rate increase would allegedly cause increased use of nonrecyclable commodities requiring the increased consumption of natural resources, and the court agreed that such an injury could provide the basis for standing if these allegations could be proved.

Similarly in *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977), a state promotional agency was afforded standing to raise the interests of that state's apple growers in a lawsuit against another state challenging its regulation of the identification by grade of apples shipped into that state. This decision was premised on the basis that, although the agency was not a voluntary membership association such as the various environmental groups that have been granted standing to raise the legal rights of their members, it functioned as the representative of the growers in speaking for their industry and promoting their product. Further, the Commission's annual financial assessment of the growers could be adversely affected by a contraction in apple sales resulting from the operation of the statute in question.¹⁴

From this discussion the conclusion emerges that the constitutional requisites for standing to sue have been more freely interpreted by the Judiciary in recent years and that the courts have in fact already accommodated many of the concerns enumerated by the sponsors of S. 680. The courts have been opened to litigants seeking to redress injuries outside of the traditional categories and, under

¹³ Accord, *Office of Communication of the United Church of Christ v. Federal Communications Comm.*, 359 F.2d 994 (D.C. Cir. 1966), holding with respect to administrative proceedings that standing to intervene in FCC broadcast license renewal hearings is not limited to parties making the traditional showings of electrical interference or economic injury, but extends as well to responsible representatives of the listening public.

¹⁴ See also *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318, 320 n.3 (1977), and *Meek v. Pittenger*, 421 U.S. 349, 355 n.5 (1975).

certain circumstances, to vindicate the rights of others, so long as the plaintiff can show at least a minimal individual stake in the controversy and a substantial connection (apart from merely the context of the instant litigation) with the third parties who are sought to be represented. At the same time that they have been reinterpreting the constitutional contours of standing, however, certain court decisions have also engrafted upon them the so-called "prudential" limitations of the standing doctrine. These prudential aspects will be examined below in the context of analyzing section 3 of S. 680.

Parenthetically one further facet of the standing question should be mentioned under the heading of constitutional considerations. The standing of citizens to sue on the basis solely of their status as taxpayers raises some unique issues.¹⁵ This aspect of standing, however, need not be further considered in connection with S. 680. Proposed section 1591(2), which would be added to title 28 by section 3 of this bill, expressly disclaims any legislative intention to affect the standing of persons to sue as taxpayers or to challenge agency action which affects liability under the revenue laws.

ANALYSIS OF PROPOSED 28 U.S.C. SECTION 1591(1)

Section 3 of S. 680 would enact into law a new chapter of title 28 consisting of a single section on the subject of standing to sue in the courts of the United States. It will first be observed that this new section 1591 would apply only to lawsuits of a public nature in which the United States, a state or local governmental entity, or an officer or agency of the United States or of such an entity, is named as defendant in an action based in whole or in part upon an act or omission alleged to be in violation of the Constitution or laws of the United States. This limitation in the scope of the proposed statute on standing does not appear to be significant, inasmuch as substantial questions on the existence of standing to sue are unlikely to arise in any other context than this.¹⁶ In a wholly private action the question whether the plaintiff has standing to sue is typically subsumed in the determination of whether the court has subject-matter jurisdiction in the case. These facts were recognized by the Department of Justice in testimony upon a predecessor bill, S. 3005 in the 95th Congress.¹⁷

Proposed section 1591(1) (a) would preclude a federal court from dismissing an action within the above-described category of lawsuits on the ground that the plaintiff lacks standing because the injury that he alleges is shared by all or by a large class of persons. The introductory statement of Senator Howard Metzenbaum cites the case of *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), as a prudential canon of standing, fashioned by the courts, which would be annulled by this subsection of the proposed legislation. It was stated that the Supreme Court in this case took "the anomalous position of denying relief to a meritorious claim simply because the injury is shared by many Americans."¹⁸ In fact it has been shown in the foregoing discussion that the courts have become increasingly sensitive to the need for the redress of just such grievances, as enunciated by the Supreme Court in *United States v. SCRAP*, supra.

Further, a close reading of the *Schlesinger* case reveals what I respectfully submit is a basic misconception in Senator Metzenbaum's characterization. The holding in this case, that respondents lacked standing either as citizens or taxpayers to proceed against the Secretary of Defense for a court order to remove from the Armed Forces Reserve all members of Congress belonging thereto, was firmly based upon constitutional considerations of standing and was by no means merely a "prudential" decision. In writing for the Court, the Chief Justice of the United States focused, not upon the widespread effect of the alleged injury on

¹⁵ The traditional rule was that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. *Frothingham v. Mellon*, 262 U.S. 447 (1923). This rule was modified in *Flast v. Cohen*, 392 U.S. 83 (1968), in which it was held that a citizen qua taxpayer may constitutionally challenge government programs on this standing ground alone if he has a sufficient personal stake in the outcome of the case and there is a "logical nexus" between the status of taxpayer and the claim sought to be (1974).

¹⁶ See 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 3531 at 176 (1975), and Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 92-82, 92nd Cong., 2d Sess. 636 (1972).

¹⁷ Statement of Paul Nejelski, Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice, before the Senate Judiciary Subcommittee on Citizens and Shareholders' Rights and Remedies on August 16, 1978. In this testimony the Justice Department supported "the limited approach incorporated in S. 3005" as a method to improve citizen access to the courts. Hearing transcript at p. 19.

¹⁸ 125 Cong. Rec. at S2821 (daily ed. Mar. 15, 1979).

numerous persons, but rather upon the failure of the claimants to allege any injury sufficiently concrete to lay the basis for an adjudication under Article III. 418 U.S. at 217, 220.¹⁹ The constitutional basis for this holding is plain from the Chief Justice's conclusion:

"... In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a 'case or controversy' appropriate for judicial resolution." 418 U.S. at 227.

I would respond to Senator Metzenbaum's position by observing that the federal courts, as demonstrated above, have been willing to interpret the constitutional requirements of standing to offer a judicial forum for the redress of injuries having widespread effect, when such injuries are sufficiently defined and when those seeking to raise them can show a direct effect upon themselves from the matters to be litigated.²⁰ In *Craig v. Boren*, 429 U.S. 190 (1976), for example, the Supreme Court held that a licensed vendor of 3.2% beer had standing to contest, on equal protection grounds, the enforcement of a state statute prohibiting the sale of such beer to males under the age of 21 and to females under 18. Mr. Justice Brennan here concluded in his opinion for the Court that vendor had incurred "injury in fact" from the operation of the statute, sufficient to meet the constitutional requirements affording standing, because she would suffer direct economic injury to her business if she heeded the duties imposed by the statute or would be subject to legal sanctions if she failed to heed them. It was further held that the vendor, in exercising her standing to sue, could assert "those concomitant rights of third parties [i.e., males between the ages of 18 and 21] that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force. . . . Accordingly, vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." 429 U.S. at 195.²¹

Thus the concern that litigation of issues affecting the public at large is being foreclosed by the courts does not appear to be justified in fact. The trend of the case law indicates that the courts have granted standing to hear such cases on a generous basis, limited only by their perception of the constitutional limitations upon justiciability. As Mr. Justice Powell wrote in *Warth v. Seldin*, 4422 U.S. 490 (1975), "the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." (Emphasis supplied.)²² The premise upon which the sponsors of S. 680 have advocated the enactment of proposed 28 U.S.C. § 1591(1)(a) appears to be effectively rebutted by the following language of Mr. Chief Justice Burger writing for the Supreme Court:

"... Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, supra, at 227.

"It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately

¹⁹ Although this decision does refer to "the necessarily abstract nature of the injury all citizens share," it seems clear that the court did not view the injury as unsatisfactorily abstract merely because of its generalized effect but rather because of its lack of specificity. The quoted language seems to be intended only as an observation that grievances affecting the general public, rather than any identifiable individual or group, frequently tend to be too ill-defined to provide the concrete injury needed to afford a constitutional basis for standing.

²⁰ See *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and *Laird v. Tatum*, 408 U.S. 1, 13 (1972).

²¹ Accord, *Carey v. Population Services International*, 431 U.S. 678, 682-684 (1977), in which the Supreme Court recognized the standing of a mail-order retail seller of non-medical contraceptive devices to challenge the constitutionality of a state criminal law affecting the sale, distribution, and advertisement of contraceptives.

²² The fact that this position is firmly based upon constitutional considerations is emphasized by the sentence that follows: "Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this court has held that the plaintiff generally must assert his own legal rights and interests. . . ." 422 U.S. at 499.

to the political process. Any other conclusion would mean that the Founding Fathers intended to set up 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. . . . I lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. . . .

" . . . The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . or a 'particular, concrete injury,' . . . or a 'direct injury' . . . ; in short, something more than 'generalized grievances'" *United States v. Richardson*, 418 U.S. 166, 179-180 (1974).

Subsection (b) of proposed section 1591(1) would preclude a federal court from dismissing an action for lack of standing because the defendant's conduct that forms the basis for the complaint is not or may not be the primary cause of the injury complained of. Senator Metzenbaum's statement suggests that this version of S. 680 "would change the frequently criticized result" in the case of *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973). This Supreme Court decision held that the mother of an illegitimate child had no standing to enjoin the district attorney from failing to prosecute the child's father for non-support under a state statute imposing criminal penalties upon parents who fail to support their children.²³ This denial of standing was grounded upon the failure to make a sufficient showing of a "direct nexus between the vindication of [the appellant's] interest and the enforcement of the State's criminal laws." Great stress was laid upon the fact that this issue arose "in the unique context of a challenge to a criminal statute," and the Court seemed to view this aspect of standing to challenge the application of criminal laws as necessitating separate treatment and analysis in the same manner as taxpayer standing, citing *Flast v. Cohen*, 392 U.S. 83 (1968).

It seems apparent therefore that this case must be viewed as separate and distinct from the main line of standing cases because it involved a criminal statute. Thus the Supreme Court applied different treatment from other cases invoking more typical manifestations of the standing issue (which is preeminently a doctrine for civil application and thus foreign to the criminal law in most contexts). In explaining this case, I would elevate this consideration above the matter of injury causation upon which the sponsors of S. 680 have focused:

" . . . Standing was denied, with the surprising assertion that there was no adequate claim that the lack of support payments was a 'direct' injury resulting from failure to prosecute. More usefully, the Court said that a private citizen lacks a 'judicially cognizable interest' in the prosecution of another. This lack of judicial intervention seems well founded, not in the lack of direct interest, but in a host of special reasons surrounding criminal penalties." 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 5331 at 229 (1975).

The facet of injury causation is discussed in a single paragraph of the Court's opinion, which comments upon the lack of a showing that the appellant's failure to receive child support payments would actually be cured by the granting of the requested relief and the resulting enforcement of the criminal statute. It was noted that this would most likely result merely in the jailing of the father without effectively redressing the actual financial injury complained of. 410 U.S. at 618. While it was observed that the failure to make this showing casts doubt upon the directness of the injury alleged, the above statement does not appear to constitute the primary rationale for the Court's holding. It is doubtful that this portion of the opinion should even be characterized as a "prudential" rule of standing, as the bill implies. In any event, this subsection of S. 680 appears largely superfluous because its enactment would not necessarily have changed the outcome of *Linda R. S. v. Richard D.* or of other past or future suits. Even if the subsection were amended to address more directly the matter of standing to contest criminal law enforcement, this change might not result in any greater effect, since it could be argued that this principle of standing is not merely a prudential rule

²³ The state courts had construed this statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. The appellant claimed that this interpretation constituted a "discriminatory application" of the statute. 410 U.S. at 615.

and changeable by the Congress but rather is constitutionally based, in the sense that the challenger would not be able to demonstrate injury in fact to himself.²⁴

The third major subsection of proposed 28 U.S.C. § 1591(1) provides that a court shall not dismiss an action for lack of standing on the theory that the injury alleged is not "substantially likely" to be remedied or prevented by a determination on the merits in the plaintiff's favor, if such determination may "contribute in significant part" to such remedy or prevention. This part of the bill is closely related to the immediately preceding subsection, as the discussion in *Linda R. S. v. Richard D.* would suggest. It is not immediately clear from the language employed what distinction is intended or how the courts would differentiate between a determination that would be substantially likely to remedy the alleged injury and one that may contribute in significant part to such remedy. The decision that this portion of S. 680 seeks to reverse is *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), in which it was held that certain low-income individuals and organizations representing them were without standing to judicially challenge the charitable tax-exempt status of hospitals which refused to provide full service to indigent patients. In reaching this decision the Supreme Court inquired "whether any individual respondent has established an actual injury, or whether the respondent organizations have established actual injury to any of their indigent members." 426 U.S. at 40. It concluded,

"... A federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits." 426 U.S. at 46.

The Court further relied in this case upon its earlier decision in *Warth v. Seldin*, 422 U.S. 490 (1975), which clarifies that the denial of standing in these cases rested firmly upon constitutional requirements and not upon the invocation of any mere prudential rule. In the *Warth* case it was stated clearly that indirectness of injury does not in itself deprive anyone of standing to sue or of prospects for relief, thus contradicting the thesis of S. 680:

"... When a governmental prohibition or restriction imposed on one party causes specific harm to a third party ... the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. ... But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm." 422 U.S. at 505.

The existence of a constitutional basis for these holdings is made explicit in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), wherein Mr. Justice Powell observed as follows concerning the constitutional limitations upon legislative expansion of the standing doctrine:

"Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' *Warth v. Seldin*, *supra* at 501. In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself.' *ibid.*, that is likely to be redressed if the requested relief is granted. *Simon v. Eastern Kentucky Welfare Rights Org.*, *supra* at 38." 441 U.S. at 100.

Here again it is my view that this legislation has focused upon noncrucial language of various judicial decisions and has overlooked the constitutional requirements that have consistently controlled the actual holdings of the Supreme Court in resolving the issue of standing to sue. The view that litigants are not about to be barred from receiving their day in court on account of some technical inability to draw a connection between their injury and an under-inclusive statutory scheme is again supported by the recent decision in *Orr v. Orr*, 440 U.S. 268 (1979). The Supreme Court here found standing in a divorced man to contest an Alabama statute which provided that husbands, but not wives, may be required to pay alimony upon divorce, although the appellant had not himself sought alimony from his ex-wife and the striking down of the statute

²⁴ In *Simon v. Eastern Kentucky Welfare Rights Organization*, *infra*, the requirement to establish causation of the claimed injury by the challenged conduct of the defendant was imputed to the "case or controversy" limitation of Article III, thus explicitly placing it on a constitutional rather than prudential basis. 426 U.S. at 41. *Accord*, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-75 (1978).

would not necessarily afford relief from his own liability to pay alimony. Mr. Justice Brennan in this opinion noted:

"... In every equal protection attack upon a statute challenged as under-inclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties. ... In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia*, amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties. ... Because we have no way of knowing how the State will in fact respond, unless we are to hold that underinclusive statutes can never be challenged because *any* plaintiff's success can theoretically be thwarted, Mr. Orr must be held to have standing here." 440 U.S. at 272.

Subsection (d) of proposed section 1591(1), as set forth in S. 680, would seek to undo the supposed standing requirement that the plaintiff must allege an injury "within the zone of interests to be protected or regulated by the applicable statutes or constitutional provisions." In respect to this "zone of interests" concept, Senator Metzenbaum has cited *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In this case sellers of data processing services sought standing under the Administrative Procedures Act, 5 U.S.C. §702, to challenge a ruling of the Comptroller of the Currency that national banks might make data processing services available to other banks and to bank customers. Standing was granted on the ground that bank competitors had alleged economic injury from the challenged action and were arguably within the zone of interests intended to be protected by the Bank Service Corporation Act of 1962. It should be emphasized that the Supreme Court was here construing statutes specifically addressing the regulation of banks and the review of administrative agency action, in contrast to the situation where standing is sought to litigate a constitutional or legal claim arising outside of a specific statutory scheme of economic regulation.

While Mr. Justice Douglas acknowledged in the Court's opinion that problems of standing, apart from Article III questions and as resolved by the Court "for its own governance, have involved a 'rule of self-restraint,'" (397 U.S. at 154), it is apparent that this decision was fundamentally based upon the constitutional criterion of a showing of economic injury.²⁵ Indeed the "zone of interests" test formulated here might be viewed as simply an alternative expression (appropriate only in cases where the right to judicial review is grounded on a specific statutory provision) referring to that basic tether between the injury alleged and the remedy invoked, which has traditionally been considered essential to produce an Article III "case" or "controversy" rather than an academic exercise.²⁶ It has been observed that the actual application of this formula "will allow standing to all but the most implausible assertions of interest."²⁷ Even the sponsors of S. 680 admit that the Supreme Court has never applied the "zone of interests" test to deny standing to a plaintiff and that the lower courts have rarely done so.²⁸

Senator Metzenbaum contends that the "zone of interests" test has been widely criticized as causing "undue confusion and unnecessary expenditure of judicial time." This statement appears to be contradicted, however, by the fact that the doctrine has very rarely been found to require a denial of standing and does not appear to be a substantial component of the standing doctrine, as compared with the more direct and better defined constitutional requirements governing this issue. In any event, it appears that the enactment of subsection (d) would have little practical effect, since it would be expected to alter the result in virtually no cases and would "repeal" a judicial formulation which has been useful perhaps primarily as a descriptive and explanatory device for more substantial components of the standing doctrine.

²⁵ In two footnotes to subsequent decisions, Mr. Chief Justice Burger noted the primary of this showing and emphasized that standing in this case arose under a specific statute. *United States v. Richardson*, 418 U.S. 166, 176 n. 9 and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 n. 16.

²⁶ See 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 3531 at 203 (1975).

²⁷ *Id.*

²⁸ 125 Cong. Rec. at S 2822 (daily ed Mar. 15, 1979). E.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111-115 (1979), and *Tax Analysts and Advocates v. Blumenthal*, 566 F. 2d 130 (D.C. Cir. 1977), *cert denied*, 434 U.S. 1086.

CONCLUSION

Although it has been said that the issue of standing is surrounded by "complexities and vagaries" and is "one of the most amorphous [concepts] in the entire domain of public law,"²⁰ the Judicial Conference does not believe that the legislation currently being considered on this subject would do anything to improve the present situation. I have attempted to demonstrate my belief that the so-called "prudential" aspects of standing that S. 680 attempts to address are for the most part either derivations or reformulations of ultimately unbending Article III concepts. Any substantial attempt by the Congress to alter such concepts would fail as an effort to legislatively amend the Constitution without the proper resort to the amending process.

While portions of S. 680 may indeed be unconstitutional, its constitutionality in the event of enactment is, as a practical matter, quite unlikely to be tested. Judges would probably respond merely by avoiding any mention of the more policy-oriented and prudential facets of the judicial standing formulation. For this reason the sponsors' vision of resultant increasing litigation in the areas of public policy is not likely actually to be realized, although the enactment of this bill might, I suppose, offer some psychological impetus for the increased filing of these sorts of cases by citizens.

Indeed the Supreme Court has most recently deemphasized these prudential doctrines of standing and has declined to apply them outside of the special context of taxpayer suits. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), Mr. Chief Justice Burger wrote that the Supreme Court "cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate anything more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III." Apart from situations where rights of third parties are implicated, this opinion concluded that "the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met." 438 U.S. at 79-81.

Thank you for offering me the opportunity to submit the foregoing statement in support of the Judicial Conference position opposing the enactment of S. 680. I shall be pleased to offer any additional assistance which might be desired by the Judiciary Committee in its consideration of this legislation.

²⁰ *Flast v. Cohen*, 392 U.S. 83, 98-99 (1968).

