

Bills of Attainder and the Supreme Court in 1960 —Flemming v. Nestor

INTRODUCTION

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny.¹

This statement by James Madison at the time of the adoption of the Constitution is descriptive of the reasons which underlie the doctrine of separation of powers inherent in the American tripartite system of government. Partiality and prejudice can occur under any system. Separation of legislative and judicial power minimizes the incidence of official prejudice by preventing the same body from simultaneously legislating and adjudicating.² The theory is based on the proposition that men should be judged by general and prospective rules. American legal tradition prohibits condemnation until the accused has been given an opportunity to be heard in a court of justice.³ Inescapably opposed to this ideology are laws by which a legislature imposes a penalty on named persons it declares guilty of some described offense. Such enactments—bills of attainder—are substitutions of the legislative will for the judicial processes,⁴ and are forbidden to both Federal and state governments by the United States Constitution.⁵

As a result of the broad sweep of the fifth and fourteenth amendments the prohibition has been infrequently argued to the Supreme Court since first being used shortly after the Civil War.⁶ However, in the recent hearing of *Flemming v. Nestor*⁷ the proscription against bills of attainder was urged against an act of Congress⁸ resulting in

1. The Federalist No. 47, at 373-74 (Hamilton ed. 1864) (Madison).

2. Wormuth, Legislative Disqualifications As Bills of Attainder, 4 Vand. L. Rev. 603 (1951). See generally Corwin, The Basic Doctrine of American Constitutional Law, 12 Mich. L. Rev. 247 (1914); Comment, 63 Yale L.J. 844 (1954).

3. *Ibid.*

4. *Flemming v. Nestor*, 363 U.S. 603 (1960). See generally Davis, United States v. Lovett and the Attainder Bogy in Modern Legislation, 1950 Wash. U. L. Q. 13.

5. U.S. Const. art. I, §§ 9, cl. 3; 10, cl. 1. See Chafee, Three Human Rights in the Constitution of 1787, 90-91 (1956).

6. See generally Comment, supra note 2.

7. 363 U.S. 603 (1960).

8. Immigration & Nationality Act § 241 (a), 66 Stat. 204-08 (1952), 8 U.S.C. § 1251(a) (1953).

the deportation of an alien and severance of his Social Security benefits. The majority held that such action was not punishment and therefore not in conflict with the Constitution.

Defining a bill of attainder very broadly as "a legislative act which inflicts punishment without a judicial trial,"⁹ an attempt will be made to determine the particular elements of such a bill as disclosed by the cases and the present efficacy of the prohibition.

I. ENGLISH AND COLONIAL BILLS

English bills of attainder originated around 1300. They were acts of Parliament punishing persons by exile or death, and generally involved an attainder of the blood.¹⁰ The typical statute was directed at named individuals or an ascertainable class designated as guilty of some specifically unlawful act, usually criminal.

Professor Wylie H. Davis has analyzed the act which took the head of the Earl of Strafford,¹¹ indicating the historical essentials of a bill of attainder directed at an individual.

Named Individual	Whereas . . . [the members] . . . of the House of Commons . . . have . . . impeached Thomas Earl of Strafford of High Treason for endeavoring to subvert the ancient and fundamental Laws and Government of His Majesty's Realms . . . and to introduce an arbitrary and tyrannical Government against the laws of the said Kingdoms. And for exercising a tyrannous and exorbitant Power . . . And likewise for having by his own Authority commanded the seating of soldiers upon His Majesty's Subjects in Ireland against their consent to compel them to obey his unlawful summons & orders . . . and in so doing did levy war against the King . . . ; And also for that he upon the unhappy dissolution of the last Parliament did slander the House of Commons to His Majesty. . . .
Recital of "Criminal" Activities	

Declaration of Guilt	For which he deserves to undergo the pains and forfeitures of High Treason. . . All which Offenses have been sufficiently proved against the said Earl upon his Impeachment [which had been withdrawn when acquittal became evident].
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Legislative Judgment	Be it therefore enacted . . . That the said Earl of Strafford stand and be adjudged attainted of High Treason and shall suffer such pains of Death and incur the
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9. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

10. Annot., 90 L. Ed. 1267 (1945).

11. Davis, *supra* note 4, at 14-15.

Punishment Forfeiture of his Goods and Chattels, Lands Tenements & Hereditaments of any Estate of Freehold or Inheritance in . . . England and Ireland. . . .¹²

An excellent example of an attainder directed against an ascertainable class is furnished by the bill against the Earl of Kildare and others:

[T]he same attainder, judgment and conviction against the said comforters, abettors, partakers, confederates and adherents, shall be as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act.¹³

In addition to bills of attainder, there were also bills which imposed penalties less than death, such as forfeiture of civil rights or loss of property. These were bills of pains and penalties.¹⁴

Historically, the same five elements were present in both kinds of bills. They: (1) named as their victims, individuals or an ascertainable class; (2) contained recitals of activities deemed reprehensible; (3) declared the guilt of their victims; (4) imposed a legislative judgment and verdict; and (5) prescribed the punishment.

English bills were in disrepute and had often been criticized as antithetical to freedom and liberty of democratic process. Nevertheless, the American colonies had inherited the English type of bill and colonial legislatures had frequently enacted such bills during the Revolution to thwart Loyalism.¹⁵ The framers of the Federal Constitution, in order to protect against impassioned legislative decrees of guilt and punishment, passed the prohibition against bills of attainder without debate.¹⁶

Despite the absolute nature of the language, the courts have not been able to agree on the scope of the restriction. American legislatures have been far more sophisticated in their enactments than were the early English Parliaments, and few laws have been found to be within the prohibition. Those cases in which the attainder issue was discussed by members of the court, however, contain certain common elements which have influenced the decisions.

12. Attainder of Earl of Strafford, 1640, 16 Car. 1, c. 38.

13. Attainder of Earl of Kildare, 1536, 28 Hen. 8, c. 18.

14. Annot., 90 L. Ed. 1267, 1273 n.2 (1945); see Clarendon's Case (1667) 6 How.St.Tr. (Eng.) 291, wherein a bill, passed in the reign of Charles II directed that the Earl should suffer perpetual exile and if he should be found within the Realm after February 1, 1667, he should suffer the pains and penalties of treason, providing, however, that if he should surrender himself for trial before the above named date, the pains and penalties declared should be void and of no effect.

15. Davis, *supra* note 4, at 16; see generally 5 Acts & Resolves of Massachusetts Bay 912 (1778); 9 Laws of Va. 463 (Hening 1821).

