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UNITED STATES v. LOVETT AND THE ATTAINDER BOGY IN MODERN LEGISLATION

WYLIE H. DAVIS*

I. INTRODUCTION

Notwithstanding the broad protection afforded by the due process clauses of the Federal Constitution against arbitrary or discriminatory legislation, it is sometimes easier to draw a like protection from those clauses that anticipate special cases. One such clause warns Congress that "No bill of attainder or ex post facto law shall be passed,"¹ and another clause places a similar restriction on state power.² Until the decision in *United States v. Lovett*³ three years ago, these guarantees had played a comparatively minor part in the United States Supreme Court's steady, and of late, robust crusade for civil liberties. The Court, by invalidating as legislative attaint a rider to an appropriation act that cut off the salaries of three named federal officers, has raised in that case new and already recurring implications from the guaranties against bills of attainder. Both the decision and its possibilities deserve analysis, in which the relevant English, Colonial, and constitutional background is necessarily a critical factor.

II. ENGLISH AND COLONIAL BILLS OF ATTAINDER

The framers of the Constitution were thoroughly familiar⁴ with legislative attaint, which was by no means rare either in England or the American Colonies.⁵ Bills of attainder had come

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1. U. S. CONST. Art 1, § 9, cl. 3.

2. *Id.* Art. I, §10, cl. 1.

3. 328 U. S. 303 (1946). Noted, 8 ALA. LAW. 197 (1947), 46 COL. L. REV. 849 (1946), 45 MICH. L. REV. 98 (1946), 21 TULANE L. REV. 278 (1946), 35 U. OF PA. L. REV. 80 (1946), and 33 VA. L. REV. 88 (1947).

4. Bills of attainder were dealt with extensively by eminent writers of the time and by earlier writers whose works were standard reference for American lawyers and statesmen: 2 BLACKSTONE, COMMENTARIES 46 (3d ed. 1884); 4 *id.* at 259 *et seq.*; COKE, FOURTH INSTITUTE 14, 36-9 (1809); THE FEDERALIST, No. 84 (Madison), Nos. 78, 66, 65 (Hamilton), No. 44 (Madison). It is significant that the bill of attainder clauses were adopted by the Convention without discussion, indicating the framers' familiarity with a definite and specific abuse.

5. The origin and development of bills of attainder in England and America may be gleaned from such sources as ADAMS, CONSTITUTIONAL

into vogue in England during the fifteenth century as acts of Parliament which in effect tried, convicted, and eliminated a man without benefit of jury, hearing in court, confrontation, production of witnesses, and without regard for the rules of evidence. A bill of attainder was distinguishable from the less severe bill of pains and penalties in that the former exacted capital punishment and invariably worked a corruption of blood.⁶

In the beginning Parliament served only as a rubber stamp for bills of attainder directed against those who had incurred the royal displeasure,⁷ but during the reign of Charles I (1625-1649) Parliament went into the attainder business in its own right. The act which took the head of Thomas Wentworth, Earl of Strafford and chief adviser of Charles I, may be cited as typical of this gory English tradition. A part of the text of this act is reproduced here, with spacing and marginal designations which indicate the historical essentials of a bill of attainder:

Named Individual Whereas [the members] of the House of Commons have impeached Thomas Earl of Strafford

Recital of "Criminal" Activities 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

HISTORY OF ENGLAND 229 (Schuyler's ed. 1934); COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 311 (3d ed. 1898); POMEROY, CONSTITUTIONAL LAW 410-11 Bennett's ed. 1888); Pound, *Justice According to Law*, 14 COL. L. REV. 1-12 (1914); Thompson, *Anti-Loyalist Legislation during the American Revolution*, 3 ILL. L. REV. 81, 147 (1948).

6. It will be seen *infra* that this distinction as a practical matter no longer exists. Both bills of attainder and bills of pains and penalties have been held to be encompassed by the constitutional prohibitions.