Additional Submissions of Senator Metzenbaum

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1601

Cite as 99 S.Ct. 1601 (1979)

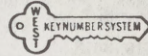
and of his profound influence in the impartation of our society's values. Are the attributes of an attorney any the less? He represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. He is responsible for strict adherence to the announced and implied standards of professional conduct, to the requirements of evolving ethical codes, and for honesty and integrity in his professional and personal life. Despite the almost continuous criticism leveled at the legal profession, he, too, is an influence in legislation, in the community, and in the role model figure that the professional person enjoys.⁸ The Court specifically recognized this in *In re Griffiths*:

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country." 413 U.S., at 729, 93 S.Ct., at 2858.⁹

If an attorney has a constitutional right to take a bar examination and practice law, despite his being a resident alien, it is impossible for me to see why a resident alien, otherwise completely competent and qualified, as these appellees concededly are, is constitutionally disqualified from teaching in the public schools of the great State of New York. The District Court expressed it well and forcefully when it observed that New York's exclusion "seems repugnant to the very heritage the State is seeking to

inculcate." 417 F.Supp. 913, 922 (SDNY 1976).

I respectfully dissent.



GLADSTONE, REALTORS, et al., Petitioners,

v.

VILLAGE OF BELLWOOD et al.

No. 77-1493.

Argued Nov. 29, 1978.

Decided April 17, 1979.

Actions by area residents and a village charged real estate brokers and sales personnel with "steering" prospective home buyers to different residential areas according to race, in violation of the Fair Housing Act and Civil Rights Act of 1966. A summary judgment of dismissal was affirmed in part and reversed in part, and remanded, by the Court of Appeals, Seventh Circuit, 569 F.2d 1013. On writ of certiorari, the Supreme Court, Mr. Justice Powell, held that: (1) standing under the Fair Housing Act section providing for enforcement, by civil actions in United States district court, of rights granted by specified sections of the Act is as broad as is permitted by the

1961); J. Rogers, *The Lawyer in American Public Life*, in *Morrison Foundation Lectures* 40, 61 (1940).

9. In order to keep attorneys on the nongovernmental side of the classification line, the Court continued:

"Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy." 413 U.S., at 719, 93 S.Ct., at 2858.

8. See also *Stockton v. Ford*, 11 How. 232, 247, 13 L.Ed. 676 (1851); *Hickman v. Taylor*, 329 U.S. 495, 514-515, 67 S.Ct. 385, 395, 91 L.Ed. 451 (1947) (concurring opinion); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247, 77 S.Ct. 752, 760, 1 L.Ed.2d 796 (1957) (concurring opinion); *In re Sawyer*, 360 U.S. 622, 668, 79 S.Ct. 1376, 1399, 3 L.Ed.2d 1473 (1959) (dissenting opinion); J. Story, *Miscellaneous Writings, Value and Importance of Legal Studies*, 503-549 (W. Story ed., 1972); H. Stone, *The Public Influence of the Bar*, 48 *Harv.L.Rev.* 1 (1934); W. Brennan, Jr., *The Responsibilities of the Legal Profession* (1967); A. de Tocqueville, *Democracy in America* 321-331 (Schocken ed.

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1603

Cite as 99 S.Ct. 1601 (1979)

§§ 3604, 3610, 3610(c, d), 3612; Civil Rights Act of 1964, §§ 706 et seq., 706(b), (f)(1, 2) as amended 42 U.S.C.A. §§ 2000e-5 et seq., 2000e-5(c), 2000e-5(f)(1, 2).

7. Statutes ⇐219(1)

Agency's interpretation of statute ordinarily commands considerable deference. Civil Rights Act of 1968, §§ 810, 812, 42 U.S.C.A. §§ 3610, 3612.

8. Civil Rights ⇐13.6

Standing under Fair Housing Act section providing for enforcement, by civil actions in United States district court, of rights granted by specified sections of Act is, like standing under Fair Housing Act section providing for aggrieved person's enforcement of rights granted by Fair Housing Act provisions generally, as broad as is permitted by judicial article of the Constitution. Civil Rights Act of 1968, §§ 810, 812, 42 U.S.C.A. §§ 3610, 3612; U.S.C.A. Const. art. 3, § 1 et seq.

9. Federal Courts ⇐460

In resolving issue of standing, Supreme Court would, as did courts below and parties themselves, accept as true all material allegations of complaint and facts contained in discovery materials, and would construe complaint in favor of complaining party.

10. Civil Rights ⇐13.6

Upon allegations that sales practices of real estate brokerage firms and employees had actually begun to rob village of its racial balance and stability, village had standing to challenge legality of such conduct under Fair Housing Act. Civil Rights Act of 1968, §§ 801 et seq., 810, 812, 42 U.S.C.A. §§ 3601 et seq., 3610, 3612; U.S.C.A. Const. art. 3, § 1 et seq.

11. Civil Rights ⇐13.12(3)

Complaint alleging only that violations of Fair Housing Act caused harm to particular area and its residents showed no standing on part of individual plaintiffs who resided elsewhere. Civil Rights Act of

1968, §§ 810, 812, 42 U.S.C.A. §§ 3610, 3612; U.S.C.A. Const. art. 3, § 1 et seq.

12. Civil Rights ⇐13.12(3)

Complaint alleging that Fair Housing Act violations by real estate brokerage firms and employees were depriving plaintiff residents of village of "social and professional benefits of living in an integrated society" although complaint defined community in terms of city blocks in suburban neighborhood rather than apartment buildings, was sufficient allegation, of injury to plaintiff individual residents of the described area, to confer standing, subject to requirements of proof of "distinct and palpable injury", to which nature and extent of business of the real estate brokers would be relevant. Civil Rights Act of 1968, §§ 810, 812, 42 U.S.C.A. §§ 3610, 3612; U.S.C.A. Const. art. 3, § 1 et seq.

13. Federal Civil Procedure ⇐103

Standing is generally matter dealt with at earliest stages of litigation, usually on pleadings, but it sometimes remains to be seen whether factual allegations of complaint necessary for standing will be supported adequately by evidence adduced at trial. U.S.C.A. Const. art. 3, § 1 et seq.

Syllabus *

Section 812 of the Fair Housing Act of 1968 (Act) provides that the rights granted by § 804 against racial discrimination in the sales or rental of housing "may be enforced by civil actions in appropriate United States district courts." Respondents (the village of Bellwood, one Negro and four white residents of Bellwood, and one Negro resident of a neighboring municipality) brought separate actions in District Court under § 812 against petitioners (two real estate brokerage firms and certain of their employees) alleging that they had violated § 804 by "steering" prospective Negro homeowners toward a specified 12- by 13-block integrated area ("target" area) of Bellwood and by

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

judicial article of the Constitution; (2) upon allegations that such realty sales practices had actually begun to rob the village of its racial balance and stability, the village had standing to challenge legality of such conduct under the Act; (3) complaint alleging that violations of the Act caused harm to particular area and its residents showed no standing on part of individual plaintiffs who resided elsewhere, and (4) complaint alleging that violations by real estate brokerage firms and employees were depriving plaintiff residents of village of "social and professional benefits of living in an integrated society" was sufficient allegation of injury to plaintiff individual residents of the described area, to confer standing, subject to requirements of proof.

Affirmed, subject to exception.

Mr. Justice Rehnquist dissented and filed opinion in which Mr. Justice Stewart joined.

1. Federal Civil Procedure ⇐103

Constitutional limits on standing eliminate claims in which plaintiff has failed to make out case or controversy between himself and defendant, and, in order to satisfy judicial article of Constitution, plaintiff must show that he personally suffered some actual or threatened injury as result of putatively illegal conduct of defendant. U.S.C.A.Const. art. 3, § 1 et seq.

2. Federal Civil Procedure ⇐103

Even when case falls within constitutional boundaries, plaintiff may still lack standing under prudential principles by which judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated, and to limit access to federal courts to those litigants best suited to certain particular claim, and, e. g., litigant normally must assert injury peculiar to himself or to distinct group of which he is part, rather than one shared in substantially equal measure by all or large class of citizens, and plaintiff must also assert his own legal interests rather than those of third parties. U.S.C.A. Const. art. 3, § 1 et seq.

3. Federal Civil Procedure ⇐103

Congress by legislation may expand standing to full extent permitted by judicial article of Constitution, thus permitting litigation by one who otherwise would be barred by prudential standing rules, but in no event may Congress abrogate judicial article minima, and plaintiff must always have suffered distinct and palpable injury to himself that is likely to be redressed if requested relief is granted. U.S.C.A.Const. art. 3, § 1 et seq.

4. Civil Rights ⇐13.6

That plaintiffs themselves had not been granted substantive rights by Fair Housing Act section did not determine whether they could sue to enforce rights granted to others by such section. Civil Rights Act of 1968, §§ 804, 812, 42 U.S.C.A. §§ 3604, 3612; 42 U.S.C.A. § 1982.

5. Civil Rights ⇐13.9

Fair Housing Act section providing for enforcement, by "person aggrieved," in federal district court, of rights granted is not structured to keep complaints brought under it from reaching federal courts, or even to assure that administrative process runs its full course, though such section does appear to restrict access to federal courts in one respect not paralleled by section providing for civil actions for enforcement of certain provisions, in that, to extent state or local remedies prove adequate, complainant under first-mentioned section is required to pursue them. Civil Rights Act of 1968, §§ 801 et seq., 810, 812, 42 U.S.C.A. §§ 3601 et seq., 3610, 3612.

6. Civil Rights ⇐13.9

Fair Housing Act section providing for enforcement, by "person aggrieved," in federal district court, of rights granted, unlike section providing remedy for violation of equal employment opportunity provisions, does not provide effective administrative buffer between federal courts and individual complainants. Civil Rights Act of 1968, §§ 804, 810, 810(c, d), 812, 42 U.S.C.A.

steering white customers away from the "target" area. It was further alleged that Bellwood had been injured by having its housing market wrongfully manipulated to the economic and social detriment of its citizens and that the individual respondents had been denied their right to select housing without regard to race and had been deprived of the social and professional benefits of living in an integrated society. Monetary, injunctive, and declaratory relief was sought. Prior to bringing suit, the individual respondents, purportedly but not in fact seeking to purchase homes, had acted as "testers" in an attempt to determine whether petitioners were engaged in racial steering. Four of the six individual respondents reside in the "target" area. The District Court granted summary judgment for the petitioners in both cases, holding that respondents, who had acted only as testers and thus were at most indirect victims of the alleged violations, lacked standing to sue under § 812, which was limited to actions by "direct victims" of violations. The Court of Appeals reversed and remanded, holding that although the individual respondents lacked standing in their capacity as testers, they were entitled to prove that the discriminatory practices documented by their testing deprived them, as residents of the adversely affected area, of the social and professional benefits of living in an integrated society; that the requirements of Art. III had been satisfied as to both the individual respondents and respondent village; that § 810 of the Act—which provides that a "person aggrieved" by a violation of the Act may seek conciliation from the Secretary of Housing and Urban Development (HUD) and if conciliation fails bring suit in district court—and § 812 provide alternative remedies available to precisely the same class of plaintiffs; and that the conclusion in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 366, 34 L.Ed.2d 415, that standing under § 810 extends "as broadly as is permitted by Article III," is applicable to cases brought under § 812. *Held*:

1. The Court of Appeals correctly interpreted §§ 810 and 812 as providing alternative remedies to precisely the same class of plaintiffs, with the result that standing under § 812, like that under § 810, is as broad as is permitted by Art. III. *Trafficante, supra*. This construction of the Act is consistent with both its language and its legislative history and with the interpretation of HUD, the agency primarily assigned to implement and administer the Act. Pp. 1608–1613.

2. The facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing to respondents under Art. III, except with respect to the two individual respondents who do not reside within the "target" area, and thus summary judgments for petitioners should not have been entered. Pp. 1613–1616.

(a) If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct. Pp. 1613–1614.

(b) The allegation that the "target" area is losing its integrated character because of petitioners' conduct is sufficient to satisfy Art. III with respect to the individual respondents who reside in that area. The constitutional limits of these respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than, as in *Trafficante, supra*, by reference to apartment buildings, but rather are determined by the presence or absence of a "distinct and palpable injury" to respondents. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343. Moreover, to the extent that the complaints allege economic injury to these respondents resulting from a diminution in the value of their homes due to petitioners' conduct, convincing evidence of such a decrease in value would be sufficient under Art. III to allow standing to contest the legality of that conduct. Pp. 1614–1616.

569 F.2d 1013, affirmed in part.

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1605

Cite as 99 S.Ct. 1601 (1979)

Jonathan T. Howe, Chicago, Ill., for petitioners.

F. Willis Caruso, Chicago, Ill., for respondents.

Lawrence G. Wallace, Washington, D. C., for United States, as amicus curiae, by special leave of Court.

Mr. Justice POWELL delivered the opinion of the Court.

Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U.S.C. § 3601 *et seq.*, commonly known as the Fair Housing Act of 1968 (Act), broadly prohibits discrimination in housing throughout the Nation. This case presents both statutory and constitutional questions concerning standing to sue under Title VIII.

I

Petitioners in this case are two real estate brokerage firms, Gladstone, Realtors (Gladstone) and Robert A. Hintze, Realtors (Hintze), and nine of their employees. Respondents are the Village of Bellwood, a municipal corporation and suburb of Chicago, one Negro and four white residents of Bellwood, and one Negro resident of neighboring Maywood. During the Fall of 1975,

the individual respondents and other persons consulted petitioners, stating that they were interested in purchasing homes in the general suburban area of which Bellwood is a part. Respondents were not in fact seeking to purchase homes, but were acting as "testers" in an attempt to determine whether petitioners were engaging in racial "steering," i. e., directing prospective home buyers interested in equivalent properties to different areas according to their race.

In October 1975, respondents commenced an action under § 812 of the Act, 42 U.S.C. § 3612,¹ against Gladstone and its employees in the District Court for the Northern District of Illinois, alleging that they had violated § 804 of Title VIII, 42 U.S.C. § 3604.² Simultaneously, respondents filed a virtually identical complaint against Hintze and its salespeople in the same court. The complaints, as illuminated by subsequent discovery, charged that petitioners had steered prospective Negro home buyers toward an integrated area of Bellwood approximately 12 by 13 blocks in dimension and away from other, predominantly white areas. White customers, by contrast, allegedly were steered away from the integrated area of Bellwood. Four of the six individual respondents reside in this "target" area of Bellwood described in the

1. Section 812 provides in part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State and local courts of general jurisdiction."

2. Section 804 provides:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

"(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

"(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

"(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin."

Respondents also claimed that petitioners had violated 42 U.S.C. § 1982.

complaint.³ The complaints further alleged that the "Village of Bellwood"] has been injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village," and that the individual respondents "have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society." App. 6, 99. Respondents requested monetary, injunctive, and declaratory relief.

Petitioners moved for summary judgment in both cases, arguing that respondents had "no actionable claim or standing to sue" under the statutes relied upon in the complaint, that there existed "no case or controversy between the parties within the meaning of Article III of the Constitution," and that respondents failed to satisfy the prudential requirements for standing applicable in the federal courts. App. 78, 143.

3. Respondent Perry is a resident of Bellwood, but lives outside the area allegedly affected by petitioners' steering practices. Respondent Sharp lives in Maywood. These respondents are Negroes.

4. Section 810 provides in part:

"(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary [of HUD]. . . . Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion.

"(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such

The District Judge presiding over the case against Gladstone and its employees decided that respondents were not within the class of persons to whom Congress had extended the right to sue under § 812. The court expressly adopted the reasoning of *TOPIC v. Circle Realty*, 532 F.2d 1273 (CA9 1976), a case involving facts similar to those here. In *TOPIC* the Ninth Circuit decided that Congress intended to limit actions under § 812 of the Act to "direct victims" of Title VIII violations, even though under *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), standing under § 810⁴ of the Act extends to the broadest class of plaintiffs permitted by Art. III. Since the individual respondents had been acting only as testers and thus admittedly had not been steered away from any homes they might have wished to purchase, the court concluded that they were, at most, only indirect victims of Gladstone's alleged violations of the

complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

"(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject matter of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title.

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1607

Cite as 99 S.Ct. 1601 (1979)

Act. As respondents' action was brought under § 812, the court ruled that they lacked standing under the terms of the Act. The court did not discuss Gladstone's contention that respondents lacked standing under Art. III and the prudential limitations on federal jurisdiction. The District Judge presiding over the case against Hintze adopted the opinion of the Gladstone court as his own and also granted summary judgment.

The Court of Appeals for the Seventh Circuit consolidated the cases for appellate review. It first considered the significance of the fact that the individual respondents were merely testers not genuinely interested in purchasing homes. The court noted that while this precluded respondents from arguing that they had been denied their right to select housing without regard to race, "the testers did . . . generate evidence suggesting the perfectly permissible inference that [petitioners] have been engaging, as the complaints allege, in the practice of racial steering with all of the buyer prospects who come through their doors." 569 F.2d 1013, 1016 (1978) (emphasis in original). Thus, although the individual respondents lacked standing in their capacity as testers, they were entitled to prove that the discriminatory practices documented by their testing deprived them, as residents of the adversely affected area, "of the social and professional benefits of living in an integrated society."

The Court of Appeals then turned to the question whether the Art. III minima for standing had been satisfied. Observing the similarity between the allegations of injury here and those accepted as constitutionally sufficient in *Trafficante*, it concluded that the individual respondents had presented a case or controversy within the meaning of Art. III. The court also read the complaints as alleging economic injury to the Village itself as a consequence of the claimed racial segregation of a portion of

Bellwood. Although this aspect of the case was not directly controlled by *Trafficante*, the court found that the requirements of Art. III had been satisfied.⁵

Having concluded that a case or controversy within the meaning of Art. III was before it, the Court of Appeals addressed the District Court's ruling that § 812 of the Act, unlike § 810, affords standing only to those directly injured by the discriminatory acts challenged. After considering the legislative history and recent federal court decisions construing these provisions, the court concluded, contrary to the decision in *TOPIC v. Circle Realty*, *supra*, that §§ 810 and 812 provide alternative remedies available to precisely the same class of plaintiffs. The conclusion of this Court in *Trafficante* that standing under § 810 extends "as broadly as is permitted by Article III of the Constitution," 409 U.S., at 209, 93 S.Ct., at 367, quoting *Hackett v. McGuire Bros. Inc.*, 445 F.2d 442, 446 (CA3 1971), was seen as applicable to these cases brought under § 812. The Court of Appeals reversed the judgments of the District Court and remanded for further proceedings.

Petitioners sought review in this Court. We granted certiorari to resolve the conflict between the decision of the Court of Appeals in this case and that of the Ninth Circuit in *TOPIC*, and to consider the important questions of standing raised under Title VIII of the Civil Rights Act of 1968. 436 U.S. 956, 98 S.Ct. 3068, 57 L.Ed.2d 1120 (1978). With the limitation noted below, n. 25, *infra*, we now affirm.

II

In recent decisions we have considered in some detail the doctrine of standing in the federal courts. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential

5. The Court of Appeals agreed with the District Court that the Leadership Council for Metropolitan Open Communities, also a plaintiff in

the two actions in the District Court lacked standing. 569 F.2d 1013, 1017 (1978). That ruling has not been challenged in this Court.

limitations on its exercise. . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

[1] The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 71, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260–261, 97 S.Ct. 555, 560–561, 50 L.Ed.2d 450 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); *Warth v. Seldin*, supra, 422 U.S., at 499, 95 S.Ct., at 2205; *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Otherwise, the exercise of federal jurisdiction “would be gratuitous and thus inconsistent with the Art. III limitation.” *Simon v. Eastern Kentucky Welfare Rights Org.*, supra, 426 U.S., at 38, 96 S.Ct., at 1924.