16. Wormuth, *supra* note 2.

II. IDENTIFICATION OF PARTIES

A bill of attainder is applicable only to a named individual or an ascertainable class.¹⁷ The early English bills were candid in this respect.¹⁸ American legislatures have been more subtle, citing their victims by name but once since the adoption of the Constitution.¹⁹ Almost as rare are cases in which the group affected could be determined from the act itself.²⁰

The first United States cases involved so-called "test oaths" and arose out of the bitterness generated by the Civil War. Former supporters of the Confederacy were excluded from various professions by expurgatory oaths. An applicant was required to swear that he had not participated in nor been sympathetic to the Rebel cause before he was allowed to undertake certain activities.

Such an oath was questioned on constitutional grounds for the first time in *Cummings v. Missouri*.²¹ A Roman Catholic priest was indicted and convicted of the crime of preaching without first having taken an oath,²² required by the Missouri constitution, that he had

17. *United States v. Lovett*, 328 U.S. 303, 315 (1946).

18. See text accompanying note 12 supra.

19. Urgent Deficiency Appropriation Act, ch. 218, § 304, 57 Stat. 431, 450 (1943).

20. See, e.g., *In re Yung Sing Hee*, 36 Fed. 437 (C.C.D. Ore. 1888); *Jones v. Slick*, 56 So. 2d 459 (Fla. 1952); Comment, supra note 2, at 846.

21. 71 U.S. (4 Wall.) 277 (1867); Mo. Const. art. II, §§ 3, 6, 9, 14 (1865) prescribed an oath that the taker had not committed certain acts ranging from expressions of sympathy with the Confederate cause to manifest hostility against the Union; § 9 states:

No person shall assume the duties of any state, county, city, town, or other office, to which he may be appointed, otherwise than by a vote of the people; nor shall any person, after the expiration of sixty days after this constitution takes effect, be permitted to practice as an attorney . . . be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath.

22. Mo. Const. art. II, § 6 (1865) sets forth the oath:

I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never directly, or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the constitution and laws thereof as the supreme law of the land, any law or ordinance of any state to the contrary notwithstanding; that I will to the best of my ability protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under

not been sympathetic to the Confederate cause nor openly opposed to the Union. Cummings was fined and imprisoned pending payment.²³

The decision was reversed by the United States Supreme Court in a five to four decision. Mr. Justice Field speaking for the majority hypothesized two extreme situations: first, a declaration of guilt by name; second, a declaration that all priests and clergymen either were guilty of armed hostility toward the Union or were sympathetic to the Confederate cause. He noted that either of these extremes would have come within the Federal constitutional prohibition.²⁴ In his attempt to preserve the traditional concept of bills of attainder,²⁵ Field stated, "the existing clauses [in the Missouri Constitution] presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally."²⁶ While Field's hypotheticals declared the guilt outright, the Missouri amendment silently assumed guilt. In any case, the parties were certainly denied a right or privilege either directly or indirectly. Resorting to the ancient maxim, that *what cannot be done directly cannot be done indirectly*, Field declared that the legal result of both kinds of legislation was identical. The framers of the Constitution prohibited punishment by legislative determination. The prohibition cannot be evaded by the form of legislation, and to declare otherwise would make its insertion a vain and futile transaction.²⁷ Thus, a legislative act which either

declares or assumes the guilt of named individuals or an ascertainable class of having committed designated acts and which absolutely or conditionally inflicts punishment therefor, without a trial in court, by depriving the persons affected of the right to follow a lawful calling, is a bill of attainder within the meaning of the Constitution.²⁸

A similar oath, required before an attorney was admitted to practice in the Federal courts, was invalidated in a companion case to *Cum-*

any circumstances, if in my power to prevent it; that I will support the constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding upon me.

23. Mo. Const. art. II, § 14 (1865). This section prescribes the following penalty upon conviction for violation of these provisions: "be punished by fine, not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both. . . ."

24. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1866).

25. *Davis*, supra note 4, at 19.

26. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

27. *Ibid.*

28. *Davis*, supra note 4, at 19-20.

mings.²⁹ In these kinds of cases, a group (those who cannot truthfully take the oath or who for any reason refuse to take it) is denied some right or privilege. The mere fact that the legislature does not name names does not mean that the statute falls outside the forbidden area. To allow such a slight formal distinction to validate an act which would otherwise have been invalid would be to make the constitutional clause a nullity.

This position was reaffirmed six years later in a memorandum decision,³⁰ and no one has seriously questioned its validity. Instead, the attack has been aimed at other of the requirements.

III. LEGISLATIVE DETERMINATION OF GUILT³¹

Mr. Justice Field defined the bill of attainder as a "legislative act which inflicts punishment *without a judicial trial*."³² When a legislature undertakes such an extra-curricular function, he said, it usurps the office of the judge; asserts the guilt of the individual; disregards the safeguards of a trial; passes on the adequacy of the evidence produced without applying the rules of evidence; and sets the penalty according to its own conceptions of the seriousness of the indignity.³³

This traditional concept is seldom recognized by modern cases. Even the minority in the first oath cases at least admitted the validity of the doctrine, but argued that these oaths were not within the historic scope of bills of attainder or bills of pains and penalties.

In his vigorous dissent³⁴ to both *Cummings* and *Garland*, Mr. Justice Miller, with specific reference to *Garland*, stated that the purpose of the act was to require loyalty of attorneys practicing in the federal courts, a legitimate object of legislation. Admittedly, his analysis of English attainders was at least as accurate historically as the majority's, perhaps more so. But he contended that preventing one from pursuing a chosen profession is not punishment and that designation of an ascertainable class does not identify the parties. Miller would have restricted the scope of the constitutional prohibition to the English type of bill. Because in his view the act did not meet two of the common law requirements, he found no constitutional in-

29. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

30. *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872).

31. For an excellent discussion of this matter, see *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial*, 63 *Yale L.J.* 844, 857-61 (1954).

32. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866). (Emphasis added.) 2 *Story, Commentaries on the Constitution* § 1344 (5th ed., Bigelow 1891).

33. *Cummings v. Missouri*, *supra* note 32, at 328-29.

34. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 385 (1866).

firmity. Referring to the federal statute, he argued that Congress did not declare anybody guilty of anything at all, saying:

If by any possibility it [the act of Congress] can be said to *provide* [italics by the Court] for conviction and sentence, though not found in the act itself, *it leaves the party himself to determine his own guilt or innocence*, and pronounce his own sentence. It is not, then, the act of Congress, but the party interested, that tries and condemns.³⁵

The fallacy in the argument is that the lawmakers *have* pointed to a group—those who either cannot truthfully take the oath or who will not take it, for whatever reason—declared them guilty of misbehavior, and provided a penalty. The prohibition is directed against just this sort of thing, said the majority. The Constitution intends that pronouncements of guilt be made only by the judiciary after the accused has been given a trial under closely circumscribed procedures. These statutes did more than accuse: they condemned all those engaging in the designated activities without having taken the oath. Every criminal statute declares a class—its violators—guilty of a crime. But determination of guilt and identification of parties eventually must be a court function if the act is to be unobjectionable.

