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Legitimate Classification and Nonpunitive Confiscation: Avoiding the Bill of Attainder Proscription

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.

—Chief Justice John Marshall

A bill of attainder is a legislative enactment imposing punishment upon a named or easily ascertainable individual or group without further judicial determination. The Constitution of the United States prohibits such enactments by Congress or by state legislatures. In Nixon v. Administrator of General Services, the United States Supreme Court held that Congress is not precluded by the attainder clause from enacting a statute imposing burdensome consequences upon even a named individual, so long as the person so identified constitutes a "legitimate class of one" and the interference with his private interests does not rise to the level of "punishment."

This Comment will examine the Nixon decision and its impact upon the attainder doctrine as developed in prior cases. The argument is not that the Nixon result is necessarily incorrect, but rather that the analysis employed by the Court fails to adequately address the issue of attainder. The doctrine as developed over the years is overburdened with notions borrowed from equal protec-

2. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866). Historically, the bill of attainder always sentenced the attainted individual (or members of a group) to death. Any statute imposing punishment less than execution was termed a bill of pains and penalties. However, early dicta, subsequently approved, established that the proscription of the Constitution applied equally to both types of enactments; the term "bill of attainder" is used to denote both. Nixon v. Administrator of Gen. Servs., 433 U.S. at 537 (Burger, C.J., dissenting); United States v. Brown, 381 U.S. 437, 447 (1965); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).
4. Id. § 10, cl. 1. The Supreme Court has interpreted the provisions identically. See Ex parte Garland, 71 U.S. (4 Wall.) 333, 377-78 (1866). This Comment will use the term "attainder clause" without specifying the particular provision involved.
tion doctrine that have a limited place in the attainder context. The Nixon majority's approach represents the clearest example to date of the extent to which attainder doctrine has become encumbered with foreign concepts. In answer to the Nixon approach, this Comment suggests an alternative analysis based upon the following definitions:

1. A bill of attainder legislatively imposes punishment upon an individual or group whose activities or character have been adjudged blameworthy by the legislature.

2. Punishment is either (a) the deprivation of an interest afforded due process protection or (b) other burdens imposed where consideration of all the circumstances indicates that the legislature has exceeded purely regulatory purposes.

I. THE SUPREME COURT AND THE ATTAINER CLAUSES

A. From Confederate Rebels to Communist Subversives

For the most part, the mere existence of the attainder prohibition has been sufficient to deter the legislature from such enactments. After the Constitution's adoption, three-quarters of a

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6. The purposes for inclusion of the attainder clauses in the Constitution are open to considerable conjecture, since there was no debate or opposition on this point. Attainers confiscating land of Loyalists in the post-Revolutionary War era were rather common; it has been suggested that the prohibition was included as an olive branch to Great Britain in the interest of renewed commerce. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 93-98 (1956).

Contemporaneous writings by the Framers are of little help in discerning the rationale behind these clauses. James Madison referred to the proscription against bills of attainder and ex post facto laws as a "constitutional bulwark in favor of personal security and private rights" and protection against "the fluctuating policy which has directed the public councils." THE FEDERALIST No. 44, at 299 (Heritage ed. 1945). Alexander Hamilton mentioned the bill of attainder provision as part of his argument that the Constitution was the equivalent of a bill of rights, but he did not amplify this discussion to show what particular rights were intended to be protected by the clause. THE FEDERALIST No. 84, at 573 (Heritage ed. 1945). This view was reiterated by the Supreme Court in Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322-23 (1866).

The only extensive pronouncement by the Court as to the purposes behind the bill of attainder prohibition focused on separation of powers and due process safeguards available in judicial determinations:

The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

... [T]he Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness
century passed before the Supreme Court struck down an enactment as violative of the attainder clause.\(^7\) Even then the offending provisions were not clear-cut attempts to single out a group for punishment.

Two companion cases reached the Court in 1866. In the first, *Cummings v. Missouri*,\(^8\) a Catholic priest challenged a provision of the 1865 Missouri Constitution requiring an expurgatory oath from those who sought to hold certain positions of trust. Teachers, clergymen, corporate managers, and trustees were all required to swear that they had not taken any part in the rebellion against the Union. The second case, *Ex parte Garland*,\(^9\) involved a similar oath required by federal statute with respect to attorneys admitted to practice before the federal courts. Since the provisions absolutely excluded an ascertainable class of persons (those who had participated in the Confederate cause) from pursuing desired vocations, the Court struck down both requirements under the respective attainder clauses. The disability was deemed a penalty and therefore punishment.

The *Cummings* decision adopted a broad approach to the bill of attainder question. First, the Court recognized that such bills need not be directed against an individual by name; they may be directed against an entire class.\(^10\) Similarly, conditional imposition of punishment was no less prohibited than punishment absolutely imposed.\(^11\) Most importantly, the *Cummings* Court rejected any formalistic approach to the attainder analysis:

> [W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition of, and levying appropriate punishment upon, specific persons... By banning bills of attainder, the Framers of the Constitution sought to... [limit] legislatures to the task of rule-making.


7. Some early cases referred to the attainder clause tangentially, usually in very broad terms. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 286 (1827) ("By classing bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts together, the general intent [of the clause] becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property.").

8. 71 U.S. (4 Wall.) 277 (1866).
10. 71 U.S. (4 Wall.) at 323.
11. *Id.* at 324.
was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of enactment, its insertion in the fundamental law was a vain and futile proceeding.\textsuperscript{12}

As to the nature of rights protected against legislative deprivation, the Court recognized that punishment might include the deprivation of "any rights, civil or political, previously enjoyed," including "life, liberty and the pursuit of happiness."\textsuperscript{13}

During the latter part of the 19th century, the broad language of the Cummings decision formed the basis of various unsuccessful attacks on statutes establishing minimum qualifications for the practice of professions.\textsuperscript{14} The leading case in this period was Dent \textit{v. West Virginia}\textsuperscript{15} which upheld a licensing statute for doctors. In Dent, the Court reasoned that there was no absolute bar to presently unqualified persons and that the statute sought only to promote the health of citizens, not to punish anyone. A more difficult case from this era involved a bar from the practice of medicine imposed on convicted felons. In Hawker \textit{v. New York},\textsuperscript{16} the Court sustained such a statute, despite its condemnation of an identifiable class, because the disqualification was based on a prior judicial conviction.\textsuperscript{17}

\begin{itemize}
  \item \textsuperscript{12} Id. at 325.
  \item \textsuperscript{13} Id. at 320-22.
  \item \textsuperscript{14} Dictum from the \textit{Ex parte Garland} opinion had anticipated such attacks:
  \begin{quote}
  The Legislature may . . . prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment. . . .
  \end{quote}
  71 U.S. (4 Wall.) at 379-80.
  \item \textsuperscript{15} 129 U.S. 114 (1889).
  \item \textsuperscript{16} 170 U.S. 189 (1898).
  \item For a detailed examination of these and similar decisions and the distinctions upon which they are based, see Comment, \textit{The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial}, 63 YALE L.J. 844 (1954).
  \item \textsuperscript{17} Accord, De Veau \textit{v. Braisted}, 363 U.S. 144 (1960) (upholding a New York statute barring convicted felons from office in waterfront labor unions). In De Veau, the Court observed:
  \begin{quote}
  The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. . . . Clearly, [this Act] embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction . . . . The question . . . where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.
  \end{quote}
  Id. at 160 (citation omitted).
\end{itemize}
Eighty years passed after *Cummings* and *Ex parte Garland* before the Supreme Court struck down another federal statute on bill of attainder grounds. In *United States v. Lovett*, the Court summarily invalidated a provision of the Urgent Deficiency Appropriation Act of 1943 denying compensation to three named individuals who, in the view of the House Un-American Activities Committee, were "guilty" of subversive activities. The case is most notable, however, for Justice Frankfurter's concurrence that rejected the attainder challenge but dealt at length with the issue. Justice Frankfurter advocated a narrow, historical approach to the attainder issue, setting out his view of the necessary elements as follows:

1. All bills of attainder specify the offense for which the attained person was deemed guilty and for which punishment was imposed.  
2. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable *ex post facto*.