[2] Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one “shared in substantially equal measure by

all or a large class of citizens.” *Warth v. Seldin*, supra, 422 U.S. at 499, 95 S.Ct. at 2205. He also must assert his own legal interests rather than those of third parties.⁶ *Ibid.* Accord, *Arlington Heights v. Metropolitan Housing Development Corp.*, supra, 429 U.S., at 263, 97 S.Ct., at 561.

[3] Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one “who otherwise would be barred by the prudential standing rules.” *Warth v. Seldin*, supra, 422 U.S., at 501, 95 S.Ct., at 2206. In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered “a distinct and palpable injury to himself,” *ibid.*, that is likely to be redressed if the requested relief is granted. *Simon v. Eastern Kentucky Welfare Rights Org.*, supra, 426 U.S., at 38, 96 S.Ct., at 1924.

III

Petitioners have insisted throughout this litigation that respondents lack standing under the terms of the Act. Their argument, which was accepted by the District Court, is that while § 810 provides standing to the fullest extent permitted by Art. III, see *Trafficante v. Metropolitan Life Insurance Co.*, supra, 409 U.S., at 209, 93 S.Ct., at 366, § 812, under which respondents proceed, affords standing only to “direct victims” of the conduct proscribed by Title VIII. Respondents, on the other hand, argue that the Court of Appeals correctly concluded that §§ 810 and 812 are alternative remedies available to precisely the same class of plaintiffs. The issue is a critical one, for if the District Court correctly understood and applied § 812, we do not reach the question whether the minimum requirements of Art. III have been satisfied. If the Court of Appeals is cor-

6. There are other nonconstitutional limitations on standing to be applied in appropriate circumstances. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n. 19, 96 S.Ct. 1917, 1925 n. 19, 48 L.Ed.2d 450 (1976) (“the interest of the plaintiff, regardless

of its nature in the absolute, [must] at least be ‘arguably within the zone of interests to be protected or regulated’ by the statutory framework within which his claim arises.” Quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1969)).

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1609

Cite as 99 S.Ct. 1601 (1979)

rect, however, then the constitutional question is squarely presented.⁷

Petitioners' argument centers on two points. First, § 810 uses the term "person aggrieved," defined as "[a]ny person who claims to have been injured by a discriminatory housing practice," to describe those who may seek relief under that section. By contrast, § 812 lacks this broad definition of potential plaintiffs, referring explicitly only to civil suits brought to enforce the rights granted elsewhere in the Act. Second, under § 810 a plaintiff must first seek informal conciliation of housing discrimination disputes from the Department of Housing and Urban Development (HUD) and appropriate state agencies before pursuing a judicial remedy. See n. 4, *supra*. But under § 812 a complainant may proceed directly to federal court.

From these facts, petitioners infer a congressional plan to create two distinct, though overlapping, remedial avenues under Title VIII. Under § 810, they argue, Congress intended to reach *all* victims—both direct and indirect—of housing discrimination by referring generally to those "aggrieved." But in order to protect the courts from the volume of litigation such plaintiffs might generate, to make available the administrative expertise of state and federal agencies, and to involve state and local governments in national fair housing goals, Congress interposed administrative remedies as a prerequisite to the invocation of the federal judicial power by "indirect victims" of Title VIII violations.

Since § 812 does not specifically refer to "persons aggrieved" and allows direct access to the courts by those invoking it, petitioners argue that Congress must have intended this provision to be available only

to those most in need of a quick, authoritative solution: those directly victimized by a wrongful refusal to rent or sell a dwelling place or by some other violation of the Act. The construction of § 812 accepted by the Court of Appeals, they contend, is illogical because it would permit a plaintiff simply to ignore, at his option, the scheme of administrative remedies set up in § 810. Thus, according to petitioners, "direct victims" may proceed under either § 810 or § 812, while those injured only indirectly by housing discrimination may proceed, if at all, under the former provision alone.

[4] Finally, petitioners claim that the legislative history of the Act supports their view. That history reflects that Congress was concerned that Title VIII not be used as an instrument of harassment.⁸ Petitioners contend that permitting individuals such as respondents, who have not been harmed directly by petitioners' alleged conduct, to invoke § 812 provides substantial opportunity for abuse of that kind.

We find this construction of Title VIII to be inconsistent with the statute's terms and its legislative history. Nothing in the language of § 812 suggests that it contemplates a more restricted class of plaintiffs than does § 810. The operative language of § 812 is phrased in the passive voice—"[t]he rights granted by [§ 804] may be enforced by civil actions in appropriate United States district courts"—simply avoiding the need for a direct reference to the potential plaintiff. The absence of "person aggrieved" in § 812, therefore, does not indicate that standing is more limited under that provision than under § 810. To the contrary, § 812 on its face contains no particular

7. It is not clear whether our opinion in *Trafficante* was intended to construe § 812 as well as § 810. Although certain intervening plaintiffs in that case asserted standing under § 812, but not § 810, see *Trafficante v. Metropolitan Life Ins. Co.*, 322 F.Supp. 352, 353 (N.D.Cal.), *aff'd*, 446 F.2d 1158, 1161 n. 5 (CA9 1971), and the Court failed to disclaim a decision on the former provision, the opinion focuses exclusively on § 810. Rather than attempt to reconstruct

whatever understanding of the relationship between §§ 810 and 812 might have been implicit in *Trafficante*, we consider the merits of this important statutory question directly.

8. This concern was expressed clearly in connection with an amendment to § 804 proposed by Senator Allott. See 114 Cong.Rec. 5515 (1968).

statutory restrictions on potential plaintiffs.⁹

[5, 6] Contrary to petitioners' contention, § 810 is not structured to keep complaints brought under it from reaching the federal courts, or even to assure that the administrative process runs its full course. Section 810(d) appears to give a complainant the right to commence an action in federal court whether or not the Secretary of HUD completes or chooses to pursue conciliation efforts.¹⁰ Thus, a complainant

under § 810 may resort to federal court merely because he is dissatisfied with the results or delays of the conciliatory efforts of HUD.¹¹ The most plausible inference to be drawn from Title VIII is that Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail.¹²

9. Both petitioners and the dissenting opinion, *post*, at 1620, emphasize the language of § 812 that "[t]he rights granted by section [n] 804 . . . may be enforced by civil actions . . ." See n. 1, *supra*. They argue that since § 804 on its face grants no right to have one's community protected from the harms of racial segregation, respondents have no substantive rights to enforce under § 812.

That respondents themselves are not granted substantive rights by § 804, however, hardly determines whether they may sue to enforce the § 804 rights of others. See p. 1608, *supra*. If, as is demonstrated in the text, Congress intended standing under § 812 to extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm under § 812.

10. The lower federal courts are divided over the question whether a Title VIII complainant who has enlisted the aid of HUD under § 810 must commence the civil action referred to in § 810(d) no later than 60 days after the filing of his administrative complaint, even if HUD has not completed its conciliatory efforts by that time. Several courts believe the plain language of § 810(d), see n. 4, *supra*, requires this result. *Green v. Ten Eyck*, 572 F.2d 1233, 1240-1243 (CA8 1978); *Tatum v. Myrick*, 425 F.Supp. 809, 810-812 (M.D.Fla.1977); *Sumlin v. Brown*, 420 F.Supp. 78, 80-82 (N.D.Fla.1976); *Brown v. Blake & Bane Inc.*, 402 F.Supp. 621, 622 (E.D. Va.1975); *Young v. AAA Realty Co.*, 350 F.Supp. 1382, 1385-1387 (M.D.N.C.1972). Others, following HUD's interpretation of § 810(d), see 24 CFR §§ 105.16(a), 105.34, believe that the only time limitation on one who has properly complained to HUD is that a civil action be commenced within 30 days of notice of HUD's failure to negotiate a settlement. *Logan v.*

Richard E. Carmack & Assoc., 368 F.Supp. 121, 122-123 (E.D.Tenn.1973); *Brown v. Ballas*, 331 F.Supp. 1033, 1036 (N.D.Tex.1971). This case does not require us to resolve this conflict, and we express no views on it. But regardless of which position is correct, it is clear that § 810 does not serve as a screening mechanism to deflect certain classes of Title VIII grievances from the federal courts.

11. Section 810 does appear to restrict access to the federal courts in one respect not paralleled by § 812. To the extent state or local remedies prove adequate, a complainant under § 810 is required to pursue them. Thus, under § 810(c), the Secretary of HUD must suspend his conciliation efforts if local remedies providing protection equivalent to that of Title VIII are being carried forward by the appropriate public officials. Such deferral by the Secretary apparently delays the availability of judicial review under § 810(d). Section 810(d) also conditions the availability of its civil action on the absence of an equivalent state or local judicial remedy. Section 812 contains no such limitation.

We are convinced that neither these differences nor the variations between § 810 and § 812 relied upon by the dissent, see *post*, at 1620-1621, imply that § 810 is directed to a larger class of plaintiffs than is § 812. The legislative history, discussed in the text, contradicts any such suggestion. See pp. 1611-1612, and n. 20, *infra*.

12. It is instructive to compare the administrative remedy of § 810 with that provided by § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. Under § 810(d), a complainant may simply bypass the conciliatory efforts of HUD by commencing a civil action, apparently without notice to the agency, 30 days after filing his complaint. Under § 706(f)(2), by contrast, a complainant must allow the EEOC a full 180 days to negotiate a settlement, and he must obtain a "right-to-sue" letter before proceeding in federal court. Moreover, under § 706(b), the EEOC is instruct-

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1611

Cite as 99 S.Ct. 1601 (1979)

Although the legislative history gave little help in determining the proper scope of standing under § 810, see *Trafficante*, 409 U.S., at 210, 93 S.Ct., at 367, it provides substantial and rather specific support for the view that §§ 810 and 812 are available to precisely the same class of plaintiffs.¹³ Early legislative proposals for fair housing legislation contained no administrative remedies.¹⁴ The nonjudicial avenue of relief was later added on the theory that it would provide a more expeditious and less burdensome method of resolving housing complaints.¹⁵ There is no evidence that Congress intended to condition access to the

courts on a prior resort to the federal agency. To the contrary, the history suggests that all Title VIII complainants were to have available immediate judicial review. The alternative, administrative remedy was then offered as an option to those who desired to use it.

[7] This apparently was the understanding of Representative Celler who, as chairman of the House Judiciary Committee, summarized the Act on the floor of the House.¹⁶ Similar perceptions were reflected in reports on the proposed legislation by the Department of Justice¹⁷ and the

ed to make a judgment on the merits of the administrative complaints it receives by dismissing those it does not have reasonable cause to believe are true. No such administrative statement on the merits of a § 810 complaint is required; the Secretary of HUD is asked only to indicate whether he "intends to resolve" a complaint. Finally, under § 706(f)(1), the EEOC may elect to bring suit itself, thereby preempting the individual complainant's right to commence the litigation and exercising important supervision over the conduct of the case. The Secretary of HUD enjoys no similar authority under § 810. From these and other differences between the two statutes, it is apparent that § 810, unlike § 706, does not provide an effective administrative buffer between the federal courts and individual complainants.

13. For a general review of the legislative history of Title VIII, see Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 Washburn L.J. 149 (1969).

14. Three bills containing fair housing provisions were introduced in Congress in 1966. S. 3296, 89th Cong., 2d Sess. (1966); H.R. 14770, 89th Cong., 2d Sess. (1966); H.R. 14765, 89th Cong., 2d Sess. (1966). As introduced, they provided for judicial enforcement only.

15. Explaining the addition of administrative remedies to H.R. 14765, one of the bills introduced in 1966, Representative Conyers stated: "Experience with comparable State and local agencies repeatedly has shown that the administrative process is quicker and fairer. It more quickly implements the rights of the person discriminated against and also quickly resolves frivolous and otherwise invalid complaints. Conciliation is easier in an informal administrative procedure than in the formal judicial process. Also individual court suits would place a greater burden of expense, time and effort on not only the plaintiff but on all other parties involved, including the seller, broker and mort-

gage financier, and on the judicial system itself." 112 Cong.Rec. 18402 (1966).

Fair housing legislation introduced in 1967 similarly provided for administrative relief, which again was justified in terms of its perceived advantages to litigants over judicial review. Hearings on S. 1358, etc. before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 108 (testimony of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights).

The administrative remedies in the 1966 and 1967 proposals would have granted substantive enforcement powers to HUD. Although Title VIII, enacted in 1968, provided for only informal, conciliatory efforts by that agency, petitioners have identified nothing in the legislative history suggesting that the purpose for including an administrative avenue of relief had changed from that stated with respect to the 1966 and 1967 bills.

16. In describing the enforcement provisions of Title VIII, Representative Celler stated: "In addition to administrative remedies, the bill authorizes immediate civil suits by private persons within 180 days after the alleged discriminatory housing practice occurred" 114 Cong.Rec. 9560 (1968).

17. The Justice Department report explained an amendment to the proposed Fair Housing Act offered by Senator Dirksen, which contained the enforcement provisions ultimately enacted as §§ 810 and 812. It states:

"In addition to the administrative remedy provided through the Department of Housing and Urban Development, the bill provides for an immediate right to proceed by civil action in an appropriate Federal or State court." 114 Cong.Rec. 4908 (1968).

House Judiciary Committee.¹⁸ HUD, the federal agency primarily assigned to implement and administer Title VIII, consistently has treated §§ 810 and 812 as alternative remedial provisions.¹⁹ Under familiar principles, see *International Brotherhood of Teamsters v. Daniel*, — U.S. — at —, 99 S.Ct. 790 at 800 n. 20, 59 L.Ed.2d — (1978); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), and as we stated in *Trafficante*, *supra*, 409 U.S. at 210, 93 S.Ct. at 367, the agency's interpretation of the statute ordinarily commands considerable deference.

[8] Petitioners have identified nothing in the legislative history contrary to this view. Their reliance on the expressed intent that Title VIII not be used for harassment is unconvincing. Nowhere does the history of the Act suggest that Congress attempted to deter possible harassment by limiting standing under § 812. Indeed, such an attempt would have been pointless, given the relatively easy access to the courts provided by § 810.²⁰

18. The House Judiciary Committee report states:

"Section 812 states what is apparently an alternative to the conciliation-then-litigation approach [of § 810]: an aggrieved person within 180 days after the alleged discriminatory practice occurred, may, without complaining to HUD, file an action in the appropriate U. S. district court." 114 Cong.Rec. 9612 (1968) (emphasis added).

The use of the term "aggrieved person" to refer to potential plaintiffs under § 812, as well as the reference to the § 812 remedy as an alternative to that of § 810, indicates that the authors of this report believed the two sections were intended to reach a single class of plaintiffs.

19. In its regulations describing the process of administrative conciliation under § 810, HUD provides that every "person aggrieved [who files a complaint with HUD] shall be notified of his right to bring court action under sections 810 and 812." 24 CFR § 105.16(a) (1978). The regulations suggest no distinction between complainants under § 810 and plaintiffs under § 812.

In a handbook designed for internal agency use, § 812 is described as an "additional remedy" for discriminatory housing practices [that] may be pursued concurrently with the complaint procedure [of § 810]." Department

Most federal courts that have considered the issue agree that §§ 810 and 812 provide parallel remedies to precisely the same prospective plaintiffs. *E.g.*, *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F.Supp. 486, 489-492 (E.D.N.Y. 1977); *Village of Park Forest v. Fairfax Realty, P-H EOH* ¶ 13,699, at 14,467-14,468 (N.D.Ill.1975); *Fair Housing Council v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F.Supp. 1071, 1081-1083 (N.J.1976). See also *Howard v. W. P. Bill Atkinson Ent.*, 412 F.Supp. 610, 611 (W.D. Okl.1975); *Miller v. Poretsky*, 409 F.Supp. 837, 838 (D.C.1976); *Young v. AAA Realty Co.*, 350 F.Supp. 1382, 1384-1385 (M.D.N.C. 1972); *Crim v. Glover*, 338 F.Supp. 823, 825 (S.D.Ohio 1972); *Johnson v. Decker*, 333 F.Supp. 88, 90-92 (N.D.Cal.1971); *Brown v. Lo Duca*, 307 F.Supp. 102, 103-104 (E.D. Wis.1969). The notable exception is the Ninth Circuit in *TOPIC v. Circle Realty*, *supra*, 532 F.2d 1273, upon which petitioners rely. For the reasons stated, we believe that the Court of Appeals in this case cor-

of Housing and Urban Development, Title VIII Field Operations Handbook 59 (1971).

20. Although the legislative history is not free from some ambiguity, we do not agree with the view of it taken by the dissenting opinion. See *post*, at 1621-1622. The fact that, under Senator Miller's amendment Title VII complainants choosing to avail themselves of the informal, administrative procedures under § 810 are required to exhaust state remedies equivalent to Title VIII does not compel any particular conclusion about the size of the class to which § 812 extends. It was not irrational for Congress to conclude that, even with its limited exhaustion requirement, the incentive of § 810's simple, inexpensive conciliation procedure, as opposed to the immediate commencement of a formal lawsuit in federal district court under § 812, would be an attractive alternative to many of those aggrieved under Title VIII. Thus, under our construction of § 812, the exhaustion requirement of § 810 is not rendered meaningless. Apart from the argument based on the Miller amendment, the dissent relies on nothing more than an isolated, rhetorical remark by one Senator. Nothing in the legislative history or the administrative practices of HUD affirmatively supports the view that standing under § 810 is not identical to that under § 812.

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1613

Cite as 99 S.Ct. 1601 (1979)

rectly declined to follow *TOPIC*. Standing under § 812, like that under § 810, is "as broad" as is permitted by Article III of the Constitution." *Trafficante, supra*, 409 U.S., at 209, 93 S.Ct., at 367.²¹

IV

[9] We now consider the standing of the Village of Bellwood and the individual respondents in light of Art. III. We "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party," *Warth v. Seldin*, 422 U.S., at 500, 95 S.Ct., at 2206, as standing was challenged largely on the basis of the pleadings.²²

A

[10] The gist of Bellwood's complaint is that petitioners' racial steering effectively manipulates the housing market in the described area of the Village: Some whites who otherwise would purchase homes there do not do so simply because petitioners refrain from showing them what is available; conversely, some Negroes purchase homes in the affected area solely because petitioners falsely lead them to believe that no suitable homes within the desired price range are available elsewhere in the general area. Although the complaints are more

conclusory and abbreviated than good pleading would suggest, construed favorably to Bellwood they allege that this conduct is affecting the Village's racial composition, replacing what is presently an integrated neighborhood with a segregated one.

The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioner's steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents. Cf. *Zuch v. Hussey*, 394 F.Supp. 1028, 1030, 1054 (E.D.Mich.1975), *aff'd* and remanded, 547 F.2d 1168 (CA6 1977); *Barrick Realty, Inc. v. Gary*, 354 F.Supp. 126, 135 (N.D.Ind. 1973), *aff'd*, 491 F.2d 161 (CA7 1974); *United States v. Mitchell*, 335 F.Supp. 1004, 1005 (N.D.Ga.1971), *aff'd sub nom. United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (CA5 1973), *cert. denied*, 414 U.S. 826, 94 S.Ct. 131, 38 L.Ed.2d 59 (1973).²³ A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services. Other harms flowing from

21. Petitioners argue that regardless of the scope of standing under § 812, the Village of Bellwood cannot sue under that provision since it is not a "private person" as referred to in the caption to § 812.

The Court of Appeals noted that "[i]n a single sentence at oral argument, counsel for [petitioners] advanced the argument, not mentioned in their brief, that the Village lacks standing because it is not a 'person' as defined in [§ 802(d)]." 569 F.2d, at 1020 n. 8. The court rejected this contention, reasoning that the inclusion of "corporation" in the Act's definition of person encompassed municipal corporations such as Bellwood. *Ibid.* In this Court, petitioners have not argued that the Village is not a "person," contending instead that it is not a "private person." Petitioners thus have presented a variant of the question raised belatedly in the Court of Appeals and given, perhaps deservedly, only cursory treatment there. Under these circumstances, the question whether Bellwood is a "private person" entitled to sue

under § 812 is not properly before us, and we express no views on it.