A convicted felon, for example, may be denied certain rights and there will be no bill of attainder if the denial is based ultimately upon a judicial finding of guilt in the original prosecution.³⁶ It is a completely different matter to forbid the exercise of certain rights whenever one cannot truthfully take an expurgatory oath. Two modern cases have completely overlooked this point,³⁷ and have held that requirements of oaths pertaining to present conduct³⁸ or to past conduct which the actor *knew* was subversive (even though such conduct was insufficient to support a criminal charge)³⁹ are not bills of attainder.

IV. PROSPECTIVITY

Mr. Justice Field in *Cummings* noted that the oath was “without any precedent”⁴⁰ and “retrospective.”⁴¹ He compared the Missouri oath to those familiar in England and France which “were always limited to an affirmation of present belief, or present disposition

35. *Id.* at 390. (Emphasis added.)

36. See, e.g., *Hawker v. New York*, 170 U.S. 189 (1898).

37. *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

38. *American Communications Ass'n v. Douds*, *supra* note 37.

39. *Garner v. Board of Public Works*, 341 U.S. 716 (1951). See also *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56 (1951).

40. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 318 (1866).

41. *Ibid.*

towards the government, and were never exacted with reference to particular instances of past misconduct."⁴² It was the *retrospective* feature of the Missouri oath which made it peculiar to this country.

The use of this language was unfortunate, since its implication is that bills which on their faces appear to be attainders will not be unconstitutional if they operate only prospectively. Field was, it seems clear, attempting two things not wholly compatible. He wanted first to invalidate the test oaths as bills of attainder, but he wanted to do this within the historic framework of the standardized English bills. Although the oaths common in England and France did indeed, we may assume, exact swearings as to present beliefs, the language of the *Cummings* decision seems to state that bills of attainder *always* operate only against past conduct. This is not true historically,⁴³ and there is no reason why it ought to be true since the real objection to such bills is how they operate rather than the conduct they operate against. Indications are, however, that the Supreme Court presently believes that only retrospective bills can be attainders.⁴⁴ Mr. Justice Frankfurter, concurring in *United States v. Lovett*,⁴⁵ took a very narrow view of bills of attainder, rigidly insisting that they follow the format of the English bills and contain an outright specification of the offense charged and an explicit finding of guilt. These elements would never be found in any bill operating on future conduct. It is doubtful if the issue will ever be entirely decisive since too many other possible arguments may be made. Yet in view of the tendency to restrict constitutional limitations in favor of expanded governmental control, it is more difficult to foresee a contrary holding.

V. PUNISHMENT v. QUALIFICATION

With the decisions in *Cummings* and *Garland*, it was settled that the prohibition against attainders included bills of pains and penalties, and that the punishment imposed need not be penal.⁴⁶ Further clar-

42. *Ibid.*

43. Davis, *supra* note 4, at 41.

44. *American Communications Ass'n v. Douds*, 339 U.S. 382, 413-14 (1950).

45. 328 U.S. 303, 321-23 (1946).

46. In this respect, at least, bills of attainder differ from *ex post facto* laws. The prohibition against *ex post facto* laws applies to any law assessing a criminal penalty for acts done in the past which were not forbidden when done. *Mahler v. Eby*, 264 U.S. 32, 39 (1924). The classic definition of *ex post facto* laws was stated by Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798):

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

ification of this aspect of attainders is found in *United States v. Lovett*,⁴⁷ where it was held that a permanent ban from government service constituted punishment. Thus the permanent withdrawal of the privileges of citizenship may be a form of punishment.

This is not to say that reasonable qualifications cannot be prescribed for certain professions or positions. Even the Constitution recognizes the desirability and utility of setting standards for positions of great trust, confidence or public interest.⁴⁸ The distinction between legitimate standards and unreasonable, unconstitutional attainments is not always easy to draw, although two methods of setting standards are acceptable. If the qualifying standards may, in theory, be reached by anyone, there is no bill of attainder.⁴⁹ If a presently existing dis-

4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.

It is probable that the fourth type of statute listed by Justice Chase would be called procedural today and not within the constitutional proscription. See *Moore v. State*, 43 N.J.L. 203, 216 (Ct. Err. & App. 1881). The other three types remain firmly rooted in the law, presenting only problems of interpretation in individual cases.

A particularly troublesome area, for example, is a change in punishment. Of course, laws which reduce a punishment are not forbidden, *Rooney v. North Dakota*, 196 U.S. 319 (1905), nor are laws which substitute one kind of punishment for another so long as they are equivalent, *State v. Kent*, 65 N.C. 311 (1871). But when a punishment is increased, the courts will examine the standard prescribed by the legislature rather than the sentence actually imposed by a trial court. E.g., *Lindsey v. Washington*, 301 U.S. 397 (1937); *Ex parte Medley*, 134 U.S. 160 (1890). The punishment fixed at the time of commission of the act is the maximum which may be decreed for that particular violation. *United States v. Papworth*, 156 F. Supp. 842 (N.D. Tex. 1957). Further difficulties are encountered when determining what is punishment. It was held in *Mahler v. Eby*, 264 U.S. 32 (1924) that deportation of an alien was not punishment within the constitutional mandate. Certainly any sanctions expressly designated as criminal will fall within the prohibition, but oftentimes such designations are not clearly made. If the penalty is interpreted as being only civil, *Frazier v. Goddard*, 63 F. Supp. 696 (E.D. Okla. 1945), or even only quasi-criminal, *State v. Hughes*, 8 S.D. 338, 66 N.W. 1076 (1896), it is not forbidden by the injunction against *ex post facto* laws.

47. 328 U.S. 303 (1946).

48. U.S. Const. art. II, § 1, cl. 5.

49. See, e.g., *Dent v. West Virginia*, 129 U.S. 114 (1889) (a West Virginia statute required every practitioner of medicine to obtain a certificate from the State Board of Health indicating that he was a graduate of a reputable medical school, or had successfully practiced medicine in the state for ten years, or that he had been found qualified to practice medicine based on the successful completion of an examination. The act was upheld as a reasonable attempt to secure skill in the profession of medicine). See also *Hawker v. New York*, 170 U.S. 189 (1898) (Statute making any convicted felon attempting to practice medicine guilty of a misdemeanor upheld).

qualification may be removed by the voluntary act of the disqualified party, there is no bill of attainder.

Neither the *Cummings* nor the *Garland* oath fell into either category, the court said. The deprivation was for past acts—if a party had ever, at any time, supported the Confederacy, he could neither attain the standard prescribed nor avoid the disqualification.

A. Failure to Meet the Standard⁵⁰

The Court in *Cummings*⁵¹ held that disqualification from a legitimate occupation, from positions of confidence, from practice in the courts, or from service as executor, administrator or guardian is punishment.