Under Frankfurter's approach, the punishment element required that the deprivation be retribution for past acts. Over the next fifteen years, Justice Frankfurter's concurrence in *Lovett* cast a long shadow over several decisions involving "antisubversive" enactments in which the Court narrowed the notion of "punishment." In *American Communications Association v. Douds*, for example, the Court found no bill of attainder in a denial of access to the quasi-judicial National Labor Relations Board when union officers refused to file affidavits denying present membership in the Communist Party. The Court viewed the proscription as a requirement of conformity to present standards, not as punishment for past acts. A "loyalty oath" required of Los Angeles public employees was upheld as a reason-
able qualification in *Garner v. Board of Public Works*. The *Garner* Court distinguished *Cummings* and *Ex parte Garland* on the grounds that the Los Angeles oath barred public employment only, not entrance to an entire profession. In *Flemming v. Nestor*, the Court found no attainder in denial of Social Security benefits to aliens deported for past Communist activities. "[M]ere denial of a noncontractual governmental benefit" did not constitute punishment.

In *Communist Party v. Subversive Activities Control Board*, the bill of attainder challenge failed for lack of specificity in the enactment. The Subversive Activities Control Act of 1950 had required registration of all "communist action organizations." The determination of what groups were subject to the regulations was left to an administrative board empowered to hold public investigative hearings and to issue registration orders. The Court noted "constitutional significance" in the fact that Congress did not name the Communist Party in the enactment. Justice Frankfurter's majority opinion easily disposed of the attainder issue:

>[The Act] attaches not to specified organizations but to described activities in which an organization may or may not engage. . . . It requires the registration only of organizations which . . . are found to . . . operate primarily to advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for . . . determination whether the administrative findings as to fact are supported by the preponderance of the evidence.

Implicitly, the Court recognized that the evil of attainder lies in a lack of due process; that defect was avoided in this case through the administrative hearing procedure.

The Warren Court's most significant bill of attainder decision resoundingly rejected the narrow interpretations of the cases following *Lovett*. In *United States v. Brown*, the Court struck down section 504 of the Labor-Management Reporting and Disclosure Act of 1959. Section 504 was a substantially identical

26. Id. at 617.
29. 367 U.S. at 84-85.
30. Id. at 86-87.
replacement of the provision upheld in *Douds*. Chief Justice Warren's majority opinion seemed to signal a return to the broad approach of *Cummings*. The Court noted that the attainder clause "was intended not as a narrow, technical . . . prohibition," and rejected the notion that "punishment" required some element of retribution.

B. The Nixon Decision

The recent case of *Nixon v. Administrator of General Services* is the first reexamination of bill of attainder doctrine by the Court since *Brown*. More intense interest in other separation of powers issues has relegated this aspect of the case to relative obscurity; Justice Stevens, however, saw such "serious questions" that his concurrence addressed only the bill of attainder issue. Particularly disturbing is the fact that the statute involved arose from a circumstance that typically surrounds traditional bills of attainder: a political crisis in which the object of the legislation is an unsuccessful political foe.

1. Background and posture of the case

In the wake of his resignation, former President Richard M. Nixon entered into an agreement with the Administrator of Gen-

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33. See note 23 and accompanying text supra. The Court noted that the provision involved in *Douds* was factually distinguishable in that the new provision required affidavits denying Communist Party membership during the past five years. The Court stated, however, that the *Douds* decision involved a misreading of the *Lovett* holding. 381 U.S. at 457-58, 460.

34. 381 U.S. at 422.

35. Id. at 458-60.

36. While several recent attainder decisions have split the Court 5-4 (e.g., *Brown* and *Flemming*), the 7-2 *Nixon* decision would hardly seem to be close or controversial. Indeed, on the attainder issue, the split may well have been 8-1 since Justice Rehnquist’s dissent addressed only the separation of powers issue. 433 U.S. at 545. The Chief Justice entered the only dissent on the bill of attainder issue. Id. at 536. Three justices, however, expressed some serious reservations about the majority analysis. Justice White said that the Act does not inflict punishment and simply cited his dissent in *Brown*. Id. at 487. But he also questioned the applicability of the eminent domain "just compensation" rationale, at least with respect to some of the materials. Id. at 487-91. Justices Blackmun and Stevens both expressed hope that the congressional action in this case would not set a precedent for future dispositions of Presidential materials. Id. at 486, 491. These sentiments by the concurring Justices indicate that some uneasiness exists among four members of the Court about the nature of the congressional action.

37. At least twice in the interim, the issue was raised but not reached by the Court. Bryson v. United States, 396 U.S. 64, 67-68 (1969); Dennis v. United States, 384 U.S. 855, 864-65 (1966).

38. 433 U.S. at 484 (Stevens, J., concurring).

39. See generally Z. CHAFFEE, supra note 6, at 90-144.
eral Services, Arthur F. Sampson,\(^4\) to transfer to California the materials accumulated by the executive branch during Nixon's administration—including the infamous White House tapes. Mr. Nixon was to have ultimate control over access to the materials. The materials were to be preserved for three years (or, in the case of the tapes, five years), after which time Mr. Nixon could remove or destroy any materials he might choose. The remaining materials would be given to the United States after the establishment of a Presidential library.\(^4\) In any event, all of the original tapes were to be destroyed upon Mr. Nixon's death, but not later than September 1, 1984.

At the request of the Watergate special prosecutor, President Ford prevented execution of the agreement in order to facilitate access to the materials necessary for the pending Watergate prosecutions.\(^4\) Mr. Nixon filed suit to force implementation of the agreement.\(^4\) Before that case was decided, however, Congress took action to invalidate the agreement. Without holding a hearing, the Senate Committee on Government Operations voted out Senate bill 4016, eventually enacted in 1974 as the Presidential Recordings and Materials Preservation Act\(^4\) (the Act or the Preservation Act). The Act directed the Administrator of General Services to obtain or maintain control of "the Presidential historical materials of Richard M. Nixon."\(^4\) The Act provides that the

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45. Id. § 101 (codified at 44 U.S.C. § 2107 note). Section 101(a) of the Act deals specifically with the White House tapes and directs that "any Federal employee in possession shall deliver, and the Administrator . . . shall receive, obtain, or retain, complete possession and control of" such materials. Subsection (b) directs the Administrator to "receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period
materials be made available, as appropriate, to Mr. Nixon, executive agencies and departments, and the courts.\textsuperscript{46} The Administrator is directed to issue regulations protecting the materials and regulating public access for the protection of private interests involved.\textsuperscript{47} The Act vests exclusive jurisdiction in the United States District Court for the District of Columbia to hear challenges to the Act and regulations promulgated thereunder, and grants docket priority to such suits.\textsuperscript{48} In the event that the court should find a deprivation of private property, the Act authorizes payment of "just compensation."\textsuperscript{49} Title II of the Act\textsuperscript{50} created a commission to study questions concerning records of all federal officials.\textsuperscript{51}

Former President Nixon immediately filed an action against the Administrator of General Services challenging the Act's constitutionality and seeking injunctive and declaratory relief.\textsuperscript{52} Mr.

\begin{itemize}
\item \textsuperscript{47} Id. §§ 103-104.
\item \textsuperscript{48} Id. § 105(a).
\item \textsuperscript{49} Id. § 105(c). The Congress anticipated the constitutional challenges to the legislation and attempted to shore up the weak points. In this particular instance, the intent was to characterize the bill as an exercise of eminent domain power, contingent upon a subsequent court determination that there had been a taking.
\item \textsuperscript{50} Title II of the Act was separately titled as the "Public Documents Act." Id. § 201 (codified at 44 U.S.C. § 3315 note).
\item \textsuperscript{51} Id. §§ 201-202 (codified at 44 U.S.C. §§ 3315-3324).
\item Republicans objected to the Act, pointing out the possibility of a bill of attainder challenge for failure to make title I generally applicable even to all future Presidents. In his lengthy comments on the Senate floor, Senator Hruska became the main exponent of the constitutional objections. See 120 CONG. REC. 33863-73 (1974).
\item Senator Griffin unsuccessfully sought to amend the Act so as to make it generally applicable to federal officials. Senator Ervin, however, objected:
\begin{quote}
[T]he question of whether we would adopt a generic bill was considered fully by the Government Operations Committee at the time we voted to report this bill. It was the unanimous agreement that we should not attempt to do so. . . .

If we attempt to put too much of a burden on one little nag that has to make a speedy journey we prevent the necessary speed being made, and it might break the back of the nag . . . .
\end{quote}
120 CONG. REC. 33860-61 (1974).
\item With this second case pending, the first suit was decided on the grounds that the Act invalidated the Nixon-Sampson agreement. Nixon v. Sampson, 389 F. Supp. 107, 124. The district court's opinion covers almost 50 pages and seems overly long in light of the pending action. Ultimately, the district court dismissed the first action as moot. Nixon v. Sampson, 437 F. Supp. 654 (D.D.C. 1977).}

\end{itemize}
Nixon urged six grounds of unconstitutionality: (1) separation of powers, (2) Presidential privilege of confidentiality, (3) privacy, (4) freedom of speech and political association, (5) equal protection, and (6) bill of attainder. The three-judge district court found the privacy claims most difficult, but upheld the Act on all grounds. On appeal, the Supreme Court affirmed.