22. In addition to the complaints, the records in these cases contain several admissions by respondents, answers to petitioners' interrogatories, and exhibits appended to those answers, including maps of Bellwood. As did the courts below and the parties themselves, we accept as true the facts contained in these discovery materials for the purposes of the standing issue.

23. *Zuch* and *Mitchell* were cases in which real estate brokers were accused of "blockbusting," i. e., exploiting fears of racial change by directly perpetuating rumors and soliciting sales in target neighborhoods. Respondents have not alleged that petitioners engaged in such unprincipled conduct, but the description in those cases of the reaction of some whites to a perceived influx of minority residents underscores the import of Bellwood's allegation that petitioners' sales practices threaten serious economic dislocation to the Village.

the realities of a racially segregated community are not unlikely.²⁴ As we have said before, "[t]here can be no question about the importance" to a community of "promoting stable, racially integrated housing." *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 94, 97 S.Ct. 1614, 1619, 52 L.Ed.2d 155 (1977). If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the Village has standing to challenge the legality of that conduct.

B

The individual respondents appeared before the District Court in two capacities. First, they and other individuals had acted as testers of petitioners' sales practices. In this Court, however, respondents have not pressed the claim that they have standing to sue as testers, see Brief for Respondents 14-15, and we therefore do not reach this question. Second, the individual respondents claimed to be injured as homeowners in the community against which petitioners' alleged steering has been directed. It is in this capacity that they claim standing to pursue this litigation.

Four of the individual respondents actually reside within the target area of Bellwood. They claim that the transformation of their neighborhood from an integrated to a predominantly Negro community is depriving them of "the social and professional benefits of living in an integrated society." This allegation is similar to that presented in *Trafficante*. In that case a Negro and a white resident of a large apartment complex in San Francisco complained that the

landlord's exclusion of nonwhites from the complex stigmatized them as residents of a "white ghetto" and deprived them of the social and professional advantages of living in an integrated community. Noting the importance of the "benefits from interracial associations," 409 U.S., at 210, 93 S.Ct., at 367, and in keeping with the Court's recent statement that noneconomic injuries may suffice to provide standing, *Sierra Club v. Morton, supra*, at 734-735, we concluded that this injury was sufficient to satisfy the constitutional standing requirement of actual or threatened harm.

[11] Petitioners argue that *Trafficante* is distinguishable because the complainants in that case alleged harm to the racial character of their "community," whereas respondents refer only to their "society." Reading the complaints as a whole, and remembering that we encounter these allegations at the pleading stage, we attach no particular significance to this difference in word choice. Although an injury to one's "society" arguably would be an exceptionally generalized harm or, more important for Art. III purposes, one that could not conceivably be the result of these petitioners' conduct, we are obliged to construe the complaint favorably to respondents, against whom the motions for summary judgment were made in the District Court. So construed, and read in context, the allegations of injury to the individual respondents' "society" refer to the harm done to the residents of the carefully described neighborhood in Bellwood in which four of the individual respondents reside.²⁵ The question

24. It has been widely recognized, for example, that school segregation is linked closely to housing segregation. See, e.g., *Lee v. Nyquist*, 318 F.Supp. 710, 717 (W.D.N.Y.1970) (three-judge court), aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971); National Advisory Commission on Civil Disorders, Report 237 (1968); 114 Cong.Rec. 2276 (1968) (remarks of Sen. Mondale).

25. Neither respondent Perry nor respondent Sharp resides within the target neighborhood of Bellwood. We read the complaints as claiming injury only to that area and its residents,

and we are unable to find any allegations of harm to individuals residing elsewhere. On the record before us, we therefore conclude that summary judgment at to these two respondents was appropriate. We note, however, that the standing issue as framed by the District Court was simply whether respondents were direct, as opposed to indirect, victims of the steering practices of petitioners. Viewed in that context, it made no difference whether Perry and Sharp were residents of the target area or not, for they would be found to be without standing in either event. As stated in Part III, *supra*, the District Court's perception

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1615

Cite as 98 S.Ct. 1601 (1979)

before us, therefore, is whether an allegation that this particular area is losing its integrated character because of petitioners' conduct is sufficient to satisfy Art. III.²⁶

[12, 13] Petitioners suggest that there is a critical distinction between an apartment complex, even one as large as that in *Trafficante*,²⁷ and a 12 by 13 block residential neighborhood. Although there are factual differences, we do not view them as controlling in this case. We note first that these differences arguably may run in favor of standing for the individual respondents, according to how one views his living environment. Apartment dwellers often are more mobile, with less attachment to a community as such, and thus are able to react more quickly to perceived social or economic changes. The homeowner in a suburban neighborhood such as Bellwood may well have deeper community attachments and be less mobile. Various inferences may be drawn from these and other differences, but for the purpose of standing analysis, we

perceive no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood such as Bellwood.²⁸

The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than apartment buildings. Rather, they are determined by the presence or absence of a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S., at 501, 95 S.Ct., at 2206, to respondents resulting from petitioners' conduct. A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident. The presence of a genuine injury should be ascertainable on the basis of discrete facts presented at trial.²⁹

of the standing question was incorrect. Only upon reaching this Court has the failure of the complaints to make sufficient allegations as to these two individuals been put in issue clearly. Although we intimate no view as to whether persons residing outside of the target neighborhood have standing to sue under § 812 of Title VIII, we do not foreclose consideration of this question if, on remand, the District Court permits respondents Perry and Sharp to amend their complaints to include allegations of actual harm.

26. Apart from the use of "community" rather than "society," the complaint in *Trafficante* differed from those here in that it alleged that a segregated community was prevented from becoming integrated because of the defendant's conduct. Here, by contrast, respondents claim that an integrated neighborhood is becoming a segregated community because of petitioners' conduct. We find this difference unimportant to our analysis of standing. In both situations, the deprivation of the benefits of interracial associations constitutes the alleged injury.

27. The apartment complex in *Trafficante* housed 8,200 tenants. 409 U.S., at 206, 93 S.Ct., at 365. The population of Bellwood, of which the target neighborhood is only a part, was estimated at 20,969 in 1975. Department of Commerce, Bureau of the Census, Population Estimates and Projections, Series P-25, No. 661, p. III. 15 (1977).

28. See *Shannon v. HUD*, 305 F.Supp. 205, 208, 211 (E.D.Pa.1969), aff'd in part, 436 F.2d 809, 817-818 (CA3 1970) (residents in a neighborhood affected by urban renewal project have standing to challenge the project's impact on the neighborhood's racial balance). Accord, *Fox v. HUD*, 416 F.Supp. 954, 955-956 (E.D.Pa. 1976); *Marin City Council v. Marin County Redevelopment Agency*, 416 F.Supp. 700, 702, 704 (N.D.Cal.1975). See also Comment, *The Fair Housing Act: Standing for the Private Attorney General*, 12 Santa Clara Law. 562, 568-571 (1972).

29. In addition to evidence about the community, it will be relevant at trial to consider the nature and extent of the business of the petitioning real estate brokers. This should include an inquiry into the extent of their participation in the purchase, sale and rental of residences in the target area, the number and race of their customers, and the type of housing desired by customers. Evidence of this kind may be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury. Respondents apparently attempted to discover such information, but summary judgment was entered against them before this was accomplished.

In addition to claiming the loss of social and professional benefits to the individual respondents, the complaints fairly can be read as alleging economic injury to them as well.³⁰ The most obvious source of such harm would be an absolute or relative diminution in value of the individual respondents' homes. This is a fact subject to proof before the District Court, but convincing evidence that the economic value of one's own home has declined as a result of the conduct of another certainly is sufficient under Art. III to allow standing to contest the legality of that conduct.

V

We conclude that the facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial.³¹ The

30. The complaints state that petitioners have manipulated the housing market of Bellwood "to the economic and social detriment of the citizens of [the] village." App. 6, 99.

31. Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.

32. The federal courts that have considered the question have concluded that racial steering is prohibited by Title VIII. *E. g., Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F.Supp. 486, 488 (E.D.N.Y.1977); *United States v. Real Estate One, Inc.*, 433 F.Supp. 1140, 1144 (E.D.Mich.1977); *Fair Housing Council v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F.Supp. 1071, 1075 (N.J.1976). We do not reach this issue, as it is not presented by this case.

33. The Court of Appeals found it unnecessary to consider respondents' standing under § 1982. For this reason, and because of our decision with respect to respondents' standing under Title VIII, we do not reach the § 1982 issue.

1. Section 810 provides:

(a) "Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary. Com-

adequacy of proof of respondents' standing is not before us, and we express no views on it.³² We hold only that the summary judgments should not have been entered on the records before the District Court, except possibly with respect to respondents Perry and Sharp. See n. 25, *supra*. Subject to this exception, the judgment of the Court of Appeals is affirmed.³³

So ordered.

Mr. Justice REHNQUIST, with whom Mr. Justice STEWART joins, dissenting.

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, which outlaws discrimination in virtually all aspects of the sale or rental of housing, provides two distinct and widely different routes into federal court. Under § 810, 42 U.S.C. § 3610,¹ a

plaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year."

(b) "A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1617

Cite as 98 S.Ct. 1601 (1978)

"person aggrieved," that is, "[a]ny person who claims to have been injured by a discriminatory housing practice," may seek administrative relief from the Secretary of the Department of Housing and Urban Development and, if the Secretary cannot within 30 days resolve the dispute "by informal methods of conference, conciliation, and persuasion," may bring a civil action in federal district court. In *Trafficante v.*

Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), we held that the broad definition given to the term "person aggrieved" in § 810 evinced "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.*, at 209, 93 S.Ct., at 367.

The second route into federal court under Title VIII—§ 812²—provides simply that

against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified."

(c) "Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

(d) "If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred

or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate."

(e) "In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant."

(f) "Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance." 42 U.S.C. § 3610.

2. Section 812 provides:

(a) "The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however*, That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however*, That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected."

(b) "Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and

"[t]he rights granted by sections [803, 804, 805, and 806] of this title may be enforced by civil actions in appropriate United States district courts" 42 U.S.C. § 3612. Despite the absence from § 812 of the "person aggrieved" language so crucial to our holding in *Trafficante* regarding standing under § 810, the Court today holds that "[s]tanding under § 812, like that under § 810, is 'as broad' as is permitted by Article III of the Constitution." *Ante*, at 1613, quoting *Trafficante v. Metropolitan Life Ins.*, *supra*, at 209, 93 S.Ct. at 366. I think that the Court's decision ignores the plain language of § 812 and makes nonsense out of Title VIII's formerly sensible statutory enforcement scheme.

I

The doctrine of standing is comprised of both constitutional limitations on the jurisdiction of federal courts and prudential rules of self-restraint designed to bar from federal court those parties who are ill-suited to litigate the claims they assert. In its constitutional dimension, the standing inquiry asks whether the party before the Court has "such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (emphasis in original), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The crucial elements of standing are injury in fact and causation. To demonstrate the "personal stake" in the litigation necessary to satisfy the Constitution, the party must suffer "a distinct and palpable injury," *Warth v. Seldin*, *supra*, 422 U.S., at 501, 95 S.Ct., at 2206, that bears a

"fairly traceable" causal connection" to the challenged action. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978), quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1971). Accordingly, when an objection to a party's standing to litigate in federal court is constitutionally based, "the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976).

A plaintiff who alleges sufficient injury to satisfy these minimum constitutional limitations on federal jurisdiction may nonetheless be barred from federal court under our prudential standing rules because he asserts a generalized grievance shared in substantially equal measure by all or a large class of citizens, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), or because he seeks to "rest his claim to relief on the legal rights or interests of third parties" rather than his own. *Warth v. Seldin*, *supra*, 422 U.S., at 499, 95 S.Ct., at 2205. These prudential rules, however, are subject to modification by Congress, which may grant to any person satisfying Art. III's minimum standing requirements a right "to seek relief on the basis of the legal rights and interests of others, and, indeed, [to] invoke the general public interest in support of [his] claim." *Id.*, at 501, 95 S.Ct., at 2206. Congress did just that in enacting § 810 of Title VIII, which grants to "[a]ny person who claims to have been injured by a discriminatory housing practice" a right

may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision."

(c) "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or

other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff. *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 42 U.S.C. § 3612.

Cite as 99 S.Ct. 1601 (1979)

to seek federal administrative and judicial relief. In *Trafficante*, *supra*, we held that the broad definition given "person aggrieved" in § 810 indicated a congressional intent to accord apartment dwellers, who had not themselves suffered discrimination, an actionable right to be free from the adverse consequences flowing to them from racially discriminatory rental practices directed at third parties.³ Plaintiffs' alleged "loss of important benefits from interracial associations," *Trafficante*, *supra*, 409 U.S., at 210, 93 S.Ct., at 367, was sufficient to satisfy the injury in fact requirement of Art. III.

In the case now before us, respondents—the Village of Bellwood, five of its residents, and one resident of a neighboring community—brought suit against petitioner real estate firms, alleging that the firms had violated both 42 U.S.C. § 1982 and § 804 of Title VIII by "steering" prospective homebuyers to different areas in and around Bellwood according to their race. Like plaintiffs in *Trafficante*, the individual respondents allege that petitioners' practice of racial steering has deprived them of "the social and professional benefits of living in an integrated society."⁴ App. 6, 99. Respondent Village of Bellwood alleges that it has been injured "by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of [its] citizens." *Ibid*. Unlike plaintiffs in *Trafficante*, however, respondents have not proceeded under § 810 of Title VIII, choosing instead to travel the direct route into federal court provided by § 812.

In pertinent part, § 812 provides:

3. Despite suggestions to the contrary by the Court, *ante*, at 1609 n. 7, our decision in *Trafficante* was clearly not intended to construe § 812 as well as § 810. The opinion focuses exclusively on § 810, closing with the following statement:

"We can give vitality to § 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." *Trafficante*, *supra*, 409 U.S., at 212, 93 S.Ct., at 368.

"The rights granted by sections [803, 804, 805, and 806] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction." 42 U.S.C. § 3612(a).

The language of § 812 contains no indication that Congress intended to authorize the commencement of suits under Title VIII by persons who would otherwise be barred from federal court by prudential standing rules. Indeed, were § 812 the only method for enforcing Title VIII respondents—who were not themselves discriminated against by petitioners—could hardly argue that they were statutorily authorized to seek relief on the basis of legal rights and interests of third parties who had been racially "steered" into and away from certain areas in the community. The Court, however, in effect reads the broadly defined "person aggrieved" language of § 810 into § 812, holding that the alternative routes into federal court provided under the sections are available to precisely the same class of plaintiffs. The language and structure of Title VIII leads me to a contrary conclusion.

II

The term "person aggrieved" is used throughout § 810—no less than four times—to denominate the proper § 810 claimant;⁵ by contrast, in § 812 Congress wholly avoided use of this broadly defined term, preferring instead the familiar "plaintiff." Noting that § 812 is phrased in the

The Court's passing reference in *Trafficante* to § 812 can hardly be construed as an interpretation of that provision.

4. Alleging injury to "their right to select housing without regard to race," App. 6, 99, the individual respondents initially sought to establish standing in their capacity as "testers." Respondents have abandoned, in this Court, their claim of standing as testers, electing to stand or fall on their allegations of injury in their capacity as residents in and around Bellwood.
5. Indeed, the term is found nowhere else in Title VIII.

passive voice, the Court concludes that the absence of the "person aggrieved" language from the provision "is not indicative of an attempt to limit standing." *Ante*, at 1609 (emphasis added). The point of our decision in *Trafficante*, however, was that the presence of the "person aggrieved" language in § 810 demonstrated Congress' affirmative intent to abrogate prudential standing rules and to expand standing under the section to the full extent permitted by Art. III of the Constitution. It thus follows that the absence of "person aggrieved" from § 812 indicates that Congress did not intend to abrogate the normal prudential rules of standing with regard to § 812.

Consistent with § 810's broad grant of standing is the language chosen by Congress to define the scope of the civil action that may be brought under the section: "[T]he person aggrieved may . . . commence a civil action in any appropriate United States district court . . . to enforce the rights granted or protected by this subchapter . . ." 42 U.S.C. § 3610(d) (emphasis added). Section 812, in contrast, authorizes the commencement of a civil action to enforce only "[t]he rights granted by," as opposed to "rights granted or protected by," § 803, § 804, § 805, and § 806. Clearly, Congress contemplated that § 812 suits could be instituted only by persons alleging injury to rights expressly secured under the enumerated sections.

Section 804, the provision allegedly offended by petitioners, provides in pertinent part:

"[I]t shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges

of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

"(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604.

In essence, § 804 grants to all persons⁶ seeking housing the right not to be discriminated against on the basis of race, color, religion, sex, or national origin. Nowhere in the section are the individual respondents granted a right to reap the "social and professional benefits of living in an integrated society." Nor does § 804 grant the Village of Bellwood an actionable right not to have its housing market "wrongfully and illegally manipulated." Accordingly, respondents have suffered no injury to "rights granted by [§ 804]."

The structure of both § 810 and § 812 and the significant differences between the two enforcement provisions further support the conclusion that Congress intended to restrict access to federal courts under § 812 to a more limited class of plaintiffs than that contemplated under § 810. A "person aggrieved" proceeding under § 810 must first file a complaint with the Secretary of Housing and Urban Development, who is authorized "to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 3610(a). The Secretary, however, must defer to the appropriate state or local agency whenever state or local fair housing laws provide rights and remedies substantially equivalent to those secured under Title VIII. The Secretary may recommence action on the complaint only upon certification that such action is necessary to protect the rights of

"Person" is defined in Title VIII as "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock com-

panies, trusts, unincorporated organizations, trustees, trustees and bankruptcy, receivers, and fiduciaries." 42 U.S.C. § 3602(d).

GLADSTONE, REALTORS v. VILLAGE OF BELLWOOD

1621

Cite as 99 S.Ct. 1601 (1979)

the parties or the interests of justice. *Id.* § 3610(c). If the Secretary's informal efforts prove futile, the "person aggrieved" may commence a civil action under Title VIII in federal district court, but only if he has no comparable judicial remedy under "substantially equivalent" state or local fair housing legislation. *Id.*, § 3610(d).

The § 812 "plaintiff" is not similarly encumbered. He may proceed directly into federal court, deferring neither to the Secretary of Housing and Urban Development nor to state administrative and judicial processes. See *id.*, § 3612(a). The District Court is authorized to appoint an attorney for the § 812 plaintiff and to waive payment of fees, costs, and security. *Id.*, § 3612(b). Additionally, broader relief is available under § 812. The "prevailing plaintiff" may be awarded a "permanent or temporary injunction, temporary restraining order, or other order; and . . . actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees . . ." *Id.*, § 3612(c). Section 810, by contrast, makes no allowance for damages, costs, or counsel fees, limiting the victorious claimant to injunctive relief and such other affirmative action as may be appropriate. *Id.*, § 3610(d). Nor does § 812 contain a provision similar to § 810(e), which provides that "[i]n any proceeding brought pursuant to [§ 810], the burden of proof shall be on the complainant." Given the advantages to the claimant of proceeding under § 812, it is hard to imagine why anyone would voluntarily proceed under § 810 if both routes were equally available.