7. Henry VIII was particularly choleric in this respect.

<i>Declaration of Guilt</i>	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].
<i>Legislative Judgment</i>	Be it therefore enacted That the said Earl of Strafford stand and be adjudged attainted of High Treason
<i>Punishment</i>	and shall suffer such pains of Death and incur the Forfeitures of his Goods and Chattels, Lands Tenements & Hereditaments of any Estate of Freehold or Inheritance in England and Ireland [spelling modernized] ⁸

Parliament sometimes made the punishment conditional in a sense when the victim was not conveniently within reach of the ax. In 1665, for example, it passed "An Act for attainting [three named persons] of High Treason if they render not themselves by a day."⁹ The crime recited in that statute was that the attainted were "nortoriously known [to] have traiterously and wickedly adhered and still do adhere to [the King's] enemies beyond the Seas where they as yet remain . . ." Significantly, this same act, and others like it, also attainted on similarly stated grounds whole classes of persons without naming them and without relying on *past* conduct except insofar as it might be immediately past when the attaint should attach *in futuro* by operation of law:

And be it further enacted That all [the King's] Subjects who from and after the First day of February next ensuing shall at any time during the continuance of the said War serve the States of the United Provinces shall be and are hereby attainted of High Treason and shall suffer and forfeit to all intents and purposes as persons attainted of High Treason ought to do.

Theoretically, the English Parliament even today has the power to inflict summary punishment without a trial,¹⁰ but it has not so acted since 1820.

8. 16 CAR. I, c. 38 (1640). The attainder was removed in 1662 by the statute of 14 CAR. II, c. 29, but too late to be of personal comfort to the Earl.

9. 17 CAR. II, c. 5 (1665).

10. Attainder even upon judicial conviction, with consequent corruption of blood, forfeiture, or escheat, has been abolished in England. 33 & 34 VICT., c. 23 (1870). However, this would not seem to preclude legislative

America inherited bills of attainder along with the English language, and the Revolution gave impetus to many such bills in the Colonial legislatures as a means of making Loyalism unprofitable. As in England, however, most of this legislation was spawned by pure emotionalism; it was hardly necessary or reasonably calculated to help win the Independence. Exemplary of that type was Massachusetts' act of banishment of September, 1778, which forbade the return to the Province of 308 named persons, including sixty-five Harvard graduates.¹¹

Not all of the Colonial acts of attainder were quite so repugnant to our present-day public conscience. Virginia in 1778 passed "An act to attain Josiah Philips and others, unless they render themselves to justice within a certain time," the culprits having "levied war against this commonwealth within the same, committing murders, burning houses, wasting farms, and doing other acts of hostility."¹² The Virginia Legislature attempted to justify the act by pointing therein to "the delays which would attend the proceeding to outlaw the said offenders, according to the usual forms and procedures of the courts of law. . . ."

III. EARLY BILLS OF ATTAINDER UNDER THE CONSTITUTION

One may conclude that it has been characteristic of bills of attainder to germinate most prolifically in a matrix of violence and impassioned legislative temper. The Civil War Period was no exception, and the efforts of the United States and its components to crush the Rebellion gave birth to those acts which first collided headlong with the Federal Constitution. Both the majority and concurring opinions of the Supreme Court in the *Lovett* case purported to rely heavily on the five to four decisions of the Court, *per* Mr. Justice Field, in *Cummings v. Missouri*¹³ and *Ex Parte Garland*.¹⁴ Only the latter involved an act of Congress, but the two are of equal authority in determining what a bill of attainder is within the meaning of either of the constitutional prohibitions.

These decisions condemned legislative acts which were not so

bills of pains and penalties short of corruption of blood, etc. *Cf.* U. S. CONST. Art. III, § 3, cl. 3.

11. 5 Acts & Resolves of Massachusetts Bay 912 (1778).

12. 9 LAWS OF VIRGINIA 463 (Hening 1821).

13. 4 Wall. 277 (U. S. 1866).