Justice Brennan's majority opinion systematically disposed of Nixon's objections. The Act did not compromise separation of powers principles, the Court observed, because the executive branch retained control of the materials and became a party to the Act upon the signature of President Ford. A major factor in the rejection of Presidential privilege, privacy, and first amendment association claims was the limited nature of the intrusion by the archivists during the screening process coupled with the safeguards to be incorporated in the regulations on access to the materials. The equal protection challenge was not pursued on appeal.

2. The Court's bill of attainder analysis

Justice Brennan rejected the bill of attainder challenge to the Preservation Act, holding that Mr. Nixon constituted a "legitimate class of one" and that any burden imposed upon him was not punishment in the constitutional sense. The decision was based upon a two-pronged analysis derived from the definition of an attainder as a bill which (1) inflicts punishment without judicial trial (2) upon a specified individual or group. Nixon argued that the Preservation Act violated the prohibition against bills of attainder because it was based upon a legislative determina-
nation of his individual "blameworthiness."\textsuperscript{60} The Court characterized Nixon's interpretation of the attainer clause as a prohibition against undesired consequences imposed upon an individual or group not defined at a proper level of generality. The Court refused to extend the doctrine that far because to do so would remove "the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment."\textsuperscript{61} Such an approach, reasoned the majority, would prove unworkable since any group subject to adverse legislation could complain that the enactment lacked sufficient generality.\textsuperscript{62} The Court then proceeded to examine the specificity and punishment elements separately.

The specificity element was not satisfied because former President Nixon constituted a "legitimate class of one." Congress permissibly limited the scope of the legislation because his were the only materials demanding immediate attention: he was the only former President who had not yet placed his materials in a library, and the tapes would be destroyed under the Nixon-Sampson agreement upon his death.\textsuperscript{63} The majority also considered the overall intent of the statute, looking at title II as an indication that Congress intended similar regulation of other federal officials in the future.\textsuperscript{64}

With respect to the punishment element of the analysis, the majority adopted a multifaceted approach, recognizing that punishment may be discerned from a number of perspectives. First, the Court applied a historical test: whether the deprivation or disability of the statute is one traditionally associated with attainders, \textit{i.e.}, death,\textsuperscript{65} imprisonment, banishment, property confiscation, or employment bar.\textsuperscript{66} The majority found the provision in the Act for "just compensation"\textsuperscript{67} inconsistent with a finding

\begin{itemize}
\item \textsuperscript{60} Brief for Appellant at 130-35.
\item \textsuperscript{61} 433 U.S. at 470.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. at 471-72.
\item \textsuperscript{64} Id. at 472. In so doing, the Court made a quantum leap. The National Study Commission on Records and Documents of Federal Officials created by title II could only recommend legislation relating to the preservation of such materials. Actual enactment would require further affirmative action by the Congress.
\item The Study Commission report recommended that all materials created in public service should be government property and that elected officials should be allowed to restrict access to the materials for a maximum of 15 years. \textit{National Study Commission on Records and Documents of Federal Officials, Final Report} 29-42 (1977).
\item \textsuperscript{65} See note 2 supra.
\item \textsuperscript{66} 433 U.S. at 473-74.
\item \textsuperscript{67} See note 49 and accompanying text supra.
\end{itemize}
of "punitive confiscation of property." Second, a functional test looking to the type and severity of the burdens imposed was applied to determine whether the challenged law "reasonably can be said to further nonpunitive legislative purposes." The Court saw no implication of punishment, finding the Preservation Act to be "nonpunitive legislative policymaking" based on legitimate congressional interests in preserving both trial evidence and historically valuable records. A third test, characterized as "motivational," was employed to consider "whether the legislative record evinces a congressional intent to punish." The majority saw no reason to overturn the finding of the district court that the legislative concern was focused not upon Richard Nixon but upon the Nixon-Sampson depository agreement that Congress perceived to be inimical to the public interest. The Act was therefore "regulatory and not punitive in character."

In connection with the motivational test, Justice Brennan examined a number of other considerations that he found to be inconsistent with any punitive intent. First, the Act itself contains several provisions designed to protect Mr. Nixon's interests: the right to access, regulations which permit any party to assert legal or constitutional rights or privileges, and the assurance of district court jurisdiction with docket priority. Mr. Nixon had asserted that a less burdensome alternative existed whereby Congress could achieve its legitimate purposes; the Court, however, concluded that the suggested judicial inquiry pursuant to a mandated civil action would be "no less punitive and intrusive than the solution actually adopted." The Court also refused to make inferences based upon the Justices' own "personalized reading" of the social and political realities of 1974, and limited review to the terms of the Act, the intent of Congress, and the existence vel non of legitimate explanations for the law's effects.

3. The Burger dissent

The Chief Justice filed a lengthy, angry dissent accusing the
Court of becoming caught up in the passions of national crisis and joining with Congress "[t]o 'punish' one person" in a manner that "tears into the fabric of our constitutional framework." 78 His opinion addressed three issues—separation of powers, privacy, and bill of attainder—where he saw well-settled principles bent under the "hydraulic pressure" of pervasive political interest. 79

As to the bill of attainder challenge, the Chief Justice found that title I of the Preservation Act clearly violated the constitutional proscription against "special legislation singling out one individual as the target." 80 He articulated the necessary elements of a bill of attainder as (1) a "specific designation of persons or groups as subjects of the legislation" and (2) an "arbitrary deprivation, including deprivation of property rights, without notice, trial, or other hearing." 81 Under Burger's analysis the specificity requirement was met because Richard M. Nixon was named in the Act. The sole remaining issue, then, was whether there had been a legislatively imposed deprivation of an existing right.

Ownership of the materials became the pivotal issue under Chief Justice Burger's deprivation analysis. He would have held for Mr. Nixon on the basis of tradition involving former Presidents, including legislative action upon a presumption of presidential ownership, 82 a case involving a copyright on Presidential materials, 83 and the practice of the Justices regarding their judicial papers. 84 The Chief Justice also perceived a statutorily vested Presidential right to have a Presidential library at a location chosen by the President himself for deposit of such papers as he

78. Id. at 505 (Burger, C.J., dissenting).
79. Id. (quoting Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting) (Justice Holmes had noted the tendency of great cases to make bad law)).
80. Id. at 537.
81. Id. at 538-39.
82. Id. at 539-41 (based on hearings on the establishment of Presidential libraries).
might select. Since these rights were established in Mr. Nixon, Chief Justice Burger reasoned, the punishment element was satisfied by the Act’s express denial of those preexisting interests.

The Chief Justice then proceeded to criticize portions of the majority’s analysis. He rejected any examination of congressional motives as irrelevant to bill of attainder scrutiny, because “retribution and vindictiveness are not requisite elements of a bill of attainder” and because notions of prevention are not unknown to the history of attainders. Burger also attacked the idea of a “legitimate class of one,” arguing that the classification scheme required the impermissible determination that either Nixon was culpably deserving of the deprivation or that his uniqueness justified the confiscation.

II. AN EXAMINATION OF CURRENT ATTAINER DOCTRINE

While the Nixon majority opinion represents the most well-developed analytic approach to the bill of attainder clause yet espoused, the Court failed to adopt an analysis that adequately reaches the evil of legislatively imposed punishment. This is not to say that the result was necessarily erroneous, but rather that the Nixon Court perceived the problem incorrectly. The confusion was the result of inconsistent holdings and reasoning in the line of attainder cases since Cummings. The vacillating treatment of the issue in these decisions indicates a failure to develop a coherent, comprehensive bill of attainder doctrine.

The Supreme Court has satisfactorily, if somewhat vaguely, defined a bill of attainder as a law that legislatively inflicts punishment upon an identifiable person or group of persons without judicial trial. This Comment takes no exception to the basic framework within which the Court’s analysis proceeds. The Court has stumbled, however, in the development of a clear conception of the two particular elements: (1) specificity and (2) punishment. The difficulty apparently arises from failure, or inability,

85. 433 U.S. at 541.
86. Id. at 541-42.
87. Id. at 543-44.
88. See notes 8-35 and accompanying text supra.
89. See note 59 supra.
90. One commentator has argued that the lack of procedural due process should be regarded as a third necessary element. Comment, The Supreme Court’s Bill of Attainer Doctrine: A Need for Clarification, 54 CALIF. L. REV. 212 (1966). This addition seems superfluous, however, since such safeguards are, by definition, lacking whenever there is a legislative imposition of punishment upon a specific individual or group. It is doubtful that the author of that Comment would permit such a bill if the legislature instituted the
to discern a pervasive policy behind the doctrine. This Comment proceeds on the theory, espoused by the *Brown* majority,91 that the attainer clause is a limit upon legislative power in the interest of due process. The safeguards available only in the judicial process guarantee a fair trial. Therefore, the bill of attainder prohibition serves to buttress the separation of powers principle embodied in the Constitution.92 With this concept in mind, this section will critically examine the handling of each element with particular emphasis on the developments of the *Nixon* decision.