When the carefully chosen language and the widely variant provisions of § 810 and § 812 are thus compared, the logic of Title VIII's private enforcement mechanism becomes clear. Immediate access to federal judicial power under § 812 was reserved to those directly victimized by a discriminatory housing practice; that is, those actually discriminated against on the basis of race, color, religion, sex, or national origin. Only direct victims of housing discrimination

were deemed to suffer injuries of sufficient magnitude to authorize appointment of counsel and recovery of compensatory and punitive damages, costs, and attorney fees. But because discrimination in housing can injure persons other than the direct objects of the discrimination, *Trafficante, supra*, 409 U.S., at 210, 93 S.Ct., at 367, Congress believed that the statute's fair housing goals would be served by extending standing under § 810 as broadly as constitutionally permissible. Anyone claiming to have been injured by a discriminatory housing practice, even if not himself directly discriminated against, is authorized to seek redress under § 810. By barring indirect victims of housing discrimination from immediate access to federal court under § 812, and thus requiring them to exhaust federal conciliation procedures as well as viable state and local remedies pursuant to § 810, Congress sought to facilitate informal resolution of Title VIII disputes, to avoid federal judicial intervention when possible, and to encourage state and local involvement in the effort to eliminate housing discrimination.

The legislative history of Title VIII, while "not too helpful," *Trafficante, supra*, 409 U.S., at 210, 93 S.Ct., at 367, supports the view that standing to commence a civil action under § 812 is limited to direct victims of housing discrimination. Introduced on the Senate floor and approved unchanged by the House, Title VIII's legislative history must be culled primarily from the Congressional Record. The brief debate preceding adoption of Amendment No. 586, which amended § 810 to require exhaustion of "substantially equivalent" remedies under state or local fair housing laws as a prerequisite to the filing of a Title VIII action in federal court, is particularly enlightening. Senator Miller, who introduced the amendment, explained:

"[I] provide in the second part of my amendment that no civil action may be brought in any U. S. District Court if the person aggrieved has a judicial remedy under a state or local fair housing law which provides substantially equivalent rights and remedies to this Act.

"I believe it is a matter of letting the State and local courts having jurisdiction. We in the Senate know that our federal district court calendars are crowded enough, without adding to that load if there is a good remedy under State law." 114 Cong.Rec. 4987 (1966).

Senator Hart added that the amendment "recognizes the desire all of us share that the State remedies, where adequate, be availed of and that unnecessary burdening litigation not further clog the court calendars." *Ibid.* It seems unlikely that Congress would wholly frustrate the concerns moving it to adopt § 810's exhaustion requirement by opening § 812's direct route into federal court to all "persons aggrieved."

The debate concerning the allowance of attorneys fees to prevailing plaintiffs under § 812 also indicates a congressional understanding that standing to proceed immediately into federal court under § 812 was limited to discriminatees. Senator Hart commented that § 812(b) and (c)—which authorize the district court to waive payment of fees, costs, and security in appropriate cases and to award damages, court costs, and reasonable attorney fees to prevailing plaintiffs—"reveal a clear congressional intent to permit, and even encourage, litigation by those who cannot afford to redress specific wrongs aimed at them because of the color of their skin." 114 Cong. Rec. 5514-5515 (1968).

The meager legislative history marshaled by the Court provides at best thin support for its expansive interpretation of standing under § 812. References in the legislative history describing § 812 as an "addition[all]" and "alternative" remedial provision to § 810, *ante*, at 1611, and nn. 16, 17, and 18, are hardly dispositive: one need only read the two sections to conclude that they provide "alternative" enforcement mechanisms. That § 810 and § 812 are "alternative" remedial provisions does not, however, compel the conclusion that they are equally available to all potential Title VIII claimants. The only piece of legislative history

arguably supporting the Court's interpretation of § 812 is the House Judiciary Committee staff's use of the term "aggrieved person" to refer to potential § 812 plaintiffs. *Ante*, at n. 18. This single, fleeting reference in the legislative history hardly seems sufficient to overwhelm the contrary indications of congressional intent found elsewhere in Title VIII's legislative history and in the carefully worded and structured provisions of § 810 and § 812.

I think that *Trafficante* pushed standing to the limit in construing the "person aggrieved" language of § 810. I cannot join the Court in pressing the more narrowly confined language of § 812 to the same limit.

III

Respondents also claim standing under 42 U.S.C. § 1982, which provides: "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." Unlike Title VIII, "§ 1982 is not a comprehensive open housing law." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968). Enacted as part of the Civil Rights Act of 1866, the section bars all racial discrimination, both private and public, in the sale or rental of property. *Ibid.*

It is clear that respondents have suffered no injury to the only right secured under § 1982—the right to be free from racially motivated interference with property rights. Their claim of standing under § 1982 is thus conceptually indistinguishable from a similar claim rejected by this Court in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Plaintiffs in *Warth* brought a § 1982 action against the town of Penfield, New York, and members of its Zoning, Planning, and Town Boards, claiming that the town's zoning ordinance effectively excluded persons of minority racial and ethnic groups. One of the plaintiffs, a nonprofit corporation organized to alleviate the housing shortage for low- and

BURCH v. LOUISIANA

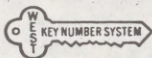
Cite as 99 S.Ct. 1623 (1979)

1623

moderate-income persons in and around Penfield, based its standing to challenge the zoning ordinance on the loss to its members residing in Penfield of the "benefits of living in a racially and ethnically integrated community." *Id.*, at 512, 95 S.Ct., at 2212. This Court rejected plaintiff's claim of standing, distinguishing *Trafficante* on the ground that § 1982, unlike § 810 of Title VIII, does not give residents of certain communities an actionable right to be free from the adverse consequences of racially discriminatory practices directed at and immediately harmful to others. Thus, we held plaintiffs' "attempt to raise putative rights of third parties," *id.*, at 514, 95 S.Ct., at 2213, barred by the prudential rules of standing.

Like plaintiffs in *Warth*, respondents claim that they have been injured by racially discriminatory acts practiced on others. Thus, their claim of standing under § 1982 must also fail.

Because I think respondents have no standing to litigate claims under 42 U.S.C. § 1982 and § 812 of the Civil Rights Act of 1968, I would reverse the judgment of the Court of Appeals.



Daniel BURCH et al., Petitioners,

v.

STATE OF LOUISIANA.

No. 78-90.

Argued Feb. 22, 1979.

Decided April 17, 1979.

Defendants' convictions of exhibiting obscene motion pictures were affirmed by

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

the Supreme Court of Louisiana, 360 So.2d 831, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense violated the right of defendant to trial by jury.

Affirmed in part, reversed in part and remanded.

Mr. Justice Stevens filed a concurring opinion.

Mr. Justice Brennan filed an opinion concurring in part and dissenting in part in which Mr. Justice Stewart and Mr. Justice Marshall joined.

Jury ⇐ 32(4)

Conviction by nonunanimous six-person jury in state criminal trial for nonpetty offense violated right of defendant to trial by jury. U.S.C.A.Const. Amends. 6, 14; LSA-Cr.P. art. 779, subd. A.

Syllabus*

Conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense, as contemplated by provisions of the Louisiana Constitution and Code of Criminal Procedure, which permit a conviction by five out of the six jurors, held to violate the right of an accused to trial by jury guaranteed by the Sixth and Fourteenth Amendments. Pp. 1625-1628.

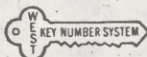
(a) Lines must be drawn somewhere if the substance of the jury trial right is to be preserved, and while this line drawing process "cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little," *Duncan v. Louisiana*, 391 U.S. 145, 161, 88 S.Ct. 1444, 1453, 20 L.Ed.2d 491, conviction for a nonpetty offense by only five members of a six-person jury presents a threat to preservation of the substance of the jury trial guarantee

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

of critical importance to his defense,⁵ faces the additional risk that the disbelief of a single listener will itself result in time in prison.

The minimal contribution that the defendant's possibly untruthful testimony might make to an overall assessment of his potential for rehabilitation, see n. 2, *supra*, cannot justify imposing this additional burden on his right to testify in his own behalf. I do not believe that a sentencing judge's discretion to consider a wide range of information in arriving at an appropriate sentence. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337, allows him to mete out additional punishment to the defendant simply because of his personal belief that the defendant did not testify truthfully at the trial.

Accordingly, I would affirm the judgment of the Court of Appeals.



DUKE POWER COMPANY, Appellant,

v.

CAROLINA ENVIRONMENTAL STUDY GROUP, INC., et al.

UNITED STATES NUCLEAR REGULATORY COMMISSION et al.,
Appellants,

v.

CAROLINA ENVIRONMENTAL STUDY GROUP, INC., et al.

Nos. 77-262, 77-375.

Argued March 20, 1978.

Decided June 26, 1978.

Direct appeal was taken from a decision of the United States District Court for

5. Notwithstanding the standard instruction that the jury is not to draw any adverse inference from the defendant's failure to testify, "a defendant who does not take the stand will

the Western District of North Carolina, 431 F.Supp. 203, declaring that the Price-Anderson Act, which imposed a \$560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, was constitutionally invalid. The Supreme Court, Mr. Chief Justice Burger, held that: (1) citizens living near the site of proposed nuclear power plants had standing to maintain the declaratory judgment action; (2) the constitutional challenges to the Act were ripe for adjudication; (3) the Act did not violate the due process clause of the Fifth Amendment, and (4) the Act did not violate the equal protection component of the Fifth Amendment.

Reversed.

Mr. Justice Stewart filed an opinion concurring in result.

Mr. Justice Rehnquist filed an opinion concurring in judgment, with whom Mr. Justice Stevens joined.

Mr. Justice Stevens filed an opinion concurring in the judgment.

1. Federal Courts ⇐242

For purposes of determining whether general federal question jurisdiction exists, it is not necessary to decide whether alleged cause of action against federal agency based directly on Constitution is in fact cause of action on which plaintiffs could actually recover; instead, test is whether cause of action alleged is so patently without merit as to justify court's dismissal for want of jurisdiction. 28 U.S.C.A. § 1331(a).

2. Federal Courts ⇐243

District court had jurisdiction over complaint seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from opera-

probably fatally prejudice his chances of acquittal." Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 Yale L.J. 204, 212 n. 36 (1956).

Cite as 98 S.Ct. 2620 (1978)

tion of federally licensed private nuclear power plants under general federal question jurisdictional statute rather than under statute granting jurisdiction over cases arising under acts regulating commerce or protecting against restraints and monopolies, where complaint, fairly read, raised two basic challenges to act, both of which were derived from Fifth Amendment; whether direct cause of action against Nuclear Regulatory Commission under Constitution was one generally to be recognized need not be decided since claimed cause of action to vindicate plaintiffs' constitutional rights was sufficiently substantial and colorable to sustain jurisdiction. Atomic Energy Act of 1954, § 1 et seq. as amended 42 U.S.C.A. § 2011 et seq.; 28 U.S.C.A. §§ 1331(a), 1337; U.S.C.A.Const. Amend. 5.

3. Federal Civil Procedure ⇐103

Essence of standing inquiry is whether parties seeking to invoke court's jurisdiction have alleged such personal stake in outcome of controversy as to assure that concrete adverseness which sharpens presentation of issues upon which court so largely depends for illumination of difficult constitutional questions; "personal stake" requires not only distinct and palpable injury to plaintiff, but also fairly traceable causal connection between claimed injury and challenged conduct.

4. Federal Courts ⇐478

In action brought against Nuclear Regulatory Commission challenging constitutional validity of statute imposing \$560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, district court's finding that several of immediate adverse effects of construction of plants, including environmental and aesthetic consequences of thermal pollution of two lakes in vicinity of disputed plants and emission of nonnatural radiation into environment, were adequate to satisfy "injury in fact" standard required as predicate for standing was not clearly erroneous. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

5. Federal Courts ⇐478

In action brought against Nuclear Regulatory Commission by citizens groups and individuals living near sites of proposed nuclear power plants, seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, district court's finding of "substantial likelihood" that neither of disputed nuclear plants would be completed or operated absent challenged statute, and that relief requested would redress injury claimed, so as to satisfy constitutional standing requirement, was not clearly erroneous. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

6. Federal Civil Procedure ⇐103

Outside context of taxpayer suits, litigant need not demonstrate more than injury in fact and substantial likelihood that judicial relief requested will prevent or redress claimed injury to satisfy "case and controversy" standing requirement; where party champions his own rights, and where injury alleged is concrete and particularized one which will be prevented or redressed by relief requested, basic practical and prudential concerns underlying standing doctrine are generally satisfied when constitutional requisites are met. U.S.C.A.Const. art. 3, § 1 et seq.

7. Constitutional Law ⇐42.3(2)

Citizens groups and individuals who lived within close proximity to planned nuclear power plants had standing to maintain action against public utility and Nuclear Regulatory Commission seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants where immediate adverse effects of construction of plants, including environmental and aesthetic consequences of thermal pollution of two lakes in vicinity of plants, was adequate to satisfy "injury in fact" standard and where there was substantial likelihood that plants would

be neither completed nor operated absent challenged statute. Atomic Energy Act of 1954, § 1 et seq. as amended 42 U.S.C.A. § 2011 et seq.

8. Federal Courts ⇐13

Constitutional challenges to statute imposing \$560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants were ripe for adjudication where all parties would be adversely affected by decision to defer definitive resolution of constitutional validity vel non of act, and where alleged injury could be redressed by relief requested. Atomic Energy Act of 1954, § 170 et seq. as amended 42 U.S.C.A. § 2210 et seq.

9. Constitutional Law ⇐48(4)

Statute imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants was classic example of economic regulation, and came to court with presumption of constitutionality; burden was on parties complaining that statute violated due process to establish that legislature acted in arbitrary or irrational way. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

10. Constitutional Law ⇐299

United States ⇐53(6)

Price-Anderson Act statutory limit on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants bears rational relationship to Congress' concern for stimulating involvement of private enterprise in production of electric energy through use of atomic power and thus the Act does not violate the due process clause. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210; U.S.C.A.Const. Amend. 5.

11. Constitutional Law ⇐299

United States ⇐53(6)

Assuming arguendo that \$560 million fund provided by Price-Anderson Act limiting liability for nuclear accidents resulting from operation of federally licensed private

nuclear power plants would not insure full recovery in all conceivable circumstances, it does not follow that liability limitation is therefore irrational and violative of due process in view of extremely remote possibility of accident in which liability would exceed statutory limit, and of Congress' commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequence of" a disaster of such proportions. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

12. United States ⇐53(6)

District court's finding that statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants encouraged irresponsibility in matters of safety and environmental protection could not withstand careful scrutiny, since nothing in liability limitation provision undermined or altered rigor and integrity of process involved in review of applications for license to construct or operate nuclear power plant, and since in event of nuclear accident utility itself would probably suffer largest damages. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

13. Constitutional Law ⇐92

Person has no property right or vested interest in any rule of common law; Constitution does not forbid creation of new rights or abolition of old ones recognized by common law to attain permissible legislative objective, despite fact that otherwise settled expectations may be upset thereby.

14. Constitutional Law ⇐92

Parties who lived within close proximity to planned nuclear power plants, and who sought declaration of constitutional invalidity of statutory limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants did not, prior to enactment of such statute, have any right cognizable under due process clause to be free of nuclear power or to take advantage of state of uncertainty which inhibited private devel-

opment of nuclear power; parties' only relevant right prior to enactment of statute was to utilize their existing common-law and state law remedies to vindicate any particular harm visited on them from whatever resources. U.S.C.A.Const. Amend. 5; Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

15. United States ⇐53(6)

Statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants to \$560 million provides fair and reasonable substitute for state tort law remedies it replaces, in view of uncertainty of recovery of damages of such magnitude from utility or component manufacturer whose resources might well be exhausted at early stage, and in view of congressional assurance of \$560 million fund for recovery accompanied by statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident; statutorily mandated waiver of defenses establishes right of injured parties to compensation without proof of fault and eliminates burden of delay and uncertainty which would follow from need to litigate question of liability after accident. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

16. Constitutional Law ⇐243(1)

United States ⇐53(6)

General rationality of Price-Anderson Act imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, particularly with reference to important congressional purpose of encouraging private participation and exploitation of nuclear energy, is ample justification for difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes; liability limitation does not violate equal protection. Atomic Energy Act of 1954, § 170(b, e) as

amended 42 U.S.C.A. § 2210(b, e); U.S.C.A. Const. Amend. 5.

17. Eminent Domain ⇐266

Statute imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants does not withdraw Tucker Act remedy for any "taking" which would result from such accident. 28 U.S.C.A. § 1491; Atomic Energy Act of 1954, § 170(b, e) as amended 42 U.S.C.A. § 2210(b, e); U.S.C.A.Const. Amend. 5.

Syllabus *

The Price-Anderson Act (Act), having the dual purpose of protecting the public and encouraging the development of the nuclear energy industry, imposes a \$560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants, requires those indemnified by the \$560 million fund established under the Act to waive all legal defenses in the event of a substantial nuclear accident, and further provides that in the event of a nuclear accident involving damages in excess of the amount of aggregate liability Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." Appellant Duke Power Co. (Duke), an investor-owned public utility which is constructing nuclear power plants in North and South Carolina, and appellant Nuclear Regulatory Commission (NRC), were sued by appellees (an environmental organization, a labor union, and a number of individuals who live near the plants in question) who sought a declaration that the Act is unconstitutional. After finding, *inter alia*, that the "immediate" adverse effects upon appellees resulting from the operation of the plants included thermal pollution of lakes in the vicinity, and emission of non-natural radiation into appellees' en-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

vironment, and also that there was a "substantial likelihood" that Duke would not be able to complete construction and maintain operation of the plants "but for" the protection provided by the Act, the District Court held that appellees had standing to challenge the Act's constitutionality and that their claim could be properly adjudicated. The court then went on to hold that the Act violated the Due Process Clause of the Fifth Amendment because the amount of recovery is not rationally related to the potential losses, the Act tends to encourage irresponsibility in matters of safety and environmental protection, and there is no *quid pro quo* for the liability limitation, and also offended the equal protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power. *Held*:

1. The District Court had jurisdiction over appellees' complaint against the NRC under § 1331(a) rather than § 1337, the jurisdictional base pleaded. The complaint, fairly read, raised two basic challenges to the Act, both of which are derived from the Fifth Amendment. Appellees' cause of action against the NRC directly under the Constitution is sufficiently substantial to sustain jurisdiction; the further question of whether such a cause of action is to be generally recognized need not be decided on this record. Pp. 2628-2630.

2. Appellees have standing to challenge the Act's constitutionality. That several of the "immediate" adverse effects of construction of the plants were found to harm appellees is sufficient to satisfy the "injury in fact" prong of the constitutional requirement for standing. And the finding as to the "but for" causal connection between the Act and the construction of the plants satisfies the second prong of the constitutional test for standing, that the exercise of the court's remedial powers would redress the claimed injuries. Pp. 2630-2635.

3. The constitutional challenges to the Act are ripe for adjudication, since all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Act. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S.Ct. 335, 355, 42 L.Ed.2d 320 (1974), the fact that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested satisfies this requirement. P. 2635.

4. The Act does not violate the Due Process Clause of the Fifth Amendment. Pp. 2635-2641.

(a) The record supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating private industry's involvement in the production of nuclear electric energy. P. 2636.

(b) Assuming, *arguendo*, that the \$560 million fund would not insure full recovery in all conceivable circumstances, it does not follow that the liability limitation is therefore irrational and violative of due process. When appraised in light of the extremely remote possibility of an accident in which liability would exceed the statutory limit and Congress' commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a disaster of such proportions, the congressional decision to fix a \$560 million ceiling is within permissible limits and not violative of due process. Pp. 2636-2638.