14. 4 Wall. 333 (U. S. 1866).

patently bills of attainder as most of those with which the Fathers had had a working acquaintance. In the *Cummings* case the defendant challenged a provision of the Missouri constitution which required priests and clergymen, as a prerequisite to further preaching and teaching, to take and subscribe an oath that they had not committed certain designated acts, some of which were already penal offenses, and others of which at the time were acts innocent in themselves. All the acts, which included expressions of sympathy with the Confederacy as well as overt hostility to the Union, were characterized as disloyalty to the United States. It is important to note that *all* were specified in some detail. The defendant, a Roman Catholic priest, was convicted in the Missouri state courts of the crime of teaching and preaching without having first taken the prescribed oath, and was sentenced to pay a fine of \$500, with body commitment until the fine should be paid.

In reversing the Missouri Supreme Court, Mr. Justice Field distinguished the expurgatory oath of Missouri from those test oaths in England and France which "were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to *particular instances of past misconduct*. . . ." ¹⁵ [italics added]. While he was sympathetic generally with the State's contention that each state possessed the reserved power to prescribe conditions upon which its citizens might exercise their various callings and pursuits within its jurisdiction, he considered it a clear *non sequitur* to say that the state could "in effect inflict a punishment for a past act which was not punishable at the time it was committed."¹⁶

Bills of attainder are not too well dissected by the majority opinion in the *Cummings* case. The problem of what may amount to the requisite punishment, for example, gets only the light of diffusion from the following summary:

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. *Any*

15. 4 Wall. 277, 318 (U. S. 1866).

16. *Id.* at 319.

*deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.*¹⁷
[italics added]

In his strictly definitive forays, Mr. Justice Fields is only slightly more helpful:

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

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.¹⁸ In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judges; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.¹⁹

The cleavage of the Court in the *Lovett* case on the issue whether the statute attacked there was a bill of attainder may have been partly the result of Fieldian efforts to make Missouri's transgression consistent with historical standards:

"A British Act of Parliament," to cite the language of the Supreme Court of Kentucky,²⁰ "might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be . . . convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury."²¹

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. The clauses supposed²² differ only in that they declare the guilt instead of assuming it. The dep-

17. *Id.* at 321.

18. This merger of the two types originated with a dictum in *Fletcher v. Peck*, 6 Cranch 138 (U. S. 1810), which was essentially a case on state impairment of the obligation of contract. By way of analogy, Mr. Chief Justice Marshall said: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

19. *Cummings v. Missouri*, 4 Wall. 277, 323 (U. S. 1866).

20. *Gaines v. Buford*, 1 Dana 481, 510 (Ky. 1833).

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

22. Hypotheticals by Mr. Justice Field.

rivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly, *The Constitution deals with substance, not shadows*.²³ Its inhibition 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 the enactment, its insertion in the fundamental law was a vain and futile proceeding.²⁴ [italics added]

It should be borne in mind in examining this language that Mr. Justice Field had a relatively easy task in deferring to history on the facts before him and was formulating with those facts as a reference. It may not be assumed from anything in the opinion that he intended to make the constitutional abolition of bills of attainder a catchall for every kind of discriminatory legislation aimed at named individuals or ascertainable classes. On the contrary, he exerted himself to preserve in its substance the traditional concept of bills of attainder. It should also be emphasized that his major difficulty lay in exposing the Missouri oath of loyalty as mere window-dressing which operated only to make the punishment conditional.

After weighing all the language, the facts in the record, and the Court's recognition that bills of attainder were the same under the Constitution as before, one may draw at least the outside limits of the *Cummings* decision. The case certainly goes no further than to announce that a legislative act which declares or assumes the guilt of named individuals or an ascertainable class of having committed designated acts²⁵ and which absolutely or conditionally inflicts punishment therefor, without a trial in court, by depriving the persons affected of the right to follow a

23. This sentence and those following it gave the majority in the *Lovett* case more than enough excuse for saying in effect that the *Lovett* decision was not really changing the law at all.

