From English Law and Blackstone to Modern Jurisprudence: A Survey of the Interpretation and Changes to the Bill of Attainder Clause of the U.S. Constitution

ALINA VENEZIANO*

I. INTRODUCTION

This Article traces the history of the Bill of Attainder Clause, including its origins from English law, U.S. case law, and various commentaries and scholarship. This is essential to understanding where the law currently stands for alleged Bill of Attainder violations. Various terms such as specificity and punishment are the subject of this Article. By noting such changes, scholars can better assess how the Supreme Court is likely to rule on future cases involving Bill of Attainder violations. But even more so, it is critical to point out this progression as an example of judicial interpretation that was developed over centuries well beyond original intent and meaning during historical times. The Article's objective is to highlight how this trend played out in U.S. jurisprudence.

II. TRACING THE HISTORY OF THE BILL OF ATTAINDER CLAUSE

A. The U.S. Supreme Court has expanded the scope of the Bill of Attainder provision of the Constitution well beyond English law and the original intent of the Founders.

Article 1, Section 9, Clause 3 of the U.S. Constitution states that "[n]o Bill of Attainder or ex post facto Law shall be passed."[1] English Bill of Attainder equated to a "sentence of death," as noted by Blackstone.[2] Attainder was a form of "capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the

* Alina Veneziano, LL.M., New York University School of Law, 2019; J.D., Georgetown University Law Center, 2018; M.B.A., Western Governors University; B.S., Accounting, Western Governors University. Ms. Veneziano is a member of the New York State Bar.

1. U.S. Const. art. I, § 9, cl. 3.

2. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 4:373–79 (1769), *reprinted in* FOUNDERS' CONSTITUTION, VOLUME III 343 (Philip B. Kurland & Ralph Lerner eds., 1987) (It is upon judgment of "outlawry, or of death, for treason or felony" that a person is attained).

ordinary course of judicial proceedings."[3] Anything less than this is otherwise called a "bill of pains and penalties."[4] Borrowed from English law, the Founders inserted the Bill of Attainder provision clause into the Constitution to prevent legislative sentences of "disqualification, disfranchisement and banishment" and to preserve a trial by jury in certain cases as "inviolate."[5] This provision was agreed to unanimously at the Federal Convention,[6] though its departure from a sentence of death may demonstrate an intent to relax its prohibitions. In other words, the express exclusion of pains and penalties may reveal an intent not to prohibit these lesser legislative punishments. It is uncertain, however, how far this intent was meant to extend. Further, even though it is an open question as to what extent the Founders meant to prohibit lesser forms of punishment, as understood as pains and penalties, the Supreme Court has impliedly held throughout history that pains and penalties are included within the prohibition of Bills of Attainder.[7] Thus, this conflation of the two by the Supreme Court has been "spun from thin air."[8]

---

3. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 3:§§ 1338–39 (1833), *reprinted in* FOUNDERS' CONSTITUTION, VOLUME III 353 (Philip B. Kurland & Ralph Lerner eds., 1987).

4. *Id.*

5. ALEXANDER HAMILTON, LETTER FROM PHOCION, TO THE CONSIDERATE CITIZENS OF NEW YORK, ON THE POLITICS OF THE TIMES, IN CONSEQUENCE OF THE PEACE, PUB. PAPERS 3:485-86 (Jan. 1784) at 1–27, *reprinted in* FOUNDERS' CONSTITUTION, VOLUME III 346 (Philip B. Kurland & Ralph Lerner eds., 1987).

6. JAMES MADISON, RECORDS OF THE FEDERAL CONVENTION, PUB. PAPERS 2:375 (Aug. 22 1787), *reprinted in* FOUNDERS' CONSTITUTION, VOLUME III 347 (Philip B. Kurland & Ralph Lerner eds., 1987).