### A. Specificity

By prohibiting a focus on particular individuals, the bill of attainder clause, viewed from a separation of powers perspective, limits the extent to which Congress and state legislatures may depart from making general rules.93 The Supreme Court has recognized, however, that Congress or state legislatures need not always legislate for the whole world, but may attack specific problems, or even parts of a problem, that the legislature may deem to require immediate attention.94 In equal protection cases, the doctrine of reasonable classification supplies the limit upon state legislative or congressional95 discretion. While the doctrine of reasonable classification may be appropriate to legislative re-

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91. See note 6 supra.
92. See note 6 supra. Justice White criticized this idea in his Brown dissent:

"[T]here are substantial reasons for concluding that the Bill of Attainder Clause may not be regarded as enshrining any general rule distinguishing between the legislative and judicial functions. Congress may pass . . . private bills. It may also punish persons who commit contempt before it. So too, one may note that if Art. I, § 9, cl. 3 [the attainer clause applicable to Congress], immortalizes some notion of the separation of powers at the federal level, then Art. I, § 10 [the clause applicable to the States], necessarily does the same for the States. But it has long been recognized by this Court that "[w]hether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State." Dreyer v. Illinois, 187 U.S. 71, 84.

381 U.S. at 473 (White, J., dissenting).
93. See note 1 and accompanying text supra.
95. By incorporating equal protection notions into the fifth amendment due process clause, the Court has extended the equal protection concept to limit congressional discretion as well as state legislative discretion. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1976) ("approach . . . precisely the same," citing cases). But cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 & n.17 (1976) ("the two protections are not always coextensive").
restrictions by regulation, the bill of attainder clause absolutely prohibits the infliction of punishment upon designated individuals. Nevertheless, the reasonable classification doctrine has found its way into attainder cases, and the Nixon decision undertook its ultimate extension through use of the concept of a “legitimate class of one.”

Consideration of the types of cases raising the attainder issue makes the intrusion of the reasonable classification doctrine at least understandable. Only twice has Congress been bold enough to name particular individuals as objects of public legislation. Legislation has often sought to indirectly reach a particular group without explicitly designating the class of persons affected. Several of the attainder cases have involved expurgatory oaths whereby the “class” is ascertained when the individuals refuse to purge themselves of the taint of legislation. By forcing the Court to examine the “classification” involved, such legislative schemes have invited the Court to test reasonableness as well. Challenges to statutes establishing qualifications for professional practice have relied on language in Cummings regarding reasonable relation to permissible state objectives. In dealing with these challenges, it was natural for the Court to employ reasonable classification analysis. But that the intrusion is understandable does not justify the continued application of a deficient form of analysis.

A related and similarly defective analytic tool has occasionally been used by the Court. The Cummings Court had suggested that a bill of attainder aims at “the person, not the calling.”

Subsequent decisions have predictably relied on this distinction.

96. 433 U.S. at 472.
100. 71 U.S. (4 Wall.) at 320.
101. For example, the Court in De Veau v. Braisted, 363 U.S. 144 (1960), upheld a New York statute barring convicted felons from leadership positions in waterfront labor unions. The issue, the Court observed, was “whether the legislative aim was to punish [an] individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.” Id. at 160.

In Flemming v. Nestor, 363 U.S. at 603, the Court relied on Cummings and De Veau in restating the distinction as one between “the person” and “the activity and status.”
as a justification for a classification scheme. Even correctly applied, this approach has only surface appeal since its application requires that the person and the "calling" be mutually exclusive. It is futile hair-splitting to separate an individual from his "status" as a "legitimate class of one."103

Although the reasonableness criterion has appeared in attainder cases since the earliest decisions, its decisive application in Nixon threatens the usefulness of the attainder doctrine as distinct from equal protection principles. The Nixon Court paid lip service to the fact that "the prohibition against bills of attainder . . . was not intended to serve as a variant of the equal protection doctrine,"104 but failed to recognize that a simple variant of equal protection doctrine is therefore inappropriate as the core of the bill of attainder analysis. It is difficult to hypothesize a

Id. at 614. The Court, however, became bogged down in a conceptual morass and incorrectly applied the test it had enunciated. Despite the unexplained inapplicability of the deprivation to all deportees, the Court held that the denial of Social Security benefits to those deported for subversive activities was the result of their present status as deportees, not because of legislative concern with the activities that led to their deportation. Id. at 619-20. In a dissenting opinion, Justice Brennan pointed out the misapplication of the person-calling distinction. Id. at 637-40 (Brennan, J., dissenting).

102. The relationship between this distinction as an analytic tool and reasonable classification doctrine is best illustrated by examining the context in which the language appears in the Cummings opinion. There, the Court had observed that

[qu]alifications relate to the fitness or capacity of the party for a particular pursuit or profession. . . . It is evident . . . that many of the acts, from the taint of which [these parties] must purge themselves, have no possible relation to their fitness for those pursuits and professions. . . . The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not . . . . It was required in order to reach the person, not the calling.

71 U.S. at 319-20 (emphasis added).

103. The Supreme Court did not use the person-calling distinction explicitly in its Nixon analysis, but it seems implicit in the argument that Congress was dealing with a problem separate from Mr. Nixon himself. The omission might be explained by the authorship of the opinion by Justice Brennan, the dissenter in Flemming. See note 101 supra. The district court disposition of the Nixon case did, however, apply the distinction. 408 F. Supp. at 373.

104. 433 U.S. at 471. Since there was no equal protection clause at the adoption of the Constitution or in 1866 when Cummings was decided (the fourteenth amendment was declared to be in force on July 28, 1868), such a categorical statement may be unwarranted. It seems that, absent the fourteenth amendment, the Supreme Court could have made the attainder clauses a constitutional basis for an equal protection doctrine. The decisions through Nixon, with language reminiscent of the rational basis test, reinforce the notion that the two doctrines are somewhat related. The very broad approach of the Brown case (involving political association) might be seen as analogous to the strict scrutiny approach in fundamental rights areas under equal protection. It might also be argued that Justice Frankfurter's "literalist" approach, advocated in Lovett and subsequent cases, was an attempt to discard the attainder analysis because he felt that the equal protection and due process doctrines protected essentially identical interests.
situation in which Congress would single out a particular individual or group as the object of legislation without a legitimate concern for some permissible subject of regulation. Even should such a situation arise, Congress would have little difficulty in formulating the enactment so as to appear to deal with some permissible legislative concern.

The reasonable classification doctrine incorporated in the Court's attainer analysis became a major hurdle in the Brown case. The government had sought to justify the disqualification of Communist Party members from positions in labor unions by analogy to conflict-of-interest laws, specifically section 32 of the Banking Act of 1933 that excluded persons involved in the securities business from positions as directors, officers, or managers of Federal Reserve System banks. Distinguishing the disqualifications proved most difficult and the Court's unsatisfactory handling of the issue contributed significantly to the influx of equal protection language into the discussion of attainders. The Court began by pointing out that the Banking Act did not aim at a political organization. Secondly, the Banking Act incorporates no judgment censuring or condemning any man or group of men. In enacting § 32, Congress relied on its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to any man—not just certain men or members of a certain political party. Thus insofar as § 32 incorporates a condemnation, it condemns all men.