How, then, did the Missouri constitution⁵² punish Reverend Cummings? While acknowledging that the state may prescribe qualifications for holding office or engaging in certain professions, Field observed that “it by no means follows that, under the form of creating a qualification . . . the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed.”⁵³

On the other hand, if the standard is reasonable and is in theory attainable by every one, there is no punishment and no bill of attainder. The establishment of standards which might be reached by all diligent and skilled persons seems to be clearly within the domain of legislative power. The interest of society is protection from charlatans, frauds and clods, or from good-intentioned but unschooled practitioners of an art. The best example of an attainable, non-attaining standard is discussed in *Dent v. West Virginia*,⁵⁴ involving the licensing of physicians.

B. Past Disqualifications Which Cannot Be Removed— The Garland Case

The other prominent test oath case, *Ex parte Garland*,⁵⁵ was decided the same day as *Cummings*, and had a similar background. In 1862,⁵⁶ Congress prescribed an oath⁵⁷ required of all elected and ap-

50. This area has been discussed very ably, with an excellent analysis. Comment, *supra* note 2, at 850-55.

51. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).

52. Mo. Const. art. II, §§ 3, 6, 9, 14 (1865).

53. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319 (1866).

54. 129 U.S. 114 (1889).

55. 71 U.S. (4 Wall.) 333 (1866).

56. An Act to prescribe an Oath of Office, and for other Purposes, 12 Stat. 502 (1862).

57. The oath is as follows:

I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I

pointed officers of the United States save only the President. In 1865 Congress passed a supplementary act extending the oath to attorneys applying for admission to practice in the Federal courts.⁵⁸ False taking of the oath again rendered the person guilty of perjury upon conviction and barred him from ever holding a United States' office.

At the December term, 1860, Garland had been admitted to practice in the Federal courts. In March 1865 the oath became a requirement for continued qualification.⁵⁹ Garland, having served as representative and later as Senator from Arkansas in the Congress of the Confederacy, was prohibited from taking the oath under penalty of perjury.

In July 1865 Garland was given a full pardon by the President. So armed, he petitioned the courts for permission to continue practicing in Federal courts without taking the oath.⁶⁰ He argued that the act of 1865⁶¹ was unconstitutional as a bill of attainder, or, if constitutional, was not applicable to him because of his presidential pardon.⁶²

Again, Field spoke for the majority. In a brief opinion he declared that the oath operated as a decree of perpetual exclusion.⁶³ He emphasized that disqualification from a profession for past conduct must be regarded as punishment. Field did not deny the power of the legislature to prescribe qualifications in the public interest but stated that the sanction imposed must have some reasonable relationship to the qualification. Since no such relationship appeared, the oath requirement was invalidated.

Here was a case where, having once acted, a party was truly attainted. Nothing he could do, nothing which could be done for him, including a presidential pardon, could ever open the pathway blocked

have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God. . . .

58. Act of Jan. 24, 1865, 13 Stat. 424 (1865).

59. *Ibid.*

60. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

61. Act of Jan. 24, 1865, 13 Stat. 424 (1865).

62. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

63. *Ibid.*

by the legislature. Being immovable, the barrier differs materially from a barrier caused by failure to persevere in pursuing a skill, serving an apprenticeship or attaining a physical maturity as determined by age.

C. Denial of a Privilege

Unlike the ex post facto law, bills of attainder need not impose a criminal penalty.⁶⁴ It has been said that denials of a privilege may constitute punishment and, where the other requirements of an attainder are met, will be invalid. *United States v. Lovett*,⁶⁵ the case usually cited for this proposition, may not, however, be good authority for such a broad statement. The *Lovett* case is unique insofar as it involved the only instance in post-Revolutionary America where the legislature was so tactless and direct as to name its victims. Between the last test oath case⁶⁶ and *Lovett*, seventy-four years had passed and many cases had been decided by the lower Federal and state courts expounding the bill of attainder doctrine, some striking down the statute in question,⁶⁷ some upholding it.⁶⁸ Then came *Lovett*, and

64. See note 46 supra.

65. 328 U.S. 303 (1946).

66. *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872).

67. See, e.g., *Putty v. United States*, 220 F.2d 473 (9th Cir. 1955), cert. denied, 350 U.S. 821 (1955) (federal statute which barred an attack upon a conviction which had been proceeded against accused by way of information rather than indictment); *Davis v. Berry*, 216 Fed. 413 (S.D. Iowa 1914), rev'd on other grounds, 242 U.S. 468 (1917) (act which authorized the performance of a vasectomy operation on mental and physical degenerates and those twice convicted of a felony was held to be punishment for a past act); *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958) (federal statute which barred payment of any annuity or retirement pay, based on federal service, to one who refused on the ground of self-incrimination to appear, testify, or produce any document with respect to his federal service or other government service); *Johnson v. United States*, 111 Ct. Cl. 750, 79 F. Supp. 208 (1948) (Madden, J., concurring) (federal statute barring payments to a retired federal judge, who renounced all rights to receive such payments following a congressional investigation resulting in condemnation of his activities while on the bench); cf. *Skinner v. State ex rel. Williamson*, 189 Okla. 235, 115 P.2d 123 (1941) (Habitual Criminal Sterilization Act was held to be eugenic and not intended as further punishment of the felonious multiple offender. The United States Supreme Court held the act unconstitutional as a denial of equal protection of the laws in that the act applied to those twice convicted of larceny but not embezzlement, and both were felonies. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). See also, *In re Yung Sing Hee*, 36 Fed. 437 (C.C.D. Ore. 1888) (the Chinese Exclusion Act was held unconstitutional as a bill of attainder in that it inflicted punishment expressly because of race); *McNealy v. Gregory*, 13 Fla. 417 (1870) (a provision in the Florida Constitution which invalidated all judgments and decrees of state courts in any action based on the sale or purchase of slaves); *Burkett v. McCarty*, 73 Ky. (10 Bush) 758 (1866) (the Kentucky Expatriation Act of 1862 deprived all persons of their state citizenship for participating in

seemingly the attainder prohibition was expanded beyond what many felt were its historical and constitutional bounds.⁶⁰ Whether the

secession and required a test oath as a condition to voting); *Gaines v. Buford*, 31 Ky. (1 Dana) 481 (1833) (forfeiture of land to the Commonwealth unless certain improvements were made to the land); *State ex rel. Pittman v. Adams*, 44 Mo. 570 (1869) (legislation requiring a loyalty oath for a college board of curators was lawfully enacted, but a declaration removing the curators from the board for not taking the oath was an attainder); *The Murphy & Glover Test Oath Cases*, 41 Mo. 339 (1867) (involving the same constitutional provision invalidated by the Supreme Court in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) but applied to attorneys; and as to teachers, *State v. Heighland*, 41 Mo. 388 (1867); *Green v. Shumway*, 39 N.Y. 418, 36 How. Pr. 5 (Ct. App. 1868) (loyalty oath required of electors of delegates to the State Constitutional Amendment Convention); *Kyle v. Jenkins*, 6 W. Va. 371 (1873) (statute requiring filing of a suitor's test oath along with petitions for a rehearing). But cf. *Boyd v. Mills*, 53 Kan. 594, 37 Pac. 16 (1894) (Kansas constitutional provision disqualified those who aided the Confederacy from voting or holding public office until said disability was removed by 2/3's vote of the legislature).