(c) The District Court's finding that the Act tends to encourage irresponsibility in matters of safety and environmental protection cannot withstand careful scrutiny, since nothing in the liability limitation provision undermines or alters the rigor and integrity of the process involved in the review of applications for a license to construct or operate a nuclear power plant, and

DUKE POWER CO. v. CAROLINA ENVIRON. STUDY

2625

Cite as 98 S.Ct. 2620 (1978)

since, moreover, in the event of a nuclear accident the utility itself would probably suffer the largest damages. P. 2638.

(d) The Act provides a reasonably just substitute for the common or state tort law remedies it replaces, and nothing more is required by the Due Process Clause. The congressional assurance of a \$560 million fund for recovery, accompanied by the statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident, is a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer whose resources might well be exhausted at an early stage. And, at the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty which would follow from the need to litigate the question of liability after an accident. Pp. 2638-2641.

(e) There is no equal protection violation, since the general rationality of the Act's liability limitation, particularly with reference to the congressional purpose of encouraging private participation in the exploitation of nuclear energy, is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. P. 2641.

(f) The Price-Anderson Act does not withdraw the Tucker Act remedy, 28 U.S.C. § 1491, and thus appellees' challenge under the Just Compensation Clause must fail. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day. P. 2641 n. 39.

431 F.Supp. 203, reversed and remanded.

1. Under the terms of the Energy Reorganization Act of 1974, 42 U.S.C. (Supp. V) § 5801 *et seq.*, the Nuclear Regulatory Commission

Steve C. Griffith, Jr., Charlotte, N. C., for appellant in No. 77-262.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for appellants in No. 77-375.

William B. Schultz, Washington, D. C., for appellees.

Mr. Chief Justice BURGER delivered the opinion of the Court.

These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on liability for nuclear accidents resulting from the operations of private nuclear power plants licensed by the Federal Government.

I

A

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H.R.Rep. No. 2181, 83d Cong., 2d Sess., 1-11 (1954). The Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011-2281 (1970), implemented this policy decision, providing for licensing of private construction, ownership and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC).¹ See *Power Reactor Development Co. v. Int'l Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961), *rev'g*, 108 U.S.App.D.C. 97, 280 F.2d 645 (CA DC 1960).

(NRC) has now replaced the AEC as the licensing and regulatory authority.

Private industry responded to the Atomic Energy Act with the development of an experimental power plant constructed under the auspices of a consortium of interested companies. It soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial. See Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 Mich.L.Rev. 479, 479-481 (1973). Although the AEC offered incentives to encourage investment, there remained in the path of the private nuclear power industry various problems—the risk of potentially vast liability in the event of a nuclear accident of a sizeable magnitude being the major obstacle. Notwithstanding comprehensive testing and study, the uniqueness of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident resulting in extensive damage. Private industry and the AEC were confident that such a disaster would not occur, but the very uniqueness of nuclear power meant that the possibility remained and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. See Hearings before the Joint Committee on Atomic Energy on Government Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards, 84th Cong., 2d Sess., 122-124 (1956). Thus, while repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation. *Id.*,

2. A "nuclear incident" is defined as "any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material . . ." 42 U.S.C. § 2014(q) (1970).

3. "The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States . . . the person with whom an indemnity agreement is exe-

at 9, 109-110, 115, 120, 136-137, 148, 181, 195, and 240.

Congress responded in 1957 by passing the Price-Anderson Act, Act of Sept. 2, 1957, Pub.L. No. 85-256, 71 Stat. 576 (codified at 42 U.S.C. § 2210). The Act had the dual purpose of "protect[ing] the public . . . and . . . encourag[ing] the development of the atomic energy industry." 42 U.S.C. § 2012(i) (1970). In its original form, the Act limited the aggregate liability for a single nuclear incident² to \$500 million plus the amount of liability insurance available on the private market—some \$60 million in 1957. The nuclear industry was required to purchase the maximum available amount of privately underwritten public liability insurance, and the Act provided that if damages from a nuclear disaster exceeded the amount of that private insurance coverage, the Federal Government would indemnify the licensee and other "persons indemnified"³ in an amount not to exceed \$500 million. Thus, the actual ceiling on liability was the amount of private insurance coverage plus the Government's indemnification obligation which totalled \$560 million.

Since its enactment, the Act has been twice amended, the first occasion being on the eve of its expiration in 1966.⁴ These amendments extended the basic liability limitation provisions for another 10 years, and added a provision which had the effect of requiring those indemnified under the Act to waive all legal defenses in the event of a substantial nuclear accident.⁵ This

cuted and any other person who may be liable for public liability . . ." 42 U.S.C. § 2014(t).

4. By the terms of the Act as originally passed, it was only applicable to licenses issued between August 30, 1954, and August 1, 1967. Act of September 2, 1957, Pub.L. No. 85-256, § 4, 71 Stat. 525, as amended, 42 U.S.C. § 2210(c) (1970).

5. The waiver provision is incorporated in the indemnity agreement. The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of risk

DUKE POWER CO. v. CAROLINA ENVIRON. STUDY

2627

Cite as 98 S.Ct. 2620 (1978)

provision was based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions—strict liability—was needed. A waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability.⁶ See S.Rep. No. 1605, 89th Cong., 2d Sess., 6-10 (1966); U.S. Code Cong. & Admin. Code 1966, p. 3201.

In 1975, Congress again extended the Act's coverage until 1987, and continued the \$560 million limitation on liability. However a new provision was added requiring, in the event of a nuclear incident, each of the 60 or more reactor owners to contribute between \$2 and \$5 million toward the cost of compensating victims.⁷ 42 U.S.C. § 2210(b). Since the liability ceiling remained at the same level, the effect of the "deferred premium" provision was to reduce the Federal Government's contribution to the liability pool.⁸ In its amendments to the Act in 1975, Congress also explicitly provided "that in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress will thoroughly review the partic-

ular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude" 42 U.S.C. § 2210(e).

Under the Price-Anderson Act as it presently stands, liability in the event of a nuclear incident causing damages of \$560 million or more would be spread as follows: \$315 million would be paid from contributions by the licensees of the 63 private operating nuclear power plants; \$140 million would come from private insurance (the maximum now available); the remainder of \$105 million would be borne by the Federal Government.⁹

B

Appellant Duke Power Company is an investor-owned public utility which is constructing one nuclear power plant in North Carolina and one in South Carolina. Duke Power, along with the Nuclear Regulatory Commission, was sued by appellees, two organizations—Carolina Environmental Study Group and the Catawba Central Labor Union—and 40 individuals who live within close proximity to the planned facilities. The action was commenced in 1973, and sought among other relief a declaration

all are waived in the event of an extraordinary nuclear occurrence, as are, to a limited degree, defenses based on certain short state statutes of limitations. Act of October 13, 1966, Pub.L. No. 89-645, 80 Stat. 891, codified at 42 U.S.C. § 2210(n)(1). See also 10 C.F.R. §§ 140.81 to 140.85, 140.91 to 140.92.

6. The Act was also amended in 1966 to provide for the transfer of all claims arising out of a nuclear incident to a single federal district court. 42 U.S.C. § 2210(n)(2). If the court finds that liability may exceed the liability limitation of the Act, immediate payments to injured parties are limited to 15% of the liability limitation until the court approves a plan of distribution to insure equitable treatment of all parties. *Id.*, at § 2210(o).

7. The NRC, which was empowered by the 1975 amendments to choose a figure in the \$2-\$5 million range, has set the assessment at \$5 million. 42 Fed.Reg. 46 (1977).

8. As the number of reactors increases, the \$5 million deferred premium in itself will yield a

fund exceeding the present liability ceiling. For example, it is predicted that by 1985 there will be a maximum of 138 reactors operating, see Executive Office of the President, The National Energy Plan 71 (1977), which would produce \$690 million in addition to whatever insurance is available from the private insurance market. Under the Act, the liability ceiling automatically increases to a level equal to the amount of primary and secondary (deferred premium) insurance coverage when the amount of such coverage exceeds the \$560 million figure. 42 U.S.C. § 2210(e).

9. Appellees' expert witness on insurance testified in the District Court that homeowners were unable to purchase insurance against nuclear catastrophes because "the nuclear industry has essentially absorbed the entire capacity of the private insurance market in their need for property and liability insurance." App., at 293.

that the Price-Anderson Act is unconstitutional.¹⁰

After the parties had engaged in extensive discovery, the District Court held an evidentiary hearing on the questions of whether the issues were ripe for adjudication and whether appellees had standing to challenge the constitutionality of the Act. That court determined that appellees had standing and that their claim could properly be adjudicated. The District Court went on to hold that the Price-Anderson Act was unconstitutional in two respects: (a) it violated the Due Process Clause of the Fifth Amendment because it allowed injuries to occur without assuring adequate compensation to the victims; (b) the Act offended the equal protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power.

We noted probable jurisdiction¹¹ in these appeals, 434 U.S. 937, 98 S.Ct. 426, 54 L.Ed.2d 297 (1977), and we now reverse.

II

As a threshold matter, we must address the question of whether the District Court had subject matter jurisdiction over appellees' claims, despite the fact that none of the parties raised this issue and the District Court did not consider it. See *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976). Appellees' complaint alleges jurisdiction under

28 U.S.C. § 1337, which provides for original jurisdiction in the district courts over "any civil action or proceedings arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Our reading of the pleadings,¹² however, indicates that appellees, claims do not "arise under" the Price-Anderson Act as that statutory language has been interpreted in prior decisions. See *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350, 353, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525 (1942).

Specifically, as we read the complaint, appellees are making two basic challenges to the Act—both of which find their moorings in the Fifth Amendment. First, appellees contend that the Due Process Clause protects them against arbitrary governmental action adversely affecting their property rights and that the Price-Anderson Act—which both creates the source of the underlying injury and limits the recovery therefor—constitutes such arbitrary action. And second, they are contending that in the event of a nuclear accident their property would be "taken" without any assurance of just compensation. The Price-Anderson Act is the instrument of the taking since on this record, without it, there would be no power plants and no possibility of an accident. Implicit in the complaint is also the assumption that there exists a cause of action directly under the Constitution to vindicate appellees' federal rights through a suit against the NRC, the executive agency charged with enforcement and administra-

ing an Act of Congress in any suit to which the United States, its agencies, officers or employees are parties.

12. The complaint provides in relevant part:

"19. Since the Price-Anderson Act provides victims of a nuclear disaster no benefit while at the same time limiting their right to recover for their losses to approximately 2 1/2 percent of such losses, the operation of the \$500 million limitation would, in the event of a nuclear disaster, deprive the persons injured by such a disaster of property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States." App., at 32.

10. The complaint also sought review of the Atomic Energy Commission's decision to grant a construction permit for one of the plants. During the pendency of this action, however, the United States Court of Appeals for the District of Columbia Circuit decided that the AEC had properly issued the permits. *CESG v. United States*, 166 U.S.App.D.C. 416, 510 F.2d 796 (1975). Accordingly, the District Court dismissed all counts of the complaint except those relating to the Price-Anderson Act's constitutionality.

11. Our jurisdiction was invoked under 28 U.S.C. § 1252, which provides for a direct appeal to this Court from any decision invalidat-

DUKE POWER CO. v. CAROLINA ENVIRON. STUDY

Cite as 98 S.Ct. 7620 (1978)

2629

tion of the allegedly unconstitutional statute.¹³ Appellees' right to relief thus depends not on the interpretation or construction of the Price-Anderson Act itself but instead "upon the construction or application of the Constitution," *Smith v. Kansas City Title & Trust*, 255 U.S. 180, 199, 41 S.Ct. 243, 245, 65 L.Ed. 577 (1921). Hence, if there exists jurisdiction to hear appellees' claims at all, it must be derived from 28 U.S.C. § 1331(a), the general federal question statute, rather than from § 1337—the jurisdictional base pleaded.¹⁴

[1,2] For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC and based directly on the Constitution is in fact a cause of action "on which [appellees] could actually recover." *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). Instead, the test is whether "the cause of action alleged is so patently without merit as to justify the

court's dismissal for want of jurisdiction." *Hagans v. Lavine*, 415 U.S. 528, 542-543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974) quoting *Bell v. Hood*, *supra*, 327 U.S., at 683, 66 S.Ct., at 776. (Emphasis added.) See also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-667, 94 S.Ct. 772, 778, 39 L.Ed.2d 73 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy.") In light of prior decisions, for example, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and *Hagans v. Lavine*, *supra*, as well as the general admonition that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell v. Hood*, *supra*, 327 U.S., at 684, 66 S.Ct., at 777, we conclude that appellee's allegations are sufficient to sustain jurisdiction under § 1331(a).¹⁵

13. Mr. Justice REHNQUIST would read the complaint, insofar as it alleges a denial of due process, as stating a claim only against Duke Power under North Carolina law. Under such a construction of the complaint, the question of the constitutionality of the Price-Anderson Act would emerge only in anticipation of a defense to appellees' state law claims and thus would not support federal jurisdiction under the "well-pleaded" complaint rule regardless of the jurisdictional statute relied upon. See *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). We conclude that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment. See n. 12 *supra*. On this view, the "well-pleaded" complaint rule poses no bar to the assertion of jurisdiction. Appellees' claim under the Due Process Clause is an essential ingredient of a well-pleaded complaint asserting a right under the Constitution and is not simply a claim made in anticipation of a defense to be raised in an action having its origin in state law. See also n. 26, *infra*.

14. Previously § 1331(a) required a minimum amount in controversy in all suits, but a 1976 amendment eliminated the jurisdictional amount requirement in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official

capacity." Pub.L. No. 94-574 § 2, 90 Stat. 2721. Thus this action, at least as against the Nuclear Regulatory Commission, would seem clearly permitted by § 1331(a) without specification of an amount in controversy. See *Andrus v. Charleston Stone Products Co., Inc.*, — U.S. —, 98 S.Ct. 2002, 55 L.Ed.2d — (1978), slip. op., at 3 n. 6. Appellees' failure to assert § 1331(a) as a basis for jurisdiction in their complaint is not fatal since the facts alleged are sufficient to support such jurisdiction. See *ibid*.

15. Mr. Justice REHNQUIST suggests that appellees' taking claim will not support jurisdiction under § 1331(a), but instead that such claims can only be adjudicated in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491. We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional. As such, appellees' claim tracks quite closely that of the petitioners in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320, which were brought under § 1331 as well as the Declaratory Judgment Act. See Joint App. in *Regional Rail Reorganization Act*

The further question of whether appellees' cause of action under the Constitution is one generally to be recognized need not be decided here. The question does not directly implicate our jurisdiction, see *Bell v. Hood*, *supra*, was not raised in the court below, was not briefed and was not addressed during oral argument. As we noted last Term in a similar context, questions of this sort should not be resolved on such an inadequate record; leaving them unresolved is no bar to full consideration of the merits. See *Mount Healthy v. Doyle*, 429 U.S. 274, 278-279, 97 S.Ct. 568, 571-572, 50 L.Ed.2d 471 (1977). It is enough for present purposes that the claimed cause of action to vindicate appellees' constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331(a).¹⁶

III

The District Judge held four days of hearings on the questions of standing and ripeness; his factual findings form the basis for our analysis of these issues.

A

[3] The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "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." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct.

2197, 2206, 45 L.Ed.2d 343, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). See also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Application of these constitutional standards to the factual findings of the District Court persuades us that the Art. III requisites for standing are satisfied by appellees.

We turn first to consider the kinds of injuries the District Court found the appellees suffered. It discerned two categories of effects which resulted from the operation of nuclear power plants in potentially dangerous proximity to appellees' living and working environment. The immediate effects included: (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a "sharp increase" in the temperature of two lakes presently used for recreational purposes resulting from the use of the lake waters to produce steam and to cool the reactor; (c) interference with the normal use of the waters of the Catawba River; (d) threatened reduction in property values of land neighboring the power plants; (e) "objectively reasonable" present fear and apprehension regarding the "effect of the increased radioactivity in the air, land and water upon [appellees] and their property, and the genetic effects upon their descendants"; and (f) the continual threat of "an accident resulting in uncontrolled release of large or even small quantities of radioactive material" with no assurance of adequate compensation for the resultant damage.

Cases, O.T.1974, Nos. 74-165, 166, 167, 168, at p. 161, 95 S.Ct. at p. 367. While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.

16. We need not resolve the question of whether Duke Power is a proper party since jurisdiction over appellees' claims against the NRC is established, and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or to our authority to award the requested relief.

431 F.Supp. 203, 209. Into a second category of potential effects were placed the damages "which may result from a core melt or other major accident in the operation of a reactor" *Id.*, at 209.¹⁷

[4] For purposes of the present inquiry, we need not determine whether all the putative injuries identified by the District Court, particularly those based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements. Compare *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) with *U. S. v. Scrap*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). See also *Conservation Society of Southern Vermont et al. v. AEC*, Civ. Act No. 19-72 (April 16, 1975 DDC). It is enough that several of the "immediate" adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the "injury in fact" standard. See *United States v. Scrap*, *supra*. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972).¹⁸ And the emission of non-natural radiation into appellees' environment would also seem a direct and present injury given

our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.¹⁹

The more difficult step in the standing inquiry is establishing that these injuries "fairly can be traced to the challenged action of the defendant," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450, or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries. *Id.*, at 43, 96 S.Ct., at 1926. The District Court discerned a "but for" causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, "and the construction of the nuclear plants which the [appellees] view as a threat to them." 431 F.Supp. 219. Particularizing that causal link to the facts of the instant case, the District Court concluded that "there is a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of the McGuire and Catawba Nuclear Plants but for the protection provided by the Price-Anderson Act." *Id.*, at 220.

These findings, which, if accepted, would likely satisfy the second prong of the constitutional test for standing as elaborated in *Simon*,²⁰ are challenged on two grounds.

17. For a detailed explanation of the nature and consequences of a core melt, see 431 F.Supp., at 206-207.

18. "We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing . . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . ." *Sierra Club v. Morton*, 405 U.S., at 734, 92 S.Ct., at 1366.

19. It is argued that the District Court's findings on the question of injury in fact upon which we rely are clearly erroneous and should not be accepted as a predicate for standing. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum*

Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Application of this standard to the factual findings of the District Court does not persuade us that they should not be accepted.

20. Our recent cases have required no more than a showing that there is a "substantial likelihood" that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement. See *Arlington Heights v. MHDC*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450, quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 ("MHDC has shown an injury to itself that is 'likely to be redressed by a favorable decision'"). See also *Warth v. Seldin*, 422 U.S. 490, 504, 506-507, 95 S.Ct. 2197, 2207, 2209-2210, 45 L.Ed.2d 343.

First, it is argued that the evidence presented at the hearing, contrary to the conclusion reached by the District Court, indicated that the McGuire and Catawba nuclear plants would be completed and operated without the Price-Anderson Act's limitation on liability. And second, it is contended that the Price-Anderson Act is not, in some essential sense, the "but for" cause of the disputed nuclear power plants and resultant adverse effects since if the Act had not been passed Congress may well have chosen to pursue the nuclear program as a government monopoly as it had from 1946 until 1954. We reject both of these arguments.