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

25. Although Mr. Justice Field stresses the fact that some of the acts comprising the mischief of the Missouri provision were not penal offenses at the time, it is pretty certain that he did this only to highlight the enormity of Missouri's outrage against the Federal Constitution. Whatever the preexisting legal status of the individual's conduct, the absence of a judicial trial is controlling on the point.

lawful calling, is a bill of attainder within the meaning of the Constitution.²⁶

On the same day that the Court rescued Fr. Cummings from Missouri tyranny, it also rebuked Congress in *Ex Parte Garland*, *supra*, for a similar kind of malpractice. By an act of 1862 Congress had prescribed an oath of office, applicable to all United States officers except the president, whereby the affiant as a condition precedent to holding office had to swear that he had never engaged in armed hostility against the United States or given aid or encouragement to persons so engaged. In 1865 this had been extended in a supplementary act to embrace attorneys and counsellors of the federal courts, *i. e.* the oath was required for admission to or continuance at the bar. The petitioner had been admitted by the Supreme Court in 1860 and had thereafter joined the losers by representing Arkansas in the Confederate Congress. In 1865, however, he received a full pardon of his misdeeds from the President of the United States and petitioned the Supreme Court for permission to resume practice as a member of its bar. Mr. Justice Field for the majority held that since the oath could not truthfully be taken by individuals in the petitioner's position, the statute prescribing it operated as a legislative decree of perpetual exclusion from the practice of law in the federal courts, and hence as a bill of attainder. Mr. Justice Miller voiced the strong dissents of four justices in both the *Garland* and *Cummings* cases, his opinion being reported with the former and directed at both.

So far as the attainder phase of the *Garland* case is concerned (there were ancillary problems not here important), the majority opinion is even less illuminating than that in *Cummings v. Missouri*. For example the following statement of Mr. Justice Field embodies a sound but slippery principle:

The legislature may undoubtedly prescribe qualifications for the office to which he [the office-holder or aspirant to office] must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordi-

26. The Court held that the enactment in question was also unconstitutional as an *ex post facto* law. The syllabus at 4 Wall. 277 defines such a law as "one which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cf. Calder v. Bull*, 3 Dall. 386 (U. S. 1798), the first case holding that the *ex post facto* inhibition applies exclusively to penal or criminal cases.

nary 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, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings v. Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.²⁷

The *Garland* decision is elusive; but there is nothing in the majority opinion to justify stretching it beyond a warning that a statute which excludes a particular class from all or part of an ordinary vocation or profession on account of designated past acts without a judicial trial is not a mere prescription of qualifications, but is a form of legislative punishment within the bill of attainder prohibitions of the Federal Constitution.

Mr. Justice Miller in his hard-hitting dissent²⁸ distinguished the legal profession from other callings and convincingly argued that Congress has plenary power over federal practitioners as such. Whether or not he was evading the question by assuming that "plenary" power might include summary punishment, his elementary analysis of bills of attainder is quite as accurate as the majority's and more concrete. In his view the challenged acts did not fill the bill:

. . . . I think it will be found that the following comprise those essential elements of bills of attainder [in English law], in addition to the one already mentioned [corruption of blood],²⁹ which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry.³⁰

27. *Ex Parte Garland*, 4 Wall. 333, 379 (U. S. 1866).

28. *Id.* at 382 *et seq.*

29. Apparently Mr. Justice Miller did not choose to accept Mr. Chief Justice Marshall's dictum in *Fletcher v. Peck* (see note 18 *supra*) that bills of attainder in the constitutional sense included bills of pains and penalties, which did not usually work a corruption of blood.

30. *Ex Parte Garland*, 4 Wall. 333, 388 (U. S. 1866).