68. See, e.g., *Drehman v. Stifle*, 75 U.S. (8 Wall.) 595 (1869) (Missouri Constitutional provision which exempted individuals from civil liability for property damage done while acting under military authority); *Communist Party of United States v. Subversive Activities Control Board*, 223 F.2d 531 (1955), rev'd on other grounds, 351 U.S. 115 (1955) (Subversive Activities Control Act of 1950); *Quattrone v. Nicolls*, 210 F.2d 513 (1st Cir. 1954), cert. denied, 347 U.S. 976 (1954) (deportation, however severe, is not punishment); *Dodez v. United States*, 154 F.2d 637 (6th Cir. 1946), rev'd on other grounds, 328 U.S. 828 (1946) (upheld Selective Service Act of 1940 denying intermediate judicial review of local draft board classification); *Story v. Rives*, 97 F.2d 182 (D.C. Cir. 1938), cert. denied, 305 U.S. 595 (1938) (upheld act of Congress which required parole violators to be returned to prison to serve the remainder of their original sentence); *Fougherouse v. Brownell*, 163 F. Supp. 580 (D. Ore. 1958) (Immigration and Nationality Act of 1952); *United States v. Stein*, 140 F. Supp. 761 (S.D.N.Y. 1956) (application of Smith Act as amended by Communist Control Act of 1954); *United States v. Kuzma*, 141 F. Supp. 91 (E.D. Pa. 1954) (section 2 of Smith Act which provided for criminal punishment of persons conspiring to overthrow government of United States by force and violence); *Goodin v. Clinchfield R.R.*, 125 F. Supp. 441 (E.D. Tenn. 1954), aff'd, 229 F.2d 578 (6th Cir. 1954), cert. denied, 351 U.S. 953 (1955) (pursuant to Railway Labor Act, a collective bargaining contract whereby contracting parties adopted age 70 as compulsory retirement age); *Simmons v. United States*, 120 F. Supp. 641 (M.D. Pa. 1954) (National Service Life Insurance provision excluded payments on any death inflicted as legal sanction); *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953), aff'd 347 U.S. 284 (1953) (F.C.C. rule providing for denial of or revocation of license for violation of Commission rules); *Peer v. Skeen*, 108 F. Supp. 921 (N.D. W. Va. 1952), cert. denied, 342 U.S. 930 (1952) (Habitual Criminal Statute which increased punishment of habitual offenders); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952) (federal statute granting discretionary authority to Secretary of State concerning issuance of or withdrawal of passports); *Washington v. Clark*, 84 F. Supp. 964 (D.D.C. 1949), aff'd sub nom. *Washington v. McGrath*, 341 U.S. 923 (1949) (President's Loyalty Orders establishing procedure for removal from government those service

Lovett decision, good or bad, is still the law can best be considered by comparing it with the most recent case, *Flemming v. Nestor*.⁷⁰

VI. UNITED STATES V. LOVETT

In 1943, Representative Dies in a passionate speech to the House attacked 39 government employees as "radical bureaucrats" and associates of "Communist front organizations."⁷¹ Among those attacked were Robert M. Lovett, Goodwin B. Watson, and William E. Dodd, Jr. A subcommittee of the Appropriations Committee was appointed to

employees classified as security risks); *United States ex rel. Lubbers v. Reimer*, 22 F. Supp. 573 (S.D.N.Y. 1938) (determination by an administrative board regarding an alien's deportability); *French v. Senate*, 146 Cal. 604, 80 Pac. 1031 (1905) (Senate resolution expelling a member for accepting a bribe); *People v. Camperlingo*, 69 Cal. App. 466, 231 Pac. 601 (1924) (statute imposing penalty for possession of a pistol by one having been convicted of a felony); *Davis v. City of Savannah*, 147 Ga. 605, 95 S.E. 6 (1918) (city ordinance which restricted area in which cattle could be kept within the city which resulted in the revocation of licenses issued to some dairymen); *Gray v. McLendon*, 134 Ga. 224, 67 S.E. 859 (1910) (act providing for appointment of a railroad commissioner by the governor, which reserved to the Legislature the right to remove him from office after his suspension by the governor); *Shepherd v. Grimmett*, 2 Idaho 1123, 31 Pac. 793 (1892) (test oath for voters directed primarily against plural marriages); *Wooley v. Watkins*, 2 Idaho 590, 22 Pac. 102 (1889) (act of Congress denying polygamists the right to vote); *People v. Lawrence*, 390 Ill. 499, 61 N.E.2d 361 (1945), cert. denied, 326 U.S. 808 (1945) (Habitual Criminal Act which automatically increased punishment of those with a record of prior convictions); *Crampton v. O'Mara*, 193 Ind. 551, 139 N.E. 360 (1923), appeal dismissed, 267 U.S. 575 (1925) (statute which prohibited one convicted of an infamous crime from holding public office); *Moore v. Commonwealth*, 293 Ky. 55, 168 S.W.2d 342 (1943) (act which caused property to be forfeited if knowingly used for the purpose of selling liquor in a dry territory); *Mosher v. Bay Circuit Judge*, 108 Mich. 503, 66 N.W. 384 (1896) (act authorized the issuance of attachment on a claim not due); *State v. Graves*, 352 Mo. 1102, 182 S.W.2d 46 (1944) (statute requiring accused to answer relevant questions pertaining to convictions for impeachment purposes if he chose to take the stand); *In re Platz*, 60 Nev. 296, 108 P.2d 858 (1940) (statute restricting the practice of law to dues paying members of the bar); *France v. State*, 57 Ohio St. 1, 47 N.E. 1041 (1897) (act which regulated the practice of medicine by creating an administrative board to pass on qualifications of those desirous of practicing within the state); *Kelley v. State Bar*, 148 Okla. 282, 298 Pac. 623 (1931) (requirement that attorneys pay reasonable annual dues under penalty of disbarment); *Davis v. Beeler*, 185 Tenn. 638, 207 S.W.2d 343 (1947) (statute prohibiting the practice of naturopathy within the state and repealed a prior statute); *State v. Coubal*, 248 Wis. 247, 21 N.W.2d 381 (1946) (statute providing for the revocation of the liquor license of any person convicted of permitting gambling on his premises).