The District Court's finding of a "substantial likelihood" that the McGuire and Catawba Nuclear Plants would be neither completed nor operated absent the Price-Anderson Act rested in major part on the testimony of corporate officials before the Joint Committee on Atomic Energy (JCAE) in 1956-1957 when the Price-Anderson Act was first considered and again in 1975 when a second renewal was discussed. During the 1956-1957 hearings, industry spokesmen for the utilities and the producers of the various component parts of the power plants expressed a categorical unwillingness to participate in the development of nuclear power absent guarantees of a limitation on their liability. 431 F.Supp. 215. See also *Green, supra*, at 486, 490-491.²¹ By 1975, the tenor of the testimony had changed only slightly. While large utilities and producers were somewhat more equivocal about whether a failure to renew Price-Anderson would entail their leaving the industry, the smaller producers of component parts and architects and engineers—all of whom are essential to the building of the reactors and generating plants—considered renewal of the Act as the critical variable in

determining their continued involvement with nuclear power. 431 F.Supp. 216-217. Duke Power itself, in its letter to the Committee urging extension of the Act, cited recent experiences with suppliers and contractors who were requiring the inclusion of cancellation clauses in their contracts to take effect if the liability limitation provisions were eliminated. *Id.*, at 217. And the Report of the JCAE, in discussing the need for renewal of the Act, stated:

"Nuclear power plants now in the planning and design phases would not receive construction permits until about 1977-1978. Thus there is uncertainty as to whether these plants would receive protection in the form of Government indemnity. Reactor manufacturers and architect-engineers are already requiring escape clauses in their contracts to permit cancellation in the event some form of protection from unlimited potential liability is not provided. Action is required soon to prevent disruption in utility plans for nuclear power." H.R.Rep.No.94-648, 94th Cong., 1st Sess., 7 (1975).

[5] Nor was the testimony at the hearing in this case, evaluation of which is the primary responsibility of the trial judge, at odds with the impression drawn from the legislative history. The testimony of Vice President Lee of Duke Power simply echoed the views presented by Duke and others to Congress in 1975, that is, although some of the utilities themselves might be confident enough with respect to safety factors to proceed with nuclear power absent a liability limitation, the suppliers of critical parts and the utility shareholders could reasonably be expected to take a more cautious view.²² Appellees presented expert testi-

21. Nor was the situation different in 1965-1966, when the first 10-year renewal of Price-Anderson was considered. See H.R.Rep.No. 883, 89th Cong., 1st Sess., 9 (1965). See generally *Green, supra*, at 493.

22. "From what I know about nuclear power, it would be my recommendation that Duke proceed even in the absence of Price-Anderson. However, from the point of view of how others

perceive nuclear power, there is some question about whether it would be a practical undertaking in the absence of the Act. . . . I have already been advised by several firms that the existence of Price-Anderson is required for them to be a supplier to our nuclear program If Price-Anderson did not exist, I would, therefore, have to evaluate the extent to which its absence caused disappearance of suppliers from the marketplace in arriving at my

Cite as 98 S.Ct. 2620 (1978)

mony essentially to the same effect. Considering the documentary evidence and the testimony in the record, we cannot say we are left with "the definite and firm conviction that" the finding by the trial court of a substantial likelihood that the McGuire and Catawba Nuclear Power Plants would be neither completed nor operated absent the Price-Anderson Act is clearly erroneous and hence we are bound to accept it. *United States v. U. S. Gypsum*, 333 U.S. 365, 395, 68 S.Ct. 526, 541.

The second attack on the District Court's finding of a causal link warrants only brief attention. Essentially the argument is, as we understand it, that Price-Anderson is not a "but for" cause of the injuries appellees claim since if Price-Anderson had not been passed, the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to appellees from such government operated plants as from privately operated ones. Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear powered generating plants injuring appellees and that their participation would not have occurred but for the enactment and implementation of the Price-Anderson Act. Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.

B

It is further contended that in addition to proof of injury and of a causal link between

recommendation." Testimony of Executive Vice President Lee, *Duke Power*. App., at 368-369.

23. The only injury that would possess the required subject matter nexus to the due process challenge is the injury that would result from a nuclear accident causing damages in excess of the liability limitation provisions of the Price-Anderson Act.

such injury and the challenged conduct, appellees must demonstrate a connection between the injuries they claim and the constitutional rights being asserted. This nexus requirement is said to find its origin in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), where the general question of taxpayer standing was considered.

"The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayers must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.*, at 102, 88 S.Ct., at 1954.

See also *United States v. Richardson*, 418 U.S. 166, 174-175, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974). Since the environmental and health injuries claimed by appellees are not directly related to the constitutional attack on the Price-Anderson Act, such injuries, the argument continues, cannot supply a predicate for standing.²³ We decline to accept this argument.

[6] The major difficulty with the argument is that it implicitly assumes that the nexus requirement formulated in the context of taxpayers suits has general applicability in suits of all other types brought in the federal courts. No cases have been cited outside the context of taxpayer suits where we have demanded this type of subject matter nexus between the right asserted and the injury alleged and we are aware of none.²⁴ Instead, in *Schlesinger v. Re-*

24. In *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1972), a non-taxpayer suit, reference was made to *Flast's* nexus requirement in the course of denying appellant's standing to challenge the nonenforcement of Texas' desertion and nonsupport statute. Upon careful reading, however, it is clear that standing was denied not because of the absence of a subject matter nexus between the injury asserted and the constitutional claim but instead because of the unlikelihood that the

servists to Stop the War, 418 U.S. 208, 225, 94 S.Ct. 2925, 2934, 41 L.Ed.2d 706 n. 15, we explicitly rejected such a broad compass for the *Flast* nexus requirement:

"Looking 'to the substantive issues' *Flast* stated to be both 'appropriate and necessary' in relation to taxpayer standing was for the express purpose of determining 'whether there is a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated.' 392 U.S. at 102 [88 S.Ct. 1942]. This step is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged. . . ."

We continue to be of the same view and cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate anything more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the "case and controversy" requirement of Art. III.²⁵

Our prior cases have, however, acknowledged "other limits on the class of persons who may invoke the court's decisional and remedial powers," *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1974), which derive from general prudential concerns "about the proper—and properly limited—role of the courts in a democratic society." *Id.*, at 498, 95 S.Ct., at 2205. See also *Schlesinger v. Reservists to Stop the War*, *supra*, 418 U.S., at 221–227, 94 S.Ct., at 2932–2935. Thus, we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure. See

United States v. Richardson, *supra*. We have also narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief in the legal rights or interests of third parties." *Warth v. Seldin*, *supra*, 422 U.S., at 499, 95 S.Ct., at 2205. See also *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). This limitation on third party standing arguably suggests a connection between the claimed injury and the right asserted bearing some resemblance to the nexus requirement now urged upon us.

There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. See *Singleton v. Wulf*, 428 U.S. 106, 113–114, 96 S.Ct. 2868, 2873–2874, 49 L.Ed.2d 826 (1976). We do not, however, find these reasons a satisfactory predicate for applying this limitation or a similar nexus requirement to all cases as a matter of course. Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met. See, e.g., *Village of Arlington Hts. v. MHDC*, *supra*.

relief requested would redress appellant's claimed injury. *Id.*, at 618, 93 S.Ct., at 1149. This case thus provides no qualitative support for the broader application of *Flast*'s principles which appellants appear to advocate. Cf. *Scott*, Standing in the Supreme Court—A Functional Analysis, 86 Harv.L.Rev. 645, 660–662.

1942, 1962, 1968–1969, 20 L.Ed.2d 947 (Harlan J., dissenting), and more recently, see *United States v. Richardson*, 418 U.S., at 181, 96 n. 18, 94 S.Ct., at 2948, 2956. (POWELL, J., concurring), there have been questions as to whether the nexus requirement, even in the context of taxpayers' suits, is constitutionally mandated or is instead simply a prudential limitation.

25. Both at the time of its formulation, see *Flast v. Cohen*, 392 U.S. 83, 120, 130–131, 88 S.Ct.

Cite as 98 S.Ct. 2620 (1978)

[7] We conclude that appellees have standing to challenge the constitutionality of the Price-Anderson Act.²⁶

C

The question of the ripeness of the constitutional challenges raised by appellees need not long detain us. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S.Ct. 335, 356, 42 L.Ed.2d 320 (1974), our conclusion that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested would appear to satisfy this requirement.

[8] The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution. However, delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees—relief that would be forthcoming if they were to prevail in their various challenges to the Act. Similarly, delayed resolution would frustrate one of the key purposes of the Price-Anderson Act—the elimination of doubts concerning the scope of private liability in the event of major nuclear accident. In short, all parties would be adversely affected by a deci-

sion to defer definitive resolution of the constitutional validity *vel non* of the Price-Anderson Act. Since we are persuaded that "we will be in no better position later than we are now" to decide this question, *Regional Rail Reorganization Act Cases*, *supra*, 419 U.S., at 143-145, 95 S.Ct., at 359, we hold that it is presently ripe for adjudication.

IV

The District Court held the Price-Anderson Act contravened the Due Process Clause because "[t]he amount of recovery is not rationally related to the potential losses"; because "[the Act] tends to encourage irresponsibility in matters of safety and environmental protection . . ."; and finally because "there is no *quid pro quo*" for the liability limitations. 431 F.Supp. 222-223. An equal protection violation was also found because the Act "places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe." *Id.*, at 224-225. Application of the relevant constitutional principles forces the conclusion that these holdings of the District Court cannot be sustained.

A

Our due process analysis properly begins with a discussion of the appropriate standard of review. Appellants, portraying the liability limitation provision as a legislative balancing of economic interests, urge that the Price-Anderson Act be accorded the traditional presumption of constitutionality generally accorded economic regulations and that it be upheld absent proof of arbi-

26. Mr. Justice REHNQUIST undertakes to sever the action of the NRC in executing indemnity agreements under the Act from the Act's alleged constitutional infirmities—particularly the liability limitation provisions. Careful examination of the statutory mechanism indicates that such a separation simply cannot be sustained. The execution of the indemnification agreements by the NRC triggers the statutory ceiling on liability which, in terms, applies only to "persons indemnified." See 42 U.S.C. § 2210(e). Thus, absent the execution of such

agreements between the NRC and the licensees, the liability limitation provisions of the Act, to which appellees object, would simply not come into play. This fact coupled with the District Court's finding that "but for" the liability limitation provisions there is a substantial likelihood that the contemplated plants would not be built or operated, is sufficient to establish the justiciability of appellees' claim against the Commission. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S., at 44-46, 96 S.Ct., at 1927-1928.

trariness or irrationality on the part of Congress. See *Ferguson v. Skrupa*, 372 U.S. 726, 731-732, 83 S.Ct. 1028, 1031-1032, 10 L.Ed.2d 93 (1963); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). Appellees, however, urge a more elevated standard of review on the ground that the interests jeopardized by the Price-Anderson Act "are far more important than those in the economic due process and business oriented cases" where the traditional rationality standard has been invoked. Brief of Appellees, at 36. An intermediate standard like that applied in cases such as *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (equal protection challenge to statute requiring that males be older than females in order to purchase beer) or *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (contract clause challenge to repeal of statutory covenant providing security for bondholders) is thus recommended for our use here.

[9] As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident. See, e.g., S.Rep. No. 296, 85th Cong., 1st Sess., 15 (1957); U.S.Code, Cong. & Admin.Code 1957, p. 1803. The liability limitation provision thus emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate "the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co.*, *supra*, 428 U.S., at 15, 96 S.Ct., at 2892. "It is by now well established that [such] legislative acts come to the Court with a presumption of

constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary or irrational way." *Ibid.* That the accommodation struck may have profound and far-reaching consequences, contrary to appellees' suggestion, provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.²⁷

B

[10] When examined in light of this standard of review, the Price-Anderson Act, in our view, passes constitutional muster. The record before us fully supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power; nor do we understand appellees or the District Court to be of a different view. Rather their challenge is to the alleged arbitrariness of the particular figure of \$560 million, which is the statutory ceiling on liability. The District Court aptly summarized its position:

"[t]he amount of recovery is not rationally related to the potential losses. Abundant evidence in the record shows that although major catastrophe in any particular place is not certain and may not be extremely likely, nevertheless, in the territory where these plants are located, damage to life and property for this and future generations could well be many, many times the limit which the law places on liability." 431 F.Supp. 222.

[11] Assuming, *arguendo*, that the \$560 million fund would not insure full recovery in all conceivable circumstances,²⁸—and the

warranted. Nothing in *National League of Cities* or in our prior due process cases provides any support for this claim.

27. Appellees, in apparent reliance on our recent decision in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), argue that because the Price-Anderson Act encroaches on substantial state government interests, an augmented standard of review under the Due Process Clause is

28. As the various studies considered by the District Court indicate, there is considerable uncertainty as to the amount of damages which

hard truth is that no one can ever know—it does not by any means follow that the liability limitation is therefore irrational and violative of due process. The legislative history clearly indicates that the \$560 million figure was not arrived at on the supposition that it alone would necessarily be sufficient to guarantee full compensation in the event of a nuclear incident. Instead, it was conceived of as a “starting point” or a working hypothesis.²⁹ The reasonableness of the statute’s assumed ceiling on liability was predicated on two corollary considerations—expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of \$560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice.

“[T]his limitation does not, as a practical matter, detract from the public protection afforded by this legislation. In the first place, the likelihood of an accident occurring which would result in claims exceeding the sum of the financial protection required and the government indemnity is exceedingly remote, albeit theoretically possible. Perhaps more important, in the event of national disaster of this magnitude, it is obvious that Con-

would result from a catastrophic nuclear accident. See 431 F.Supp., at 210–214. The Reactor Safety Study published by the NRC in 1975 suggested that there was a one in 20,000 chance (per reactor year) of an accident causing property damage approaching \$100 million and having only minor health effects. By contrast, when the odds were reduced to the range of one in one billion (per reactor year), the level of damages approached \$14 billion, and 3,300 early fatalities and 45,000 early illnesses were predicted. United States Nuclear Regulatory Commission, Reactor Safety Study, An Assessment of Accidents Risks in U. S. Commercial Nuclear Power Plants 83–85 (Wash. 1400 1975). For a thorough criticism of the Reactor Safety Study, see EPA, Reactor Safety Study (Wash. 1400): A Review of the Final Report, EPA-520/3-76-009 (1976).

29. “What we were thinking about was the magnitude of protection and we set up an arbi-

trary figure because it seemed to be practical at that time and because we didn’t think an accident would happen . . . but yet we recognize that it could happen. We wanted to have a base to work from.” Hearings before the Joint Committee on Atomic Energy on Possible Modification or Extension of the Price-Anderson Insurance And Indemnity Act of 1957 In Order for Proper Planning of Nuclear Power Plants to Continue Without Delay, 93d Cong., 2d Sess., 68 (1974) (remarks of Rep. Holifield) (emphasis added).

gress would have to review the problem and take appropriate action. The history of other natural or man-made disasters, such as the Texas City incident, bears this out. The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than as an ultimate bar to further relief of the public.” H.R.Rep. No. 89–883, 89th Cong., 1st Sess. 6–7 (1965).

See also S.Rep. No. 296, 85th Cong., 1st Sess., 21 (1957); H.R.Rep. No. 94–648, 94th Cong., 1st Sess., 12, 15 (1975).

Given our conclusion that in general limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power, and/or requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This is not, however, the kind of arbitrariness which flaws otherwise constitutional action. When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation³⁰ and Congress’ now statutory commitment to “take whatever action is deemed

30. Congress’ conclusion that “the probabilities of a nuclear incident are much lower and the likely consequences much less severe than has been thought previously,” was a key factor in the decision not to increase the \$560 million liability ceiling in 1975. S.Rep. No. 94–454, 94th Cong., 1st Sess., 12 (1975), U.S.Code, Cong. & Admin.News 1975, pp. 2251, 2262.

necessary and appropriate to protect the public from the consequences of" any such disaster, 42 U.S.C. (Supp. V) § 2210(e).³¹ we hold the congressional decision to fix a \$560 million ceiling at this stage in the private development and production of electric energy by nuclear power, to be within permissible limits and not violate of due process.

[12] This District Court's further conclusion that the Price-Anderson Act "tends to encourage irresponsibility . . . on the part of builders and owners" of the nuclear power plants, 431 F.Supp. 222, simply cannot withstand careful scrutiny. We recently outlined the multitude of detailed steps involved in the review of any application for a license to construct or to operate a nuclear power plant, *Vermont Yankee Nuclear Power Corp. v. NRDC*, — U.S. —, at ———, 98 S.Ct. 1197, at 1203-1204, 55 L.Ed.2d 460 (1978); nothing in the liability limitation provision undermines or alters in any respect the rigor and integrity of that process. Moreover, in the event of a nuclear accident the utility itself

would suffer perhaps the largest damages. While obviously not to be compared with the loss of human life and injury to health, the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of irresponsible and cavalier conduct implicitly attributed to licensees by the District Court.

[13, 14] The remaining due process objection to the liability limitation provision is that it fails to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.³² However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common or state tort law remedies it replaces. *Cf. New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed.

31. In the past Congress has provided emergency assistance for victims of catastrophic accidents even in the absence of a prior statutory commitment to do so. For example in 1955, Congress passed the Texas City Disaster Relief Act, 69 Stat. 707, to provide relief for victims of the explosion of ammonium nitrate fertilizer in 1947. Congress took this action despite the decision in *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), holding the United States free from any liability under the Federal Tort Claims Act for the damages incurred and injuries suffered. More recently Congress enacted legislation to provide relief for victims of the flood resulting from the collapse of the Teton Dam in Idaho. Pub.L. 94-400, 90 Stat. 1211. Under the Act, the Secretary of the Interior was authorized to provide full compensation for any deaths, personal injuries or property damage caused by the failure of the dam. *Ibid.*

The Price-Anderson Act is, of course, a significant improvement on these prior relief efforts because it provides an advance guarantee of recovery up to \$560 million plus an express commitment by Congress to take whatever further steps are necessary to aid the victims of a nuclear incident.

32. Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1911), quoting *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77 (1876). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law to attain a permissible legislative objective." *Silver v. Silver*, 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S., at 16, 96 S.Ct., at 2892. See also *Arizona Employer's Liability Cases*, 250 U.S. 400, 419-422, 39 S.Ct. 553, 555-556, 63 L.Ed. 1058 (1918). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, e.g., *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (automobile guest statute); *Providence & NYSS Co. v. Hill Mfg. Co.*, 109 U.S. 578, 3 S.Ct. 379, 27 L.Ed. 1038 (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America v. Pan Amer. Airways*, 58 F.Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel). *Cf. Thomason v. Sanchez*, 539 F.2d 955 (C.A.3 1976) (Federal Driver's Act).

DUKE POWER CO. v. CAROLINA ENVIRON. STUDY

2639

Cite as 98 S.Ct. 2620 (1978)

667 (1916); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).³³

The legislative history of the liability limitation provisions and the accompanying compensation mechanism reflects Congress' determination that reliance on state tort law remedies and state court procedures was an unsatisfactory approach to assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear produced energy. The remarks of Chairman Anders of the Joint Committee on Atomic Energy during the 1975 hearings on the need for renewal of Price-Anderson are illustrative of this concern and of the expectation that the Act would provide a more efficient and certain vehicle for assuring compensation in the unlikely event of a nuclear incident.

"The primary defect of this alternative [non-renewal of the Act], however, is its failure to afford the public either a secure source of funds or a firm basis for legal liability with respect to new plants. While in theory no legal limit would be placed on liability, as a practical matter the public would be less assured of obtaining compensation than under Price-Anderson. Establishing liability would depend in each case on state tort law and procedures, and these might or might not provide for no-fault liability, let alone the multiple other protections now embodied in Price-Anderson. The present assurance of prompt and equitable compensa-

tion under a pre-structured and nationally applicable protective system would give way to uncertainties, variations and potentially lengthy delays in recovery. It should be emphasized, moreover, that it is collecting a judgment, not filing a lawsuit, that counts. Even if defenses are waived under state law, a defendant with theoretically "unlimited" liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation." Hearings on H.R. 8631 before Joint Committee on Atomic Energy, 94th Cong., 1st Sess., 69 (1975).