7. *See* Nixon v. Administrator of General Services, 433 U.S. 425, 473–74 (1977) ("Article I, § 9, however, also proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution."); *see also* United States v. Lovett, 328 U.S. 303, 323 (1946)(J. Frankfurter concurring) ("The punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties."); *see also* Cummings v. Missouri, 71 U.S. 277, 323 (1867) ("If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."); *see also* Ogden v. Saunders, 25 U.S. 213, 286 (1827) (The Court observed that the Framers must have inserted the bill of attainder provision in the Constitution because its intent is "a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property."); *see also* Fletcher v. Peck, 10 U.S. 87, 137–38 (1810) (Justice Marshall stated that the Framers wanted to protect against the sudden outbursts of acting out of the "feelings of the moment;" therefore, a bill of attainder – which may affect "the life of an individual, or may confiscate his property, or may do both" was inserted into the Constitution); *see also* Calder v. Bull, 3 U.S. 386, 397 (1798) (Justice Chase observed that the Framers of the Constitution understood the bill of attainder prohibition only as referring to "crimes, pains and penalties, and no further").

8. Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 379 (1978).

B. Punishing past conduct is not a violation of the Bill of Attainder Clause if the provision imposes a condition or qualification related to employment or there is a continued threat of its reoccurrence in the future.

Punishing past conduct is a violation of the Bill of Attainer Clause. In this regard, the Supreme Court has been more likely to find a Bill of Attainer violation with loyalty oaths. For example, both *Ex parte Garland*[9] and *Cummings v. Missouri*,[10] two Supreme Court decisions in 1866 and 1867, involved loyalty oaths against supporting the Confederate government. Both opinions struck the provisions as Bill of Attainder violations because they punished past conduct without the right to a trial.[11] These represent a more traditional and formal reading of the Bill of Attainder Clause.

Legislative provisions imposed that are related to qualifications for employment are more likely not to violate the Bill of Attainder Clause. For example, in 1889, the Supreme Court noted in *Dent v. West Virginia* that the provision outlining the qualifications to practice medicine in the state will serve as a deprivation to employment "only when they have no relation to such calling or profession."[12] The provision in *Dent* was not a violation because it was "appropriate to the calling or profession."[13] Similarly, in *Hawker v. New York*, decided nine years later, the Court used the same reasoning.[14] The Court held that the state law which barred convicted felons from practicing medicine was not a violation because it is permissible for state law to prescribe the qualifications for employment.[15] The provision in *Garner v. Board of Public Works of Los Angeles* in 1951, which forbade a person from entering public employment in the city if they had advocated for the violent overthrow of the state or federal government, was also a qualification for employment.[16] The Supreme Court noted that "[p]ast conduct may well relate to present fitness" and that the general regulation here merely provides "standards of qualification and eligibility for employment."[17] These cases are distinguishable from the Court in *Cummings*, which noted that the oath does not relate to the qualification of seeking a professional license; it was enacted not for the sake of the profession but instead to reach the person by depriving them of "some of the rights and privileges of the citizen."[18]

---

9. *See generally* Ex parte Garland, 71 U.S. 333 (1866).
10. *See generally Cummings*, 71 U.S. 277 (1867).
11. *Cummings*, 71 U.S. at 325; *see also Ex parte Garland*, 71 U.S. at 381; *see also* companion case Pierce v. Carskadon, 83 U.S. 234, 239 (1872).
12. Dent v. West Virginia, 129 U.S. 114, 122 (1889).
13. *Id.*
14. *See generally* Hawker v. New York, 170 U.S. 189 (1898).
15. *Id.* at 191.
16. *See* Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951).
17. *Id.* at 720, 722.
18. Cummings v. Missouri, 71 U.S. 277, 320 (1867).

The presence of future-oriented conduct in addition to past conduct may prevent a finding of a Bill of Attainder violation. In *American Communications Association v. Douds*, the loyalty oath which required that one affirm that he or she was never a member nor advocate of the Communist Party, was not a violation of the Bill of Attainder Clause.[19] The Court here noted that the provision was intended to prevent future action and focuses on future conduct rather than past action.[20] Further, the provision had an escape by allowing individuals to renounce their allegiance.[21] Also, in *Selective Service System v. Minnesota Public Interest Research Group*, the consequences of the law that denied federal aid to males who did not register for service could be avoided either by timely or late filing.[22] These instances are distinguishable from *Ex parte Garland*, where the law's consequences were inescapable, not even by taking the oath.[23] From the above case law in this section, it appears that punishment is more about Congress' intent to punish as opposed to the impact of the punishment on the affected person(s)/group(s).