If the Court had stopped at this point, perhaps the distinction could have stood. Chief Justice Warren, however, went on to attempt a rulemaking-specification distinction. The conflict-of-interest law involved permissible rulemaking rather than specification, the Court reasoned, since "Congress merely expressed the

106. The Court upheld this provision in Board of Governors v. Agnew, 329 U.S. 441 (1947).
107. 381 U.S. at 453-54. One commentator has suggested that the Court's remark should limit applicability of the attainer clauses to those laws which attempt to control so-called subversive political groups, the traditional target of the English attainders. Note, The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives," 67 COLUM. L. REV. 1490 (1967).
Such a political-nonpolitical distinction seems unnecessarily narrow. Should not the clause at least be an effective weapon in defense of any fundamental right? For example, the attainer clauses seem clearly violated by an oath requirement for voting privileges aimed at a religious group. Cf. Davis v. Beason, 133 U.S. 333 (1890) (attainer issue not raised in case involving an Idaho statutory provision disenfranchising Mormons).
108. 381 U.S. at 453-54.
characteristics it was trying to reach in an alternative, shorthand way.” “The designation of Communists as those persons likely to cause political strikes,” the Court observed, “is not the substitution of a semantically equivalent phrase; on the contrary, it rests . . . upon an empirical investigation by Congress of the acts, characteristics and propensities of Communist Party members.” The Court’s opinion did not explain how to determine which classifications are permissible uses of “shorthand” or how the enumeration of securities market personnel is “semantically equivalent” to any characteristics permissibly reached. Justice White’s dissent correctly characterized the Court’s action: The Court struck down the labor statute because it was both overbroad and underinclusive in that it assumed that all party members were likely to incite political strikes and it failed to reach nonmembers who would be likely to do so. Under such an analysis, the conflict-of-interest provision is indistinguishable. The problem stemmed from an examination, using reasonable classification terms taken from equal protection analysis, of the “specificity element.” A satisfactory distinction could have resulted if the specificity element had been held satisfied in both contexts. Then the disqualification in the conflict-of-interest situation could have been held not to constitute punishment, whereas the criminal sanctions imposed on Communist labor union officials would clearly meet the punishment requirement.

Likewise, to denote this element of the Nixon analysis “specificity” does not clearly evince the thrust of the Court’s approach. This element, as perceived by the Court, involves more than a mere designation of an individual or group as the object of the legislation under scrutiny. Rather, the Court focused upon the justifiability of the specific designation. Sufficient justification legitimizes the classification and the “specificity element” is not satisfied. The error of such analysis is easily exposed. The Nixon majority would not have proceeded from their finding of a “legitimate class of one” and allowed Congress to impose whatever sanctions it pleased upon Mr. Nixon such as imprisonment, banishment, or confiscation of his San Clemente home. Clearly,

109. Id. at 454-55.
110. Id. at 463-68 (White, J., dissenting).
111. Quite apart from the attempt to distinguish the conflict-of-interest laws, the Brown majority seems to have correctly perceived the purposes behind the attainder provision: “The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.” 381 U.S. at 449 n.23 (emphasis added).
112. 433 U.S. at 471-72.
the question of justifiability relates to the nature of the regulation imposed. Therefore, any determination of legitimacy should be confined to the analysis of the punishment element.

Application of a reasonable classification mode of analysis to the specificity element fails to implement the separation of powers basis for the bill of attainder prohibition. Under a legitimate class analysis, so long as the legislature can develop a case for uniqueness of an individual and the circumstances sought to be regulated, the Court has no check upon a legislative determination of individual culpability. The Brown Court recognized such legislative evaluations as the true evil of attainder. Any safeguards provided by judicial review will be illusory except in the most egregious cases since the Court will look only for a "reasonable basis" on which the legislature would have made its determination.

B. Punishment

The question of what constitutes punishment for purposes of the attainder proscription has also given the Supreme Court considerable difficulty. The problem involves the tension between necessarily imposed regulations, which may be applicable only to a small segment of society, and burdens imposed selectively as punishment. The Nixon case illustrates the convergence of these competing forces. On one hand, Congress felt the need to prevent destruction of the White House tapes; on the other, a judgment, albeit implicit, that the former President was an unreliable custodian determined the form of the enactment.

Under the analysis adopted by the Nixon majority, the punishment element is satisfied by a positive result of the historical, functional, or motivational tests. Justice White, it should be noted, had argued for such a "multifold analysis" in his Brown dissent. Clearly, this analysis represents the most careful approach yet taken by the Court; nevertheless, significant problems remain.

113. See note 111 supra.
114. See note 48 and accompanying text supra.
115. As in the Nixon case, the legislative determination may have been made without any hearing to allow input from the class affected by the legislation.
116. 381 U.S. at 463 (White, J., dissenting). Justice White in turn lifted this suggested approach out of a nonattainder case that had relied on the attainder precedents, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Justice White refused to join the opinion of the Nixon majority but concurred in the result, stating simply that the statute did not inflict punishment and citing his dissent in Brown. 433 U.S. at 487 (White, J., concurring). One might conjecture therefore that his failure to join the majority analysis is based on a disagreement over the approach to the specificity element.
The historical test supposedly looks for those forms of punishment traditionally imposed by bills of attainder, i.e., death, imprisonment, banishment, confiscation of property, and bars to specified employment.\(^{117}\) Clearly, the historical standard is a convenient sample with which the enactment under scrutiny may be readily compared. The American experience, however, shows that the legislature is unlikely to impose any of the longstanding forms of punishment. Significantly, the final type (disqualifications from employment) is a relatively recent development, not established until *Cummings*. In fact, all three of the enactments struck down as attainders since adoption of the Constitution have been of this type, an extension of prior historical concepts of attainder punishment. Therefore, the historical test is of limited usefulness even if consistently applied.

The historical test loses whatever efficacy it may have when the Court refuses to confront the historical concepts directly. The *Nixon* majority avoided the confiscation issue by confining the historical notion to "*punitive* confiscations of property." The majority seems to have opted for circumlocution—defining punishment as something "*punitive.*" The only indication given as to the application of this punitive-nonpunitive distinction was in the Court's reference to the provision for "*just compensation*" should the materials seized be determined to be Mr. *Nixon's* personal property.\(^{118}\) The Court clearly inferred that an exercise of eminent domain powers could not be deemed punishment. Such an interpretation is not surprising since it follows the standard rule of construction that two provisions of the same instrument must be construed, so far as possible, as consistent with each other. It *is* surprising that the Court would base part of its decision on an issue it did not fully address, i.e., whether the Act would be a proper exercise of the eminent domain power since such a taking must be for a public use.\(^{119}\)

The functional test enunciated by the Court involves an analysis of "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said

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117. 433 U.S. at 473-74.
118. *Id.* at 475; see note 49 and accompanying text *supra*.
119. Justice White questioned whether some objects of the Preservation Act may properly be taken under the eminent domain power. 433 U.S. at 487-91 (White, J., concurring). Mr. *Nixon's* attorneys might be faulted for allowing the Court to skim over the ownership and eminent domain issues. The latter issue was not argued in the brief; with respect to the ownership issue, *Nixon's* brief spoke of "*control*" and "*access*" rather than "*ownership.*" *Brief for Appellant* at 140. Understandably, the Court seized on this language. *See* 433 U.S. at 481.
to further nonpunitive legislative purposes." 

Ostensibly this test is meant to check the legislature’s ingenuity in devising new forms of punishment violative of the attainder prohibition. The standard apparently is the absence of any “legitimate legislative purpose” rather than an actual examination of the severity of the burdens imposed. The test so applied would cut too broadly. Like the legitimate classification analysis applied to the specificity element, the legitimate legislative purpose test is easily met, even by contrivance. For example, the Ex parte Garland Court, which had no historical basis for finding punishment in a bar to the practice of a profession, might have found that protection of federal judicial integrity provided a legitimate legislative purpose. Likewise, had the Court in Brown narrowly construed Cummings and Ex parte Garland (as finding punishment in a bar to the profession for which the aggrieved party was trained), it might have found a legitimate purpose in the protection of interstate commerce from political strikes. Addition of the least burdensome alternative consideration to the functional test could strengthen this portion of the analysis. This addition would provide a more defensible standard by which the type of burden imposed might be measured. Although relevant as a factor in a multifold analysis, the severity of the deprivation cannot be determinative. As stated in Brown, “the Bill of Attainder Clause was not to be given a narrow historical reading . . . but was

120. 433 U.S. at 475-76.
121. The authorities cited for the functional test are Cummings, Dent, Hawker, and others where the actual test applied was whether the purpose of the disability (disqualification) was to reach the person or the calling.

Where no persuasive showing of a purpose “to reach the person, not the calling,” [cited Cummings] has been made, the Court has not hampered legislative regulation of activities within its sphere of concern, despite the often-severe effects such regulation has had on the person subject to it [e.g., Fong Yue Ting v. United States, 149 U.S. 698 (1893) (deportation not punishment but exercise of plenary powers of Congress over aliens)].

Flemming v. Nestor, 363 U.S. at 616. See also notes 100-03 and accompanying text supra.