69. See *United States v. Lovett*, 328 U.S. 303, 318 (1946) (Frankfurter, J., concurring opinion).

70. 363 U.S. 603 (1960).

71. 89 Cong. Rec. 474, 479, 480, 483 (1943) (remarks of Congressman Dies).

investigate the charges made by Congressman Dies. Hearings were held in secret executive session at which the accused were not permitted counsel. The committee found Lovett, Watson and Dodd "guilty" of "subversive activity."⁷² As a result of this finding, Congress added a rider to Section 304⁷³ of the Urgent Deficiency Appropriation Act of 1943.⁷⁴ The rider provided that no part of any appropriation "which is now, or which is hereafter made, available . . . shall be used, after November 15, 1943, to pay any part of the salary . . ."⁷⁵ of Lovett, Watson and Dodd, unless they were first reappointed with the advice and consent of the Senate. President Roosevelt signed the bill. While he objected to the rider, he was unable to veto it without rejecting the entire appropriation bill, which would have jeopardized our war effort.⁷⁶

The agencies employing the three named individuals kept them at their jobs after the deadline, but they received no pay. They then sued in the Court of Claims for compensation for work performed after November 15, 1943.⁷⁷ Judgment for the petitioners was affirmed by the United States Supreme Court.⁷⁸

In the Supreme Court, respondents urged that Section 304 was an infringement on the executive removal power, which is not entrusted

72. H.R. Rep. No. 448, 78th Cong., 1st Sess. 5 (1943).

73. The rider is as follows:

No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate:

Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943:

Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

74. Ch. 218, § 304, 57 Stat. 431, 450 (1943).

75. *Ibid.* The entire amendment is quoted *supra* note 73.

76. H.R. Doc. No. 264, 78th Cong., 1st Sess. (1943).

77. *Lovett v. United States*, 104 Ct. Cl. 557, 66 F. Supp. 142 (1943). The members of the court were split as to the reasons but agreed that Messrs. Lovett, Dodd, and Goodwin were entitled to compensation.

78. 328 U.S. 303 (1946).

to Congress;⁷⁹ a bill of attainder;⁸⁰ and a violation of due process.⁸¹ The Court held Section 304 unconstitutional as a bill of attainder.

Historically, bills of attainder had to declare on their faces that the individual or class was guilty of some designated misbehavior. Section 304 lacked this traditional requirement. It simply prohibited any disbursement of current or future appropriations for the salary of any of the respondents. While the rider did not command that the parties be removed from their jobs, it did accomplish this unless one is willing to assume that the parties would continue working without compensation.

Mr. Justice Black delivered the majority opinion.⁸² That declarations of guilt did not appear on the face of the legislation did not concern him. Relying on House debates and Committee reports, Black found declarations of guilt and an intent to punish. The majority adopted the *Cummings* and *Garland* definition of attainder and decided that Section 304 punished the named individuals without the protection of a judicial trial. They did not distinguish between criminal sanctions, salary severance or loss of a job as punishment. Citing *Garland*, Mr. Justice Black declared that Section 304 "operated as a legislative decree of perpetual exclusion"⁸³ from further government employment.

After *Lovett*, it seemed clear that a bill of attainder is legislation which names an individual or an ascertainable class with intent to punish. The crucial test is not the nature of the sanction imposed but the motive behind its imposition. Intent to punish may be evidenced by its presence on the face of the document or from punitive language contained in committee records and Congressional reports,⁸⁴ as may declarations of guilt. The punishment requirement encompassed legislative enactments resulting in perpetual exclusion from one's

79. U.S. Const. art. II. §§ 1, 2, 3, 4.

80. U.S. Const. art. I. § 9, cl. 3.

81. Many seemingly feel that the case would have been more appropriately decided on this point. See Davis, *United States v. Lovett and The Attainder Bogy in Modern Legislation*, 1950 Wash. U.L.Q. 13, 44-45 & n.92. The court first had to decide whether § 304 was a "mere appropriation measure" and therefore non-justiciable.

82. The vote was 8-0 in favor of affirmance. Mr. Justice Frankfurter wrote a concurring opinion declaring that respondents should be paid but that Section 304 was valid because it did no more than cut off regular disbursement of payments. Relying on *Ashwander v. T.V.A.*, 297 U.S. 288 (1936) he avoided the constitutional question.

83. *United States v. Lovett*, 328 U.S. 303, 316 (1946).

84. Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases*, 34 Ind. L.J. 231 (1959); Comment, *The Communist Control Act of 1954*, 64 Yale L.J. 712 (1955).

vocation, and was not restricted to the imposition of criminal sanctions.

In his concurring opinion,⁸⁵ Mr. Justice Frankfurter refused to decide the case on the constitutional issues, but nonetheless discussed them at length. He argued that courts should construe all laws so that their constitutionality is not questioned, if such a construction is possible. While it may be argued that Frankfurter's interpretation of Section 304 is far from reasonable, our concern here is with his discussion of bills of attainder.

Frankfurter stated that two kinds of constitutional questions appear before the Supreme Court, one requiring an exercise of legal judgment because the issue involves a broad standard such as "due process," the other allowing no lee-way since the constitutional prohibition is specific. The prohibition against bills of attainder is specific, he notes,⁸⁶ and leaves no room for judicial definition or extension. In his view the English type of bill is the only kind forbidden. Since the usual English bill contained an explicit declaration of guilt and prescribed a specific punishment, any act lacking these characteristics is, perforce, not within the prohibition. No amount of research into legislative history or delving into Congressional motives can invalidate a bill valid on its face. In other words, where Black is willing to examine the background of the questioned legislation, Frankfurter narrows his view and confines it to the text of the act itself. Not only does he assert that he will avoid deciding the issue if he can, he further tells Congress how to word a bill so that it is valid on the basis of its language alone.

VII. THE INTERIM CASES

The limited impact of *Lovett* is demonstrated by the fact that subsequent cases involving laws which looked like bills of attainder were decided on other grounds.

Example I

In *United Public Workers v. Mitchell*⁸⁷ the constitutionality of Sections 9 and 9A of the Hatch Act⁸⁸ was questioned. These sections forbade persons employed in the executive branch of the Federal

85. *United States v. Lovett*, 328 U.S. 303, 318 (1946).

86. *Id.* at 321. This is rather an unusual statement for a man who so avidly espouses the "balancing of interests" test for alleged violations of the first amendment, the language of which is at least as specific as that of the bill of attainder prohibition. See *Dennis v. United States*, 341 U.S. 494, 517 (1951) (concurring opinion).

87. 330 U.S. 75 (1947).