C. Naming a person/group in the legislative provision is not determinative to a Bill of Attainder violation.

Early case law took a narrow reading of the Bill of Attainder Clause. In 1946, the Supreme Court decided *United States v. Lovett*, involving a federal law that named three people that a committee of the House decided had engaged in and were guilty of subversive activity, and the Court struck down the provision as a Bill of Attainder violation.[24] Justice Hugo Black stated that this provision "clearly accomplishes the punishment of named individuals without a judicial trial."[25] In the 1965 decision of *United States v. Brown*, the Court also found a violation of the Bill of Attainder Clause.[26] A section of Labor-Management Reporting and Disclosure Act ("LMRDA") forbade a former Communist member from serving as an executive officer of a labor union.[27] The Court here rejected a narrow reading of the Bill of Attainder clause and held that the provision here was a violation because it "designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability."[28]

---

19. *See generally* American Communications Association v. Douds, 339 U.S. 382 (1950).
20. *Id.* at 413–14.
21. *Id.* at 414.
22. Selective Service Sys. v. Minnesota Public Interest Research Group (MPIRG), 468 U.S. 841, 851 (1984).
23. *See* Ex parte Garland, 71 U.S. 333 (1866).
24. United States v. Lovett, 328 U.S. 303, 318 (1946).
25. *Id.* at 316.
26. United States v. Brown, 381 U.S. 437, 461 (1965).
27. *Id.* at 438–40.
28. *Id.* at 450.

The standard with respect to naming an individual/group with specificity or reasonable ascertainability has slowly taken a more functional approach. In other words, naming an individual or group is not a precondition to a Bill of Attainder violation. The seminal case on this point is the 1977 decision *Nixon v. Administrator of General Services*.[29] Congress passed the Presidential Recordings and Materials Preservation Act, signed into law by President Gerald Ford, which required the Administrator of the General Services to obtain Richard Nixon's presidential papers and use them in judicial proceedings.[30] The Court held that this Act was not a violation of the Bill of Attainder Clause. Even though the Act referred to the claimant by name, he constituted "a legitimate class of one" for which Congress can legislate against via generalized standards both against Nixon and his successors.[31]

Further, the Court in *Nixon* articulated an approach for future cases that examined whether the challenged provision could constitute as a "punishment" under the Bill of Attainder clause. Such an approach examined "punishment" under three prongs: historical, functional, and motivational. The historical test looks to English law and asks whether the challenged provision "sentence[ed] a named individual or identifiable members of a group to death."[32] The functional test goes beyond the historical purpose and analyzes whether the provision "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[33] The last test, the motivational one, inquires as to whether "the legislative record evinces a congressional intent to punish."[34]

D. Where there is a legitimate public policy purpose, a punitive legislative purpose is not sufficient for a violation of the Bill of Attainder Clause where there is also a legitimate public policy purpose.

The fact that a provision imposes a burden on an individual/group and, therefore, inflicts punishment, does not automatically lead to the conclusion that there is a Bill of Attainder violation. The Court in *Dent* recognized that the provision regarding the requirements to practice medicine in the state of West Virginia was not a violation of the Bill of Attainder Clause because the provision was imposed for the protection of society.[35] In *Hawker* the Court also noted that the provision prohibiting felons from the medical profession was not enacted to punish, but instead to "protect its citizens from physicians of bad character."[36]

---

29. *See* Nixon v. Administrator of General Services, 433 U.S. 425 (1977).
30. *Id.* at 429–30.
31. *Id.* at 471–72.
32. *Id.* 473.
33. *Id.* 475–76.
34. *Id.* at 478.
35. Dent v. West Virginia, 129 U.S. 114, 122 (1889).
36. Hawker v. New York, 170 U.S. 189, 196 (1898).