122. Except, of course, the Cummings case decided the same day and relied upon. 71 U.S. (4 Wall.) at 377, 380.

123. Examined in Nixon as a “final consideration,” Nixon’s suggested alternative, that the question of his custodial fitness might have been left to judicial determination, was rejected by the Court as equally intrusive as the alternative selected. 433 U.S. at 482-83. In so doing, the Court missed the point that any determination of Mr. Nixon’s unfitness would be made in the judicial context with the attendant safeguards. The Court made a curious statement, almost as if an afterthought, to the effect that “if the record were unambiguously to demonstrate that the Act represents the infliction of legislative punishment, the fact that the judicial alternative poses its own difficulties would be of no constitutional significance.” Id. at 483. The fact that the punishment issue is ambiguous would seem to militate in favor of the judicial alternative as providing greater protection.
instead to be read in light of the evil the Framers had sought to bar: *legislative punishment, of any form or severity, of specifically designated persons or groups.*"\(^{124}\)

The motivational test, while clearly sound,\(^{125}\) seems to be of limited applicability. The effect is merely to admonish Congress to couch their enactment in carefully chosen language. Nevertheless, should Congress fail to exercise such care, a legislative history evincing a clear intent to punish should be dispositive of the case without further analysis. The circumstances leading to the *Lovett* decision would be of this type.\(^{126}\)

**C. Summary**

The Supreme Court congratulated the Congress on its treatment of the Preservation Act challenged in *Nixon*; "the legislative history of the Act," the Court observed, "offers a paradigm of a Congress aware of constitutional constraints on its power and carefully seeking to act within those limitations."\(^{127}\) These plaudits referred to the provisions of the Act intended to avoid constitutional problems, i.e., "just compensation," Nixon's access to materials, regulation to protect the rights of Nixon and others, and the provision for judicial review.\(^{128}\) Unfortunately, similar commendations are not due the Court.

The Court's present attainder doctrine is deficient in its approach to both identified elements. The weakness of the punishment analysis lies in both the limited utility of the historical and motivational tests and the application of a minimum standard of any legitimate purpose as the functional test. The specificity analysis concentrates on a problem's uniqueness and severability and fails to recognize that those are the very characteristics which make suspect the imposition of punishment upon the class so identified.

\(^{124}\) 381 U.S. at 447 (emphasis added).

\(^{125}\) A motivational test seems to go against the line of cases holding that the judiciary will not examine legislative motives. *E.g.*, *Barenblatt v. United States*, 360 U.S. 109, 132-33 (1959); *United States v. Darby*, 312 U.S. 100, 115 (1941); *Arizona v. California*, 283 U.S. 423, 455 (1931); *McCray v. United States*, 195 U.S. 27, 55 (1904). This rule, however, seems to apply only when the legislature is clearly acting within its proper powers. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. at 133. Penal legislation is one area where scrutiny of legislative motive is apparently permissible. *See* *Trop v. Dulles*, 356 U.S. 86, 94-96 (1958).

\(^{126}\) See notes 18-19 and accompanying text supra.

\(^{127}\) 433 U.S. at 482 n.47. An alternative deduction is also entirely possible—that the legislative history of this Act offers a paradigm of a Congress aware of the motivational test and carefully seeking to avoid it.

\(^{128}\) See notes 46-49 and accompanying text supra.
The present attainder doctrine, with its overreliance on equal protection concepts, threatens to destroy the prohibition against bills of attainder as a "bulwark against tyranny" distinct from other constitutional safeguards. The pervasive concern with legitimate purposes and classifications obscures the underlying issue. The emphasis is upon the ends sought, with insufficient attention being given to the permissibility of the means. The question in attainder cases should be whether or not the legislative branch has determined with finality that a particular individual or group deserves sanction that the legislature proceeds to impose without the protections of due process.

An analysis effectively reaching the basic evil of attainders must recognize that certain determinations are beyond "the peculiar province of the legislature"\textsuperscript{129} no matter how legitimate the legislative concern may be. Therefore, a restatement of the basic definition of a bill of attainder is preferable: A bill of attainder legislatively imposes punishment upon an individual or group selected on the basis of essentially adjudicative criteria. The analysis under this definition would continue to deal with the same basic elements as the Court's present doctrine (specificity and punishment), but with significant refinements necessary to clarify the basic issues. This section will elaborate the suggested analysis and demonstrate its application.

A. The Elements of an Attainder

1. Specificity

Strict limitation of the legislature to general rulemaking would require that any classification satisfy the specificity element. The Supreme Court, however, has recognized the necessity and permissibility of enactments involving some specification in order to meet particular problems.\textsuperscript{130} Under the proposed attainder analysis, the specificity element is satisfied if the enactment applies to a classification based upon a legislative determination of adjudicative facts.\textsuperscript{131}

\textsuperscript{129} See note 1 and accompanying text supra.

\textsuperscript{130} See note 94 supra.

\textsuperscript{131} Professor Kenneth Culp Davis first articulated the concept of adjudicative fact in the context of administrative law in order to resolve the issue of what type of hearing is required prior to agency action. 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958). The administrative law question is not entirely analogous to the separation of powers problem underlying the attainder analysis, because administrative agencies gener-
As used here, adjudicative facts are those requiring an evaluation of a particular party or its activities. Professor Kenneth Culp Davis has explained that “[a]djudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that to go a jury in a jury case.”

This definition, being framed solely in terms of past activities, meets only part of the problem in attainder cases. Such a limited view of the attainder prohibition, long advocated by Justice Frankfurter, has been correctly rejected by the Court. To accommodate the more expansive position, the concept of adjudicative fact must also include those facts which answer the questions of who is likely to do “what, where, when, how, why, with what motive or intent,” when the answers depend upon some evaluation of character.

In contrast to adjudicative facts, legislative facts are “general facts which help . . . decide questions of law and policy and discretion.” Legislative facts are those requiring no judgment as to a party’s character in terms of fault, culpability, motivation, intentions, or voluntary propensities. The importance of the voluntarily possess both quasi-legislative and quasi-judicial functions and therefore the question involves the choice of procedure within a single institution. In addition, administrative procedure must conform to the statutory framework imposed by the Administrative Procedure Act. In both situations, however, the concern is with affording due process to those upon whom governmental power impacts. Therefore, it would seem that the notion of adjudicative fact can be usefully adapted to the attainder analysis.


An evaluation of propensities will no doubt rest in large part upon adjudicative facts in Professor Davis’ more limited sense. However, since these bases of classification are rarely explicit in the enactments or even in the legislative history, they must be deduced. To rely on the past activities definition alone would require one more level of implication that the courts would be reluctant to make, in much the same way as the Court has tried to avoid implying punitive intent.

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132. K. Davis, supra note 131, § 7.02, at 413.
133. See notes 20-35 and accompanying text supra.
134. See Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand. L. Rev. 603, 610-15 (1951). The position of Professor Wormuth that character evaluation violates the bill of attainder prohibition was criticized without further explanation as “but a variant of the traditional ‘punitive intent’ test and subject to the same difficulties.” Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330, 351 n.129 (1962). The Brown decision shows that this is not the case. In Brown, the Court rejected the “punitive intent” test, but went on to hold that the legislature had impermissibly evaluated the propensity of Communist Party members to instigate political strikes. 381 U.S. at 456-59.

An evaluation of propensities will no doubt rest in large part upon adjudicative facts in Professor Davis’ more limited sense. However, since these bases of classification are rarely explicit in the enactments or even in the legislative history, they must be deduced. To rely on the past activities definition alone would require one more level of implication that the courts would be reluctant to make, in much the same way as the Court has tried to avoid implying punitive intent.

135. K. Davis, supra note 131, § 7.02, at 413.
tional aspect can be seen in the example of a law prohibiting the issuance of driver's licenses to grand mal epileptics. By singling out an identifiable group for sanction, the law clearly could be punishment based upon the likelihood of some harmful occurrence; however, the law does not partake of the evil of attainders. Classifications by sex, race, national origin, physical characteristics, mental capability, income, or marital status are usually based on legislative facts. The permissibility of such classifications is determined by application of equal protection doctrine. Here reasonableness and legitimate purposes, subject to strict scrutiny in some instances, adequately serve to check legislative action.

As with most legal distinctions, there is a point where the line is not easily drawn and the labels fail to supply a clear-cut solution. For example, the legislature may evaluate, in considerable detail, particular parties or their actions where the concern is not the parties themselves, but rather a more general situation with a legislative view toward policy determination. The implementation of a zoning ordinance provides a good example. The adoption of a comprehensive scheme requires study of current land uses and may involve legislative determinations as to the future intentions of owners and others. The regulation may impose burdens on only a few individuals whose identity may even be known to the zoning authority. However, so long as the zoning plan is not arbitrary and is enacted in the interest of public health, safety, or general welfare, the legislature has acted properly.