88. An Act to prevent pernicious political activities, 53 Stat. 1147, 1148 (1939), 5 U.S.C. § 118(j) (Supp. 1948).

government from actively participating in political campaigns. Persons violating the act were to be immediately discharged from government service and permanently banned from re-employment in the same position. The Hatch Act was upheld as applied to a roller employee in the United States mint who, during his off time, was a ward committeeman. Section 9A looks, on its face, like a bill of attainder. It identifies an ascertainable class (government employees), prohibits designated conduct (active participation in political campaigns), and sets out punishment for violation of its provisions (upon a determination by the United States Civil Service Commission that the employee has violated the act, he is removed from his position and permanently banned from re-employment in that same position). This case indicated the court's dilemma in separating cases where the intent is to punish from those where Congress has prescribed reasonable qualifications for office with a view toward efficient governmental operation.⁸⁹ The attainder issue was not argued, as the parties seemingly were satisfied to base their challenge on the first amendment. Section 9A was upheld as violating neither the first amendment nor the due process clause of the fifth amendment. This decision clouds the attainder issue since one is hard pressed to think of legislation not violative of due process but unconstitutional as a bill of attainder.

Example II

On appeal from a decision of the supreme court of Oklahoma upholding the validity of a state loyalty oath,⁹⁰ the Supreme Court, in *Wieman v. Updegraff*,⁹¹ reversed on the ground that the oath violated due process. The appellants particularly objected to having to swear "that within the five years immediately preceding the taking of the oath . . . I have not been a member of . . . any agency . . ."⁹² on the Attorney General's list. While agreeing with the majority that the due process clause was violated, Mr. Justice Black in a concurring opinion declared that the statute was also a bill of attainder, since it punished for past lawful associations and utterances.⁹³

89. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

90. Okla. Stat. Ann. tit. 51 § 37.1-37.8 (Supp. 1952).

91. 344 U.S. 183 (1952).

92. U.S. Const. art. II, § 1, cl.5.

93. *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952). The court distinguished this case from *Garner v. Board of Public Works*, 341 U.S. 716 (1951), which upheld a California loyalty oath on the assumption that scienter was implicit in each clause of the oath. They did not make this assumption in the *Wieman* case. Accord, *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (suspension of medical license for failure to produce certain documents before a Congressional committee upheld); *Adler v. Board of Education*, 342 U.S. 485 (1952) (requiring

Example III

The constitutionality of the Immigration and Nationality Act⁹⁴ was challenged in *Trop v. Dulles*.⁹⁵ The act prescribed loss of citizenship for all persons dishonorably discharged for desertion from the Army during wartime. The majority concluded that this amounted to cruel and unusual punishment in violation of the Eighth Amendment. On the question of bills of attainder, the court stated that the prohibition applied only to penal laws. They defined a penal law as a statute which "imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer. . . ."⁹⁶ A law may be non-penal even though it imposes a disability if it accomplishes a legitimate governmental purpose. The "evident purpose of the legislature"⁹⁷ controls in any given situation.

VIII. FLEMMING V. NESTOR⁹⁸

*Flemming v. Nestor*⁹⁹ involved a resident alien. From December 1936 until January 1955 he and his employer made regular contributions for Social Security insurance in accordance with the Federal Insurance Contributions Act.¹⁰⁰

Nestor had been a member of the Communist Party from 1933 until 1939, when membership was not illegal and was not a ground for deportation. In 1952 Congress passed a law providing that any-

teaching applicant to take an oath that he is not a member of a "subversive" group upheld); *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56 (1951) (non-subversive test oath requirement for candidates for public office upheld); cf. *Speiser v. Randall*, 357 U.S. 513 (1958) (California law requiring veterans to take a loyalty oath as a condition precedent to being allowed to take tax exemptions declared unconstitutional); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950) (loyalty oath as a condition precedent to serving as a union officer upheld).

94. 66 Stat. 163 (1952), as amended, 8 U.S.C. §§ 1101-1503 (1958), as amended, 8 U.S.C. §§ 1101-1486 (Supp. II, 1959-60). The court was particularly concerned with 8 U.S.C. § 1481(a)3 (1958).

95. 356 U.S. 86 (1958). In *Perez v. Brownell*, 356 U.S. 44 (1958), the court sustained expatriation imposed as a result of voting in a foreign election, under Section 401(e) of the Immigration and Nationality Act, (54 Stat. 1137 (1940)), as amended, 8 U.S.C. 1481(5). Such denationalization was a result of voluntary conduct and a lawful sanction imposed by Congress in an attempt to regulate foreign relations.

96. *Trop v. Dulles*, 356 U.S. 86, 96 (1958).

97. *Ibid.*

98. The make-up of the court had changed considerably since the *Lovett* decision (1946). Gone were Justices Stone, Rutledge, Murphy, Reed, Burton and Jackson.

99. 363 U.S. 603 (1960).

100. Int. Rev. Code of 1954, §§ 3101-25.

one deported because of membership in the Communist Party¹⁰¹ would cease to receive Social Security benefits.¹⁰² Nestor was deported in 1956 and his Social Security benefit payments stopped.

The trial court¹⁰³ rendered summary judgment for Nestor. The decision was reversed by the Supreme Court. The case involved three questions: (1) whether Section 212(n) of the Social Security Act deprived Nestor of an accrued property right; (2) whether the Act was arbitrary and unreasonable in violation of the fifth amendment; and (3) whether Section 202 (n) was a bill of attainder. In a 5-4 decision, the majority answered all three questions in the negative. We are concerned only with the attainder issue.

The Court concluded that the act was intended only to regulate the Social Security system, and that where legislation is aimed at an activity rather than at a person or class of persons, any resulting disability to persons or classes is not punishment.¹⁰⁴

A bill of attainder is always designed to punish. Two tests have been formulated to expose any punitive intent. One, stated by Mr. Justice Black in the *Lovett* case, permits the examination of reports and debates in search of motives. The other test, taken directly from the *Garland* case, requires that any disqualification imposed must be based on some trait which would preclude the disqualified party from functioning properly in the position he seeks. This has been appropriately termed the relevancy test.¹⁰⁵ The majority declared that their duty was to determine whether the legislature intended to punish for past conduct or whether the harm to the individual was merely incidental to the regulation of an activity.

101. Immigration and Nationality Act § 241(a) (6) (C) (i) 66 Stat. 163, 204 (1952), 8 U.S.C. § 1251(a) (6) (C) (i) (1954). Paragraphs (1), (2), and (10) of § 241(a) relate to unlawful entry, or entry not in compliance with certain conditions; paragraphs (6) and (7) apply to subversive activities; the remainder of the included paragraphs are concerned with convictions or related activities of designated crimes. See note 106 infra for a list of the four classes which are grounds for deportation but are not included in § 202(n) of the Social Security Act.