The Court determined that the legislature had a legitimate purpose in *Flemming v. Nestor*, which involved a provision that terminated the Social Security benefits of a resident alien due to his involvement with the Communist Party.[37] For instance, the distribution of Social Security benefits to society would be frustrated if such benefits had to be paid to deported aliens.[38] Additionally, in *Communist Party v. Subversive Activities Control Board*, registration provisions for organizations connected to a communist organization was not a Bill of Attainder violation because combating the threat of Communism was "legislation deemed necessary by Congress pursuant to its continuing duty to protect the national welfare."[39] Further, in *Nixon*, Congress' purpose was for the preservation of documents, not the punishment of President Nixon.[40] The law was an act of nonpunitive legislative policy making which could also be used for future presidents.[41] The Court also refused to find a bill of attainder violation in *Selective Service System v. Minnesota Public Interest Research Group* in 1984 because the congressional purpose was not to punish by denying federal financial aid to males between ages 18 and 26 who did not register for Selective Service but instead "to promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources."[42]

U.S. Circuit Courts of Appeal have demonstrated consistent reasoning on this issue as well. Starting with legislative provisions regarding alien deportation due to connections with communism and Nazism, the circuit courts have upheld the provisions due to the legitimate legislative purposes. These purposes include excluding Nazi persecutors from the United States and protecting U.S. citizens from harmful persons[43] or stopping the spread of communist thought by those who were voluntary and active members of the Communist Party.[44] In *SBC Communications v. FCC*, the Fifth Circuit held that the challenge to the restrictions on the subsidiaries of AT&T in the Telecommunications Act was not a violation of the Bill of Attainder Clause because the nonpunitive purposes of the law served the purpose of ensuring fair competition in the telecommunications markets, despite the fact that the corporations were specifically named.[45]

The Second Circuit noted in *ACORN v. United States* that Congress had a legitimate purpose in ensuring that federal funds are not misused when passing a resolution that barred ACORN from receiving federal funding due

37. *See generally* Flemming v. Nestor, 363 U.S. 603 (1960).

38. *Id.* at 612.

39. Communist Party of U.S. v. Subversive Activities Control Board, 367 U.S. 1, 115 (1961).

40. Nixon v. Administrator of General Services, 433 U.S. 425, 477–78 (1977).

41. *Id.* at 472.

42. Selective Service Sys. v. Minnesota Public Interest Research Group (MPIRG), 468 U.S. 841, 855–56 (1984).

43. Linnas v. INS, 790 F.2d 1024, 1030 (2d Cir. 1986).

44. Mackay v. McAlexander, 268 F.2d 35, 37 (9th Cir. 1959).

45. SBC Communications v. FCC, 154 F.3d 226, 243 (5th Cir. 1998).

to allegations that it engaged in tax evasion, voting fraud, etc.[46] Even though ACORN was singled out for unfavorable treatment, specificity in the provision was no longer determinative nor was there any punishment on ACORN.[47] The D.C. Circuit decided *Kaspersky Lab, Inc. v. United States Department of Homeland Security* in 2018.[48] Kaspersky challenged the 2018 NDAA as an unconstitutional Bill of Attainder by banning the use of its products by governmental agencies.[49] In holding that the government acted reasonably to protect the U.S. interests in the integrity of its information systems, the D.C. Circuit noted that the legislation was non-punitive and contained measures to combat the security risks of using Kaspersky products.[50]

The opposite may also true. The fact that Congress can articulate a nonpunitive or regulatory purpose does not automatically foreclose the possibility that the provision could be a Bill of Attainder, as circuit courts have noted. In *Foretich v. United States*, the D.C. Circuit held that the Act which gave the daughter the option to see her father whom the mother accused of sexually abusing the child was a violation of the Bill of Attainder Clause because it singled out the father for legislative punishment and destroyed his reputation and credit by permanently associating him with these crimes for which he denied.[51] The D.C. Circuit noted that just because Congress can point to some nonpunitive purpose in the provision, the provision will still be unconstitutional if there is an "extraordinary imbalance between the burden imposed and the alleged nonpunitive purpose, and if the legislative means do not appear rationally to further that alleged purpose."[52]