In this borderline area, equal protection and attainder doctrines may seem to overlap. This can be seen in the challenge to an Illinois custody statute excluding unwed fathers from the definition of "parent," thereby establishing a conclusive presumption of unfitness. The Supreme Court struck down the enactment under tortured equal protection scrutiny. Arguably, this issue

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137. Professor Davis himself has said:

The distinction . . . is a useful one and often even seems to be an essential one, even though in the borderland between the two categories the line is sometimes difficult or impossible to draw . . . [and] often has little or no utility.

138. Stanley v. Illinois, 405 U.S. 645, 668 & n.10 (1972). This case is generally classified with the line of cases involving the much-criticized doctrine of "irrebuttable presump-
might also have been framed as a bill of attainder challenge since the classification was based upon a character evaluation of unwed fathers.  

The problems of the gray area between legislative and adjudicative facts are not fatal to the usefulness of the distinction in the attainder analysis. First, the extent of the area of true indistinguishability is necessarily small, though perhaps not insignificant. Second, satisfaction of the specificity element simply serves to trigger the rest of the analysis, and does not determine that an enactment constitutes a bill of attainder. If the legislature has arguably enacted a classification based on adjudicative facts, then the requisite threshold specificity is present. Since notions of specificity are included in the factors weighed under the disqualification branch of the punishment analysis proposed below, a court sincerely troubled by the closeness of the adjudicative-legislative distinction in a particular case might adopt that portion of the analysis regardless of the type of burden imposed by the statute under scrutiny. Finally, other troublesome distinctions pervade the law; and while they may have been questionably applied in some, or even many, instances, they have nevertheless provided a necessary foundation upon which the decisionmaking process may proceed.

The analysis' specificity element will always be satisfied where a particular individual or association is named in the legislation. The difficulty of determining the basis of such a classification requires such a result. Even where an otherwise permissible reason for the sanction is expressed (e.g., "John Doe, because he suffers from severe mental retardation, shall not be employed by the State in a position of responsibility"), the inscrutability of legislative intent generates uneasiness as to the real basis of the enactment. To single out a particular person raises the presumption that the legislature meant to reach "the person, not the calling." Similarly, it is conceivable that the legislature could
enumerate legislative facts to such a degree as to identify a particular individual. In such cases, the analysis must recognize the substance of the situation created by the enactment.

2. Punishment

Specificity alone does not identify a bill of attaintder; such an enactment must also impose punishment. What constitutes punishment is not easily articulated and often depends on one's point of view. That which the regulator sees as a necessary regulation with incidental burdens may be perceived as a punitive sanction by those subject to the restrictions. Attempts by the courts to resolve the issue have culminated in the Nixon majority's three-pronged analysis with its attendant difficulties.\textsuperscript{142} Under the proposed analysis, punishment involves (1) the deprivation of a recognized right, interest, or entitlement or (2) a disqualification or bar which, in light of all the circumstances, exceeds the permissible bounds of regulation alone.

a. Deprivations as punishment. In the abstract, a deprivation is distinguishable from a disqualification only with considerable difficulty. For example, a statute establishing a law degree as a prerequisite for admittance to the bar may be viewed either as a deprivation of a "right" to pursue any chosen profession or as a disqualification to those without the required diploma. Therefore, the attainder punishment element requires a deprivation of a recognized interest, i.e., an interest traditionally protected by the courts. The distinction is between actions against interests presently enjoyed and denials of requests or expectations.\textsuperscript{143}

Under this analysis, the deprivation-type punishment depends upon a historical test. But, unlike the Nixon historical test,\textsuperscript{144} this test involves the question of whether a given interest has historically been afforded due process protection, not whether the deprivation itself has been historically used as punishment. Nevertheless, almost all of the historical attainder punishments would fit under the deprivation rubric. Death, imprisonment, banishment, and property confiscation are deprivations of pro-

\textsuperscript{142} See notes 116-26 and accompanying text supra.

\textsuperscript{143} See generally Friendly, supra note 137, at 1295-304. It is possible that a statute might work to impose a deprivation upon certain individuals but a disqualification as to others. In such situations, the court would be required to determine whether the disqualification constituted punishment and, if not, whether the applicability to the unattainted class could be separated to save the enactment to that extent.

\textsuperscript{144} See notes 65-66 and accompanying text supra.
ected rights in life, liberty, citizenship, and property, respectively. The loss of government employment (as in Lovett\textsuperscript{146}) also falls within the deprivation category of punishment. The courts have recognized public employment as an entitlement or type of property interest entitled to some degree of due process protection.\textsuperscript{146} This notion of entitlement has expanded to cover many nontraditional interests,\textsuperscript{147} each of which could be subject to deprivation and thereby becomes a means of punishment.

While a party may have no "legitimate claim of entitlement" to some potential benefit, but merely "a unilateral expectation" or "abstract need or desire,"\textsuperscript{148} a governmental bar to such future enjoyment may constitute punishment under the disqualification analysis. The attainders found in Cummings and Brown were of this type. In both cases, the decisions used language reminiscent of the equal protection rational basis test. However, comparing these cases to \textit{Ex parte Garland}, where a rational basis might have been found,\textsuperscript{149} it becomes apparent that the analysis requires more than a simple application of equal protection doctrine.\textsuperscript{150}

\textit{b. Disqualifications as punishment.} The disqualification-type punishment exists where the legislation serves to further detectable punitive purposes—retribution, condemnation, prevention, and rehabilitation—as opposed to purely regulatory purposes—protection, prevention, and efficiency.\textsuperscript{151} The factors bear-

\begin{itemize}
  \item 145. 328 U.S. at 303.
  \item 148. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
  \item 149. See note 122 and accompanying text \textit{supra}.
  \item 150. The \textit{Ex parte Garland} Court adopted the Cummings analysis by reference. 71 U.S. (4 Wall.) at 377-78, 380. In addition, however, the Court dealt at length with the peculiar position of the attorney as an officer of the Court and the fact that the petitioner had received a full pardon from the President. \textit{Id.} at 378-81.
  \item 151. Prevention is listed as a characteristic of both regulation and punishment; but there is a significant difference. Regulatory prevention anticipates a general situation, while punitive prevention, apart from any general deterrent effect, focuses upon a particu-
\end{itemize}
ing upon this determination may be roughly grouped into three broad categories: (1) the class affected, (2) the burden imposed, and (3) the legislative motivation.

The examination of the class affected partakes of some of the same notions that are involved in the threshold specificity analysis. It should be remembered, however, that the specificity element has already been satisfied and that the statute therefore adversely affects only a segment of the population selected on the basis of past activities or an evaluation of some flaw in character. This conclusion establishes a sort of presumption of irregularity that may be overcome by the weight of other factors tending to show the absence of punishment. The presumption grows stronger as the classification moves along the continuum from general to particular. In reality, there may be two specificity continua: one involving the size of the class and the other depending upon the extent of adjudication involved. This latter adjudicative-legislative continuum is most important to the specificity analysis which decides that the enactment falls into the adjudicative area. In determining whether the statute imposes punishment, however, an explicit legislative finding of guilt would have more weight than an implied legislative evaluation. The numerical continuum is especially important at the inferior extreme. The extreme case of a named individual should establish a nearly conclusive presumption of impermissibility. This notion was recognized by Justice Stevens in his concurrence in Nixon v. Administrator of General Services.152 The type of specification might also be significant. For example, a specification which implicated the exercise of constitutionally protected rights would be more difficult to justify than one which did not, even ignoring the other constitutional problems.

The nature of the burden imposed is relevant with respect to the relationship of the disqualification to the classification, the type of burden imposed, the feasibility of less burdensome alternatives, and the reasonableness of the expectations thwarted. That the classification scheme must have a rational relationship to the burdens imposed was established in the first attainder case153 and further elaborated to include notions of overinclusiveness and underinclusiveness.154 The difficulty in the Nixon

154. See note 110 and accompanying text supra.
analysis grew out of its sole reliance on these equal protection concepts—not that such considerations are wholly inapposite.