102. Social Security Act § 202(n), 68 Stat. 1083 (1954), 42 U.S.C. § 402(n) (1954):

(n) . . . (1) If any individual is (after the date of enactment . . .) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—

“(A) no monthly benefit under this section shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported”

103. *Nestor v. Folsom*, 169 F. Supp. 922 (D.D.C. 1959).

104. *Flemming v. Nestor*, 363 U.S. 603 (1960).

105. Note, supra note 84.

Nestor argued that the legislation was designed to *punish* aliens deported for certain reasons. He attempted to support this claim by pointing out that four grounds for the deportation of aliens set out in Section 241(a) of the Immigration and Nationality Act were not included in Section 202(n) of the Social Security Act.¹⁰⁶ Persons deported under those four sections would continue to receive benefits after they had been deported. After reviewing the House reports, the Court concluded that there was no evidence that the legislation was designed to punish,¹⁰⁷ and decided further that the act was necessary for the regulation of the Social Security system. Congress was concerned with the *fact* of deportation, it said, and not the *grounds* for the deportation itself. The Court concluded that denial of a non-contractual government benefit to certain deportees bore a rational relationship to the purpose of the legislation. The majority relied on earlier cases in deciding that deportation *per se* was not punishment, and was a legitimate exercise of the Congressional power to establish conditions under which aliens might remain in this country.¹⁰⁸

Mr. Justice Black dissented,¹⁰⁹ along with the Chief Justice, Justice Douglas and Justice Brennan. Black declared that the *Cummings, Gar-*

106. The four classes not included in § 202(n) are: 1) mentally diseased persons institutionalized within five years of entry, 2) persons becoming public charges within five years from causes in existence prior to entry, 3) non-immigrants who are admitted as such but do not comply with the conditions of entry, 4) those who knowingly and for gain aid another alien to enter unlawfully.

107. H.R. Rep. No. 2679, 83d Cong., 2d Sess. 18 (1954).

108. *Galvan v. Press*, 347 U.S. 522 (1954) (alien deported as having been a member of the Communist party); *Helvering v. Mitchell*, 303 U.S. 391 (1938) (deportation of aliens is a remedial sanction free of the punitive criminal element); *Mahler v. Eby*, 264 U.S. 32 (1924) (deportation while it may burden the alien, is not a punishment); *Bugajewitz v. Adams*, 228 U.S. 585 (1913) (deportation of alien prostitutes—Mr. Justice Holmes at 591 said, "It is thoroughly established that Congress has the power to order the deportation of aliens whose presence in the country it deems hurtful."). For the other side of the coin read Mr. Justice Douglas' dissent in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

109. Mr. Justice Black also urged a strong dissent on bill of attainder grounds in *Barenblatt v. United States*, 360 U.S. 109 (1959) (the activities of the House Un-American Committee violated the bill of attainder prohibition because the purpose of the committee was to try witnesses and punish them because they are or had been Communists and this is punishment inflicted without a judicial trial. The question was not considered by the majority.) See also *Uphaus v. Wyman*, 360 U.S. 72 (1959) (Black concurring in Brennan's dissent); *Galvan v. Press*, 347 U.S. 522 (1954) (Black's dissent); *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (Black's dissent); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Black's separate concurring opinion with the majority).

land and *Lovett* decisions required the court to hold Section 202(n) a bill of attainder. He argued that deprivation of insurance benefits was punishment since it divested the deportee of "an earned right."¹¹⁰ He concluded that the act was a bill of attainder even in the classic sense, since it was legislation aimed at an ascertainable class, punishing for conduct not illegal when done, without the protections of a judicial trial.

Mr. Justice Douglas thought that the object of the enactment was to deprive a deportee of his property because he had embraced a certain ideology.¹¹¹

Mr. Justice Brennan wrote a dissent in which the Chief Justice joined.¹¹² Because Section 202(n) applied only to aliens deported for one of fourteen stated reasons instead of to all deported aliens, Brennan could not be persuaded that Congress intended only to regulate an activity.¹¹³ Rather it seemed clear to him that Congress intended to punish. He concluded that the act was invalid as an *ex post facto* law, and did not decide the attainder question.

IX. THE PRESENT STATE OF THE LAW

It is interesting to note that Frankfurter was a member of the majority in the *Flemming* case, and, at least tacitly, modified the strong position he took in *Lovett*. That is, he allowed Mr. Justice Harlan, speaking for the majority, to explore (even though somewhat superficially) the legislative history behind the act under which Nestor lost his Social Security benefits. Admittedly, Frankfurter may have felt that the constitutional issue should not have been discussed. Nevertheless, his silence leaves the legal world in a quandary. It must now face a number of possibilities when considering whether an act is a bill of attainder.

First, there is the possibility that the *Flemming* decision is an example of the rather exceptional treatment to which certain persons are subjected by reason of alleged Communist affiliations.¹¹⁴ This might explain the ease with which the *Flemming* decision was able to gather majority approval.

Second, there is the possibility that the opinions expressed by Mr. Justice Frankfurter in *Lovett* have now been adopted by the Court, and the cursory excursion into legislative history found in *Flemming* represents but a slight concession to the *Lovett* majority. If such is

110. *Flemming v. Nestor*, 363 U.S. 603 (1960).

111. H.R. Rep. No. 1698, 83d Cong., 2d Sess. 25 (1954).

112. *Flemming v. Nestor*, 363 U.S. 603, 634 (1960).

113. *Id.* at 637.

114. Compare *Uphaus v. Wyman*, 360 U.S. 72 (1959) with *National Ass'n for Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958).

the case, and if future legislators follow the suggestions of the *Lovett* concurrence, the bill of attainder clause is only a dated thrust at an eighteenth century peculiarity and no longer a meaningful part of the Constitution. This finally settles the question of "substance versus form," with "form" the unabashed victor.

Third, there is yet the possibility, slight though it seems, that the attainder clause is not dead but only dormant. Unsatisfactory as the Black approach may be, and granting that this position tends to foster useless accumulations of needless evidence to rationalize a decision, it does preach the lesson of history. It recognizes that as often as men have found ways to thwart the workings of tyranny, just so often have other men found ways to evade the barriers. There is no guarantee that modern legislatures will not impose punishments by devious means. There is at hand a weapon with which to cope with any such attempts, based on the willingness, implicit in *Lovett*, to expand the Constitution to meet modern problems, and built on the "direct-indirect" language of the *Cummings* case. As for the research into legislative history which Black finds necessary—what need is there to demonstrate the obvious? If the purported bill of attainder works a punishment and if the other definitional requirements are met, there is no need to search for motives. Motives are easily disguised and more easily misread.

As Chief Justice Marshall observed, courts should always remember that it is a constitution they are expounding, and when so doing they should consider not only its language but its nature. "Its nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."¹¹⁵ The nature of the bill of attainder prohibition seems clear enough, but if the *Flemming* case anticipates a trend, this constitutional proscription apparently will soon be forgotten.

115. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).