The judiciary has also been unwilling to find a violation of the Bill of Attainder Clause when the legislative purpose of the provision was enacted pursuant to one of Congress' enumerated powers. In *Flemming v. Nestor*, the Supreme Court noted that Congress was acting pursuant to its plenary powers over aliens "to fix the conditions under which aliens are to be permitted to enter and remain in this country" when it authorized the termination of Social Security benefits to an alien because of prior Communist Party membership.[53] Further in *ACORN v. United States*, the Second Circuit determined that the provision barring ACORN from federal funding was a legitimate exercise by Congress to carry out its powers pursuant to the Spending Clause.[54]

---

46. ACORN v. United States, 618 F.3d 125, 139–40 (2d Cir. 2010).
47. *Id.* at 138.
48. *See* Kaspersky Lab, Inc. v. United States Dep't of Homeland Security, 909 F.3d 446 (D.C. Cir. 2018).
49. *Id* at 452–53.
50. *Id.* at 452, 464.
51. Foretich v. United States, 351 F.3d 1198, 1220, 1223 (D.C. Cir. 2003).
52. *Id.* at 1223.
53. Flemming v. Nestor, 363 U.S. 603, 616 (1960).
54. ACORN v. United States, 618 F.3d 125, 137 (2d Cir. 2010).

E. Where there is no right to the underlying benefit at issue, there will likely not be a violation of the Bill of Attainder Clause.

There is no right to Social Security benefits nor right to reside in the United States without limitation. In 1960, *Flemming v. Nestor* decided that the termination of Social Security benefits because of the resident alien's prior Communist Party membership was not a punishment because there was no right to receive a "noncontractual governmental benefit."[55] With respect to aliens claiming that their mandated deportations from legislative provisions were unconstitutional Bill of Attainders, the courts, too, have not struck the provisions in question as Bill of Attainder violations. These cases have normally arisen with Communist membership or officials connected to Nazism, all of which the provisions have been upheld. For example, in *Quattrone v. Nicolls* and *Linnas v. INS*, the First and Second Circuits, respectively, determined that deportation is not a punishment no matter how severe.[56]

By analyzing the case law in this Part, it is clear that the Court has expanded the Bill of Attainder's applicability and scope, and, because of this expansion, its analysis had simultaneously become more subjective and fact intensive. In *Kaspersky*, for example, the D.C. Circuit observed how "legislatures have innovated beyond death and banishment" and that "as punishments evolved over time, so too did the courts' interpretation of the Clause."[57] Thus, attainder today broadly refers to legislative interference without right to a fair trial.

III. CONCLUSION

As observed from this Article, the Court's interpretation of the Bill of Attainder Clause has changed dramatically from a focus on death and banishment to one of legislative punishment. Arguably few constitutional provisions evince such an extensive expansion from its original purpose than the Bill of Attainder provision. At noted from the outset, it has been the Supreme Court that has expanded this provision well beyond English law and what had been originally contemplated by the Founding Fathers of the United States. Some examples observed of how the Bill of Attainder Clause has been transformed include distinctions between past conduct with the potential of reoccurrence in the future versus past conduct, specificity versus easily ascertainable person/group, and punitive purpose versus punitive purpose wit public policy objective. What this Article has sought to accomplish is to survey such differences by tracing when they occurred, why the interpretation expanded, and the extent to which prior opinions have helped pave the way for an even greater expansion in subsequent cases.

---

55. *Flemming*, 363 U.S. at 617.

56. Linnas v. INS, 790 F.2d 1024, 1030 (2d Cir. 1986); *see also* Quattrone v. Nicolls, 210 F.2d 513, 519 (1st Cir. 1954).

57. Kaspersky Lab, Inc. v. United States Dep't of Homeland Security, 909 F.3d 446, 454 (D.C. Cir. 2018).