Disturbing doubts as to the stability of the *Cummings* and *Garland* decisions, generated by Mr. Justice Miller's dissent and by the critical comment of such eminent scribes as Professor John Norton Pomeroy,³¹ should have been dispelled six years later by *Pierce v. Carskadon*.³² In that case the Court in a summary opinion by Mr. Justice Field, with only Mr. Justice Bradley dissenting, held that a statute of West Virginia was a bill of attainder on the authority of the *Cummings* and *Garland* cases. The West Virginia statute had required a test oath of loyalty to be taken by litigants in the state courts as a condition of petitioning for rehearings.

IV. LATER CASES ON ATTAINDER UNDER THE CONSTITUTION

The hiatus in the Supreme Court's ferreting of attainder from 1872 to 1946³³ may be attributed for the most part to the gradual dissipation of intersectional bitterness after the Civil War. Apart from the chastisement of the *Cummings* and *Garland* cases, it is also probable that the restraining effect of Amendments V and XIV, and the expanded protection they came to afford, minimized the likelihood of legislative attainder. It is arguable too that legislators generally, as well as the public, developed a more mature sense of ordinary fairness. Still the lower federal courts and the

31. POMEROY, CONSTITUTIONAL LAW § 510 (Bennett's ed. 1888). The author agreed with Mr. Justice Miller's dissent and argued that historically the legislation in neither case could have been a bill of attainder, conceding that it might have been *ex post facto* in both cases.

32. 16 Wall. 234 (U. S. 1872).

33. It is not meant to imply that the Court did not consider the question from 1872 to 1946. In *Dent v. West Virginia*, 129 U. S. 115 (1889), it upheld a state statute which barred from the practice of medicine in West Virginia any person who had not graduated from a reputable medical college, or who had not already practiced at least ten years, or who had not been found qualified by state examination. Mr. Justice Field had little trouble in distinguishing the statute from the enactments in *Cummings* and *Garland*: ". . . The Constitution of Missouri and the Act of Congress in question in those cases were designed to deprive parties of their right to continue in their profession for past acts, or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state." 129 U. S. at 128.

Cf. *Hawker v. New York*, 170 U. S. 189 (1898), where the Court held that New York could enact a law making it a misdemeanor for anyone to practice medicine who had been convicted of a felony. The defendant had been convicted of performing an illegal abortion twenty-three years before the statute was passed.

state courts were forced on occasion to resolve the issue in favor of the Constitution.

There would be little profit in a detailed review of all the cases. A brief look at three of them will suffice to illustrate the versatility of bills of attainder and the ante-*Lovett* coverage of the guaranties which prohibit them.

In 1888 the Chinese Exclusion Act of that year was applied by the immigration authorities to deny re-entry to an American citizen of Chinese descent. A federal court in *Re Yung Sing Hee*³⁴ held that, as so applied, the Act was a bill of attainder in that it inflicted the punishment of exile expressly on account of race or color.

The Kentucky Expatriation Act of 1862 deprived of their state citizenship all persons in the state joining or aiding the rebels, and further exacted a test oath of loyalty as a condition precedent to voting. This was held to inflict the punishment of a bill of attainder in *Burkett v. McCarty*,³⁵ where the state court artfully said, "A legislative act cannot make voluntary rebellion involuntary expatriation."³⁶

The Florida constitution was held unconstitutional in 1870 insofar as it set aside all judgments and decrees rendered after 1861 upon any evidence of debts arising out of the sale or purchase of slaves, and established a conclusive defense of failure of consideration in all such future litigation. The Florida Supreme Court in *McNealy v. Gregory*³⁷ found that the purpose of the constitutional convention had been to punish either for the moral wrong of trafficking in slaves or for acts of hostility to the United States, and that in either aspect the convention had fashioned a bill of attainder.

There are several other cases reaching the same result on widely varied facts.³⁸ All of the decisions seem to turn on the

34. 36 Fed. 437 (C. C. D. Ore. 1888).

35. 10 Bush 758 (Ky. 1866).

36. *Id.* at 762.