The type of disability created by the legislation under scrutiny is also relevant. Affirmative disabilities tend to be more punitive in nature than surmountable restraints.\textsuperscript{155} Similarly, the disability which acts as a complete bar is more severe than one which may be avoided by a choice between two positions. While severity of the disability is not determinative of punishment,\textsuperscript{156} the incorporation of a sanction disproportionate to nonpunitive purposes would be strong evidence of impermissibility.\textsuperscript{157} The availability of less burdensome alternatives that would satisfy the legitimate purposes behind the enactment would also be a relevant consideration.\textsuperscript{158} The area in which the disability occurs could determine the reasonableness of private expectations and the permissibility of legislative interference. For example, greater legislative control of a heavily regulated industry would tend to support a system of qualification. On the other hand, a prisoner’s expectation of parole, while not a right, is not unjustified in light of current practice.\textsuperscript{159} The \textit{Ex parte Garland} opinion implied that the scope of legislative control in a particular field could be a pertinent consideration. There, the Court dealt with the special status of attorneys as officers of the court as an indication of improper congressional action in an area of nonexclusive jurisdiction.\textsuperscript{160}

Finally, to the extent it can be discerned, the legislative motivation behind the enactment may be evidence of impropriety. This factor comprises the third test of the \textit{Nixon} decision with its examination of legislative history for evidence of punitive intent.\textsuperscript{161} In addition, however, the political climate in which the legislation arises deserves consideration. While the \textit{Nixon} Court refused to indulge in “personalized reading of the contemporary scene or recent history,”\textsuperscript{162} previous courts have not been so reluctant. The \textit{Cummings} majority explicitly referred to the passions


\textsuperscript{156} \textit{See} Flemming v. Nestor, 363 U.S. at 616 n.9.


\textsuperscript{158} \textit{Nixon v. Administrator of Gen. Servs.}, 433 U.S. at 482-83.

\textsuperscript{159} While the legislature might decide that all those convicted of certain crimes should not be eligible for parole, a law denying parole to a particular convict would seem to involve impermissible adjudication by the legislature.

\textsuperscript{160} 71 U.S. (4 Wall.) at 378-80.

\textsuperscript{161} 433 U.S. at 478.

\textsuperscript{162} \textit{Id.} at 484.
aroused by the Civil War and their inevitable influence on the legislature. This reference was mentioned approvingly in Flemming. The Brown opinion also took note of the traditional utilization of bills of attainder to reach possible political foes.

None of the foregoing factors, considered alone, is determinative of a punitive disqualification. Such a finding must rest upon the impression derived from consideration of them all, weighed against the individual's right to due process.

B. An Illustrative Application of the Proposed Analysis

The soundness of any legal analysis depends to a certain extent upon its ability to harmonize the results of prior cases or to point out explainable error in isolated instances. As an illustration, the foregoing proposal as applied to the facts of the Nixon case will be contrasted with its application to the conflict-of-interest provision of the banking regulations that posed such difficulty in Brown. The analysis does not promise a clear-cut conclusion from any particular set of facts, but it is hoped that the "specification of the relevant factors may help to produce more principled and predictable decisions."

The requisite specificity is present in both cases. The Presidential Recordings and Materials Preservation Act singles out the administration of Richard M. Nixon for special treatment and therefore partakes of the problems of enactments with named individuals. In addition, however, the legislation rests upon a judgment by the Congress that Mr. Nixon would be likely to handle his Presidential materials so as to preclude the discovery of the truth behind the Watergate scandal if such evidence could be found in the materials. Similarly, the conflict-of-interest law focuses upon persons holding particular positions as likely to mismanage bank affairs, and therefore impugns the character of those persons.

The punishment analysis of the Nixon situation depends on several contingencies, an in-depth treatment of which is beyond the scope of this Comment. First, the Court could have found that the former President owned the materials. Given such a result,

163. 71 U.S. (4 Wall.) at 322.
164. 363 U.S. at 615.
165. 381 U.S. at 453. In light of these precedents, it is somewhat ironic that Justice Stevens was willing to take judicial notice of the political events surrounding the Watergate affair as a justification for the statute under scrutiny in Nixon. 433 U.S. at 486 (Stevens, J., concurring).
166. Friendly, supra note 137, at 1278.
167. See note 84 supra.
the eminent domain provisions of the Act would come into play. If the materials were taken for a legitimate "public use," the analysis would end since there is no confiscation of property in the strict sense, but rather an exchange for just compensation. Failure to find a "public use" would result in a finding of a bill of attainder because there would be a deprivation of a recognized property right. Second, the Court might have found that Mr. Nixon had no recognized right in the property. Nevertheless, in light of the treatment afforded other Presidents and federal officials under de facto practice and the statutory provisions for the creation of Presidential libraries, the confiscation might still constitute a bill of attainder under the punitive disqualification rubric. 168 The Act focuses upon a single individual, thereby raising a very strong presumption of impropriety. While legitimate purposes for the regulation and its narrow applicability have been articulated, clearly less burdensome alternatives could have accomplished the desired result. For example, a statute might have prohibited destruction or alteration of any Watergate-related materials and required prompt establishment of a depository Presidential library. Third, the Act grew out of the political turmoil of Watergate and targeted the ultimate victim of the scandal. On balance, the legitimate ends sought seem outweighed by the punitive character of the enactment.

On the other hand, the conflict-of-interest law involves no deprivation of a recognized right. While a person might aspire to occupy a position of bank responsibility, this aspiration is a "unilateral expectation or desire." Under the disqualification analysis, the degree of specificity is relatively broad in the numerical sense and rationally related to the desired regulation. The disqualification is not absolute because it may be overcome by resignation from the position of perceived conflict. The banking industry is also heavily regulated in all of its aspects; therefore the disqualification is part of a pervasive regulatory system, not an isolated attack upon a class. There is no evidence of an intent to punish those working in the securities market. Finally, the enactment arose from an economic rather than a political crisis.

The Flemming decision perhaps deserves a parenthetical comment. There, the Court noted that a deprivation of a "noncontractual governmental benefit" did not constitute punishment. 169 Subsequently, the Supreme Court recognized the no-

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168. The disqualification involved would be a denial of custody and possession of the materials and power over their future disposition.
169. 363 U.S. at 617.
tion of entitlement that would probably be applicable to Social Security retirement benefits.\textsuperscript{170} Under the proposed analysis, the deprivation there would satisfy the punishment element, and the statutory provision would fail as a bill of attainder.

The major attainder cases may be reconciled by application of the proposed analysis. The exceptions are the cases involving the antisubversive enactments that passed Court scrutiny after \textit{Lovett} and that were essentially overruled by the \textit{Brown} decision.\textsuperscript{171} It is hoped that the proposed analysis provides a comprehensive framework for handling subsequent cases without undue emphasis on any particular consideration lifted from prior decisions in isolation.

\textbf{IV. Conclusion}

The Supreme Court's development of the bill of attainder doctrine has suffered from the irregularity with which such cases have arisen. The major cases, while probably correct in result, have lacked a desirable cohesiveness that would come from a consensus about the interests intended to be protected by the attainder prohibition. Therefore, the opinions seem to flow as an afterthought from a decision reached on the basis of intuitive reaction to the challenged enactment in light of general notions about the nature of attainders. The opinion writers have adopted language developed elsewhere that fits nicely as applied to the case at hand. When the \textit{Nixon} Court attempted finally to articulate a definitive analytic structure, familiarity with equal protection concepts resulted in a formulation of the attainder doctrine providing little distinguishable protection.

Due process, as structurally guaranteed by the separation of powers, in the evaluation of activities, motives, and propensities of individuals provides the best foundation for a workable and truly separate bill of attainder analysis. The experience of almost two centuries does not serve as a sufficient check on a legislature intent on punishing an unpopular individual or group. The courts must assume this protective responsibility. In the words of Professor Chafee:

If legislators are determined not to be guardians of the liberties of the people and if judges refuse to interfere when legislators take those liberties away, what is the use of putting guarantees of fundamental rights into the Constitution except, perhaps, to

\textsuperscript{170} See note 147 and accompanying text \textit{supra}.
\textsuperscript{171} See notes 23-35 and accompanying text \textit{supra}.
furnish political orators with noble words to quote while they tell us Americans to thank God that we are not as other men are?\textsuperscript{172}

A comprehensive attainder doctrine, designed to shield the vital right to a judicial determination of guilt or fault, can effectively meet this challenge.

The analysis suggested by this Comment emphasizes the nature of both the classification scheme and the interest interfered with. Legislative specificity based on individualized evaluations are inherently suspect. Rights and entitlements traditionally afforded due process protection in other contexts may not be denied on the basis of such evaluations. Other burdens imposed upon such censured parties must have strong justification in a permissible, nonpunitive scheme of general regulation. This justification must be found after consideration of all the surrounding circumstances. Such a formulation of the analysis is necessary to prevent legislative punishment masquerading as regulation behind the presumptive disguise of rational basis and legitimate classification.

\textit{Carl F. Hufner}

\textsuperscript{172} Z. \textsc{Chafee}, supra note 6, at 161.