Appellees, like the District Court, differ with this appraisal on several grounds. They argue, *inter alia*, that recovery under the Act would not be greater than without it, that the waiver of defenses required by the Act, 42 U.S.C. § 2210(n), is an idle gesture since those involved in the development of nuclear energy would likely be held strictly liable under common-law principles;³⁴ that the claim-administration procedure under the Act delays rather than expedites individual recovery, and finally that recovery of even limited compensation is uncertain since the liability ceiling does not vary with the number of persons injured or amount of property damaged. The exten-

33. We reject at the outset appellees' contention that the Price-Anderson Act differs from other statutes limiting liability because the Act itself is the "but for" cause of the tort for which liability is limited. Put otherwise, the argument is that no *quid pro quo* can be provided by the Act since without it there would be no nuclear power plants and no possibility of accidents or injuries. As we understand the argument, it proceeds from the premise that prior to the enactment of Price-Anderson, appellees had some right, cognizable under the Due Process Clause, to be free of nuclear power or to take advantage of the state of uncertainty which inhibited the private development of nuclear power. This premise we cannot accept. Appellees' only relevant right prior to the enactment of the Price-Anderson Act was to uti-

lize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources. After the Act was passed, that right at least with regard to nuclear accidents was replaced by the compensation mechanism of the statute, and it is only the terms of that substitution which are pertinent to the *quid pro quo* inquiry which appellees insist the Due Process Clause requires.

34. See *Rylands v. Fletcher*, LR 3 H. L. 330 (1868). See generally Prosser, *The Law of Torts* 516 (1971); Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv.L.Rev. 644, 649 (1964).

sion of short state statutes of limitations and the provision of omnibus³⁵ coverage do not save the Act, in their view, since such provisions could equally well be included in a fairer plan which would assure greater compensation.

[15] We disagree. We view the congressional assurance of a \$560 million fund for recovery, accompanied by an express statutory commitment, to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident, 42 U.S.C. § 2210(e), to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage. The record in this case raises serious questions about the ability of a utility or component manufacturer to satisfy a judgment approaching \$560 million—the amount guaranteed under the Price-Anderson Act.³⁶ Nor are we persuaded that the mandatory waiver of defenses required by the Act is of no benefit to potential claimants. Since there has never been, to our knowledge, a case arising out of a nuclear incident like those covered by the Price-Anderson Act, any discussion of the standard of liability that state courts will apply is necessarily speculative. At the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty which would follow from the need to litigate the

question of liability after an accident. Further, even if strict liability were routinely applied, the common-law doctrine is subject to exceptions for acts of God or of third parties³⁷—two of the very factors which appellees emphasized in the District Court in the course of arguing that the risks of a nuclear accident are greater than generally admitted. All of these considerations belie the suggestion that the Act leaves the potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies—not known in modern times for either their speed or economy.

Appellees' remaining objections can be briefly treated. The claim-administration procedures under the Act provide that in the event of an accident with potential liability exceeding the \$560 million ceiling, no more than 15% of the limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for "possible latent injury claims which may not be discovered until a later time." 42 U.S.C. § 2210(e). Although some delay might follow from compliance with this statutory procedure, we doubt that it would approach that resulting from routine litigation of the large number of claims caused by a catastrophic accident.³⁸ Moreover, the statutory scheme insures the equitable distribution of benefits to all who suffer injury—both immediate and latent; under the common-law route, the proverbial race to the courthouse

35. See n. 3, *supra*.

36. The expert testimony before the District Court indicated that Duke Power, one of the largest utilities in the country, could not be expected to accumulate more than \$200 million for damage claims before reaching the point of insolvency. App. 393-397. This amount, even when coupled with the amount of available private insurance, would be less than the \$560 million provided by the Act. Moreover, if the liability were of sufficient magnitude to force the utility or component manufacturer into bankruptcy or reorganization, recovery would likely be further reduced and delayed. See Issues of Financial Protection in Nuclear Activities in Selected Materials on Atomic Energy

Indemnity and Insurance Legislation, Joint Committee on Atomic Energy, 93d Cong., 2d Sess., 110 (Committee Print 1974).

37. See Prosser, *Law of Torts*, *supra*, at 520-521.

38. The Act explicitly provides for "payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident." 42 U.S.C. § 2210(m). Unlike the normal tort recovery situation, these emergency payments are made prior to the determination of injury and the setting of damages, and are not conditioned on the execution of any release by the victim. *Ibid*.

DUKE POWER CO. v. CAROLINA ENVIRON. STUDY

2641

Cite as 98 S.Ct. 2620 (1978)

would instead determine who had "first crack" at the diminishing resources of the tortfeasor and fairness could well be sacrificed in the process. The remaining contention that recovery is uncertain because of the aggregate rather than individualized nature of the liability ceiling is but a thinly disguised version of the contention that the \$560 million figure is inadequate which we have already rejected.

In the course of adjudicating a similar challenge to the Workmen's Compensation Act in *New York Central R. Co. v. White*, 243 U.S. 188, 201, 37 S.Ct. 247, 252, 61 L.Ed. 667 (1917), the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "[H]e is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages." The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-

Anderson Act. Nothing more is required by the Due Process Clause.

[16, 17] Although the District Court also found the Price-Anderson Act to contravene the "equal protection provision that is included within the Due Process Clause of the Fifth Amendment," 431 F.Supp., at 224-225; appellees have not relied on this ground since the equal protection arguments largely track and duplicate those made in support of the due process claim. In any event, we conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations—particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy—is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from Price-Anderson is, of course, not pertinent to the equal protection analysis. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 378, 93 S.Ct. 1652, 1665, 36 L.Ed.2d 318 (1973).³⁹

Accordingly, the decision of the District Court is reversed and the case is remanded for proceedings consistent with this opinion.

Reversed. —

Mr. Justice STEWART, concurring in the result.

With some difficulty, I can accept the proposition that federal subject matter jurisdiction under 28 U.S.C. § 1331 exists here, at least with respect to the suit against the

39. Appellees also contend that the Price-Anderson Act effects an unconstitutional "taking" because in the event of a catastrophic nuclear accident their property would be destroyed without any assurance of just compensation. We find it unnecessary to resolve the claim that such an accident would constitute a "taking" as that term has been construed in our precedents since on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy, 28 U.S.C. § 1491. See

Regional Rail Reorganization Act Cases, 419 U.S. 102, 125-136, 95 S.Ct. 335, 349-354, 42 L.Ed.2d 320 (1974). Appellees concede that if the Tucker Act remedy would be available in the event of a nuclear disaster, then their constitutional challenge to the Price-Anderson Act under the Just Compensation Clause must fail. Brief of Appellees, at 71 n. 56. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day.

Nuclear Regulatory Commission, the agency responsible for the administration of the Price-Anderson Act. The claim under federal law is to be found in the allegation that the Act, if enforced, will deprive the appellees of certain property rights, in violation of the Due Process Clause of the Fifth Amendment. One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents.

But there never has been such an accident, and it is sheer speculation that one will ever occur. For this reason I think there is no present justiciable controversy, and that the appellees were without standing to initiate this litigation.

On the issue of standing, the Court relies on the "present" injuries of increased water temperatures and low-level radiation emissions. Even assuming that but for the Act the plant would not exist and therefore neither would its effects on the environment, I cannot believe that it follows that the appellees have standing to attack the constitutionality of the Act. Apart from a but-for connection in the loosest sense of that concept, there is no relationship at all between the injury alleged for standing purposes and the injury alleged for federal subject matter jurisdiction.

Surely a plaintiff does not have standing simply because his challenge, if successful, will remove the injury relied on for standing purposes *only* because it will put the defendant out of existence. Surely there must be *some* direct relationship between the plaintiff's federal claim and the injury relied on for standing. Cf. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450; *United States v. SCRAP*, 412 U.S. 669, 687-690, 93 S.Ct. 2405, 2415-2417, 37 L.Ed.2d 254; *Linda R. S. v. Richard D.*, 410

U.S. 614, 617 618, 93 S.Ct. 1146, 1148 1149, 35 L.Ed.2d 536. An interest in the local water temperature does not, in short, give these appellees standing to bring a suit under 28 U.S.C. § 1331 to challenge the constitutionality of a law limiting liability in an unrelated and as-yet-to-occur major nuclear accident.

For these reasons, I would remand this case to the District Court with instructions to dismiss the complaint.

Mr. Justice REHNQUIST, with whom Mr. Justice STEVENS joins, concurring in the judgment.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on District Court jurisdiction as carefully defined in our statutes and cases. Because I believe the preservation of these limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf. *Montana-Dakota v. Public Service Co.*, 341 U.S. 246, 249-250, 71 S.Ct. 692, 694-695, 95 L.Ed. 912 (1951).

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish only two grounds for the declaratory relief requested. First, they contend that the Price-Anderson Act deprives them of their property without due process of law in that it irrationally limits the tort recovery otherwise available in the North Carolina courts.¹ Second, they contend that the Act works an unconstitutional taking of their property for public use without just compensation. They purport to base District Court juris-

1. Appellees have explicitly abandoned their claim based upon the so-called equal protection component of the Fifth Amendment "since in this case any equal protection arguments

would be largely duplicative of appellees' due process arguments." Brief of Appellees, at 21 n. 26.

Cite as 98 S.Ct. 2620 (1978)

diction upon 28 U.S.C. § 1337 which covers "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

I

It is apparent that appellees' first asserted basis for relief does not state a claim "arising under" the Price-Anderson Act. Their complaint alleges that the operation of the two power plants will cause immediate injury to property within their vicinity. App. 32 ¶ 21. The District Court explicitly found that these injuries "give rise to an immediate right of action for redress. Under the law of North Carolina a right of action arises as soon as a wrongful act has created 'any injury, however slight,' to the plaintiff." 431 F.Supp. 203, 221 (W.D.N.C. 1977) (citations omitted). This right of action provided by state, not federal, law is the property of which the appellees contend the Act deprives them without due process. Thus, the constitutionality of the Act becomes relevant only if the appellant Duke Power Co. were to invoke the Act as a defense to appellees' suit for recovery under their North Carolina right of action.

It has long been established that the mere anticipation of a possible federal defense to a state cause of action is not sufficient to invoke the federal question jurisdiction of the District Courts. In *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), the plaintiffs sought to compel the specific performance of a contract by which the railroad had granted them free passes for life. Although their contract was not predicated upon federal law, the plaintiffs contended that federal question jurisdiction was established by the presence of an Act of Congress forbidding railroads to issue free passes. This Court held that the District Court did not have jurisdiction to consider whether the Act was inapplicable or unconstitutional:

"It is the settled interpretation of these words ['arising under'], as used in this

statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." *Id.*, at 152, 29 S.Ct., at 43.

Just as the underlying claim in *Mottley* arose under Kentucky contract law, the underlying claim in this case arises under North Carolina tort law. This Court has construed the "arising under" language of 28 U.S.C. § 1337 just as it has the similar language of 28 U.S.C. § 1331. *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350, 353, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525 (1942).

Nor does the fact that appellees seek only declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, support a different result. This Court has held that the well-pleaded complaint rule applied in *Mottley* is fully applicable in cases seeking only declaratory relief, because the Declaratory Judgment Act merely expands the remedies available in the district courts without expanding their jurisdiction. "It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673, 70 S.Ct. 876, 880, 94 L.Ed. 1194 (1950). See also *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974); *C. Wright, A. Miller & E. Cooper*, Federal

Practice and Procedure § 3566, at 437-438 (1975).²

Appellees do not contend that the Price-Anderson Act itself grants to them personal rights which may be vindicated in a federal proceeding. Since the only property rights they assert arise under North Carolina law, the District Court had no jurisdiction to consider whether the setting up of an Act of Congress as a defense against those rights would deny them due process of law under the Fifth Amendment.

Indeed, the Court does not even contend that there is an independent statutory source of jurisdiction over Duke. *Ante*, at 2630 n. 16. It suggests instead that the complaint states a claim against the Nuclear Regulatory Commission, not as a joint tortfeasor under North Carolina law, but as the administrator of an unconstitutional federal statute. The Court's theory is that the complaint alleges the existence of an implied right of action under the Fifth Amendment to obtain relief against arbitrary federal statutes. It can hardly be said that this theory of the case emerges

with crystal clarity from either the complaint or the brief of the appellees.

More importantly, there is no allegation in this complaint that the Nuclear Regulatory Commission has taken or will take any unconstitutional action at all. The complaint alleges only that the Commission granted construction permits to Duke, and that it will enter into an agreement "to indemnify Duke for any nuclear incident exceeding the amount of \$125,000,000, subject to a maximum liability of \$560,000,000." App. 31 ¶ 13. Neither of these actions is alleged to be unconstitutional. The gist of the complaint is the asserted unconstitutionality of 42 U.S.C. § 2210(e) which limits Duke's liability. But this limitation of liability is separate and apart from the indemnity agreement which the Commission is authorized to execute under 42 U.S.C. § 2210(d). The Commission has nothing whatever to do with the administration of the limitation of liability; whatever administration of that statute there is to be is left in the hands of the District Court. 42 U.S.C. § 2210(o). The District Court, of course, is not a party to this suit.³

2. The Court asserts that its decision today does not undermine the well-pleaded complaint doctrine because of its conclusion "that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment." *Ante*, at 2629 n. 13. The supposed claim against the Commission arises only under federal law, since the complaint does not allege and the District Court did not find that North Carolina law would provide any remedy against it as a joint tortfeasor. On the Court's theory of the case, then, it need not decide whether jurisdiction could be obtained over Duke Power under § 1331. *Ante*, at 2630 n. 16. That is a particularly felicitous conclusion from the Court's point of view, since the complaint does not allege that each member of the plaintiff class has a \$10,000 claim against Duke Power, which is a prerequisite to jurisdiction under § 1331. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1975).

Despite the Court's assurances, it is conceivable that the practical effect of today's decision could be an erosion of the well-pleaded complaint doctrine. Had the plaintiffs in *Mottley* joined as defendants a federal agency having as ephemeral a relation to the statute challenged there as does the Commission to the statute involved here, the District Court, according to

today's decision, would have had jurisdiction to consider the constitutionality of the statute, even though its judgment would not have been binding against the Louisville & Nashville Railroad. Innumerable federal statutes and regulations affect the daily decisions of private parties, who would undoubtedly appreciate the sort of advisory opinion rendered today on the validity of those provisions. This Court should not encourage the hope that such opinions may be obtained by suing an appropriate federal agency under a claim which verges on the frivolous.

3. Appellees' challenge to the construction permits was rejected in *Carolina Environmental Study Group v. United States*, 166 U.S.App. D.C. 416, 510 F.2d 796 (1975). It is true, as the Court remarks, *ante*, at 2635 n. 26, that "absent the execution of such [indemnity] agreements between the NRC and the licensees, the liability limitation provisions of the Act, to which appellees object, would simply not come into play." That logical connection, however, does not amount to an allegation that the Commission's execution of an indemnity agreement is itself unconstitutional. The only federal action challenged by this complaint is a hypothetical district court's hypothetical invocation of the statute in the event of a hypothetical nucle-

Cite as 98 S.Ct. 2620 (1978)

It simply cannot be said that these allegations make out an actual controversy against the Commission. While the Commission may be quite interested in the constitutionality of the statute, that is hardly sufficient to establish a justiciable controversy. *Muskraat v. United States*, 219 U.S. 346, 361-362, 31 S.Ct. 250, 255-256, 55 L.Ed. 246 (1911). While appellees may have been damaged by Duke's decision to construct these plants, there is no "challenged action of the defendant" Commission to which their damage "fairly can be traced." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976). If Duke decided to proceed with construction despite a declaration of the statute's unconstitutionality, there would be nothing that the Commission could do to aid appellees. Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against that defendant. *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975). In short, appellees' only conceivable controversy is with Duke, over whom the District Court had no jurisdiction.

II

As appellees themselves describe the second aspect of their complaint, "the central issue is whether in the circumstances of this case, the complete destruction of appel-

lees' property by a nuclear accident occurring at one of Duke's plants would be a 'taking' by the United States, as that term is defined in the Fifth Amendment." Brief of Appellees, at 62. This statement makes clear that appellees' claim arises not under the Price-Anderson Act, but under the Fifth Amendment itself. Jurisdiction under § 1337 extends only to actions vindicating rights created by an Act of Congress. Compare *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300, 64 S.Ct. 95, 96, 88 L.Ed. 61 (1943), with *General Committee v. Missouri-K-T. R. Co.*, 320 U.S. 323, 337, 64 S.Ct. 146, 152, 88 L.Ed. 76 (1943). Since it cannot be maintained that the Price-Anderson Act created appellees' asserted right to be free from takings for public use without just compensation, it follows that District Court jurisdiction may not be predicated upon § 1337.

The District Court does have jurisdiction to consider claims of taking under the Tucker Act, 28 U.S.C. § 1346(a)(2), where the amount in controversy is under \$10,000.⁴ "But the Act has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States." *Richardson v. Morris*, 409 U.S. 464, 465, 93 S.Ct. 629, 631, 34 L.Ed.2d 647 (1973). It is incontrovertibly established that neither the district courts nor the Court of Claims have jurisdiction under the Tucker Act to issue the sort of declaratory relief granted here.

ar accident. In that entire string of hypothetical events, no action of the Commission is alleged to be unconstitutional.

4. The Court concludes, *ante*, at 2629-2630 n. 15, although appellees do not so contend, that their taking claim is cognizable under 28 U.S.C. § 1331(a) which grants jurisdiction to the district courts where the suit "arises under the Constitution." The Court cites only the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), in support of its conclusion that this claim may be maintained under § 1331. It is, of course, well established that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v.*

Lavine, 415 U.S. 528, 535 n. 5, 94 S.Ct. 1372, 1378, 39 L.Ed.2d 577 (1974). In the *Regional Rail Reorganization Act Cases* this Court's opinion did not even cite the statutory basis for jurisdiction, much less consider its validity. To conclude that § 1331 embraces a "taking" claim makes the Tucker Act largely superfluous, cf. *United States v. Testan*, 424 U.S. 392, 404, 96 S.Ct. 948, 956, 47 L.Ed.2d 114 (1976), and will permit the district courts to consider claims of over \$10,000 which previously could only be litigated in the Court of Claims. *Richardson v. Morris*, 409 U.S. 464, 93 S.Ct. 629, 34 L.Ed.2d 647 (1973). Such a significant expansion of the jurisdiction of the district courts should not be accomplished without the benefit of arguments and briefing.

Compare *ibid.*, with *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Thus, the record does not establish any jurisdictional basis upon which the District Court could grant declaratory relief on appellees' taking claim.

There being no basis for District Court jurisdiction over either of appellees' claims, its judgment should be reversed and the cause remanded with instructions to dismiss the complaint for want of jurisdiction.

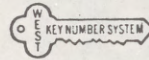
Mr. Justice STEVENS, concurring in the judgment.

The string of contingencies that supposedly holds this case together is too delicate for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees; we are then asked to remedy an alleged due process violation that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this case ripe for decision or to establish appellees' standing; * it is even more remarkable

that this occurs in a case in which, as Mr. JUSTICE REHNQUIST demonstrates, there is no federal jurisdiction in the first place.

The Court's opinion will serve the national interest in removing doubts concerning the constitutionality of the Price-Anderson Act. I cannot, therefore, criticize the statesmanship of the Court's decision to provide the country with an advisory opinion on an important subject. Nevertheless, my view of the proper function of this Court, or of any other federal court, in the structure of our government is more limited. We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.

I join Mr. Justice REHNQUIST'S opinion concurring in the judgment.



* With respect to whether appellees' claim of present injury is sufficient to establish standing, it should be noted that some sort of financing is essential to almost all projects, public or private. Statutes that facilitate and may be essential to the financing abound—from tax

statutes to statutes prohibiting fraudulent securities transactions. One would not assume, however, that mere neighbors have standing to litigate the legality of a utility's financing. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539.