37. 13 Fla. 417 (1870).

38. *State v. Adams*, 44 Mo. 570 (1869) (statute ousting a college board of curators for having failed to take an oath of loyalty, and filling the vacancies then and there declared); *Green v. Shumway*, 36 How. Pr. 5 (N. Y. 1868) (statute requiring oath of loyalty like that in the *Cummings* case to be taken by electors of delegates to state constitutional amendment convention); *Kyle v. Jenkins*, 6 W. Va. 371 (1873) (statute requiring "suitor's test oath" to be filed with all defendants' petitions for rehearings). A few other decisions invalidated statutes substantially the same as those preceding: *In re Baxter*, 2 Fed. Cas. 1043, No. 1, 118 (C. C.

question whether punishment had been inflicted, the other historical elements of legislative attainder being present beyond serious dispute.

Similarly, a cry of punishment and consequent attainder has been raised in a remarkably large number of cases where the courts correctly found that there was no attainder at all. Enactments so attacked before 1946 but held non-penal in character range all the way from an Oklahoma statute authorizing sterilization of habitual criminals upon court orders,³⁹ to a California state senate resolution expelling a member for taking a bribe.⁴⁰

E. D. Tenn. 1866); *State v. Highland*, 41 Mo. 388 (1867); *Murphy and Glover Test Oath Cases*, 41 Mo. 339 (1867); *Lynch v. Hoffman*, 7 W. Va. 553, 578 (1874); *Ross v. Jenkins*, 7 W. Va. 284 (1874).

But as to the *Shumway* case *supra*, compare *Boyd v. Mills*, 53 Kan. 594, 37 Pac. 16 (1894), where the Kansas constitution denied the right to vote or hold public office to all persons who had aided the Confederacy, until such disability should be removed by two-thirds of all members of the legislature. *Held*: Not a bill of attainder on the ground that there was nothing in the nature of a punishment for crime. The court made no effort to distinguish *Green v. Shumway*, but said that the latter was not consistent with "the weight of authority."

Actually, the Kansas court seems to have been correct in its count of noses, many of the state legislatures and courts having found it easy to squirm from under *Cummings v. Missouri* and *Ex Parte Garland* on the basis that denying the franchise is a state prerogative and not punishment, even though barring a person from a lawful vocation might be. See, for example, *Shepherd v. Grimmett*, 2 Idaho 1123, 31 Pac. 793 (1892), where a test oath for voters directed primarily against plural marriages was sustained. The court held that the right of suffrage is a privilege conferred or withheld by the legislature and is in no way like those rights to follow chosen vocations which were infringed in the *Cummings* and *Garland* cases. Of course, Amendment XV of the Federal Constitution was not in issue in any of these cases.

39. *Skinner v. State ex rel. Williamson*, 189 Okla. 235, 115 P. 2d 123 (1941). The Oklahoma Supreme Court decided that the act was a "eugenic" rather than punitive measure, and as such was analogous to compulsory vaccination. In some respects the analogy is obviously remote. Fortunately for defendant Skinner, the Supreme Court of the United States found the act in this case unconstitutional as a denial of equal protection of the laws. *Skinner v. Oklahoma*, 316 U. S. 535 (1942).

40. *French v. Senate of State of California*, 146 Cal. 604, 80 Pac. 1031 (1905). For other cases giving alleged bills of attainder clean bills of health, see *Drehman v. Stiffe*, 8 Wall. 595 (U. S. 1869) (Missouri statutory exemption of acts done by military authority from suits based on such acts); *Dodez v. United States*, 154 F. 2d 637 (6th Cir. 1946), *rev'd on other grounds sub nom. Gibson v. United States*, 329 U. S. 338 (1946) (the Selective Service Act of 1940 and regulations thereunder); *Story v. Rives*, 97 F. 2d 182 (D. C. Cir. 1938) (act of Congress requiring convicted prisoners to serve remainders of their sentences after being returned to confinement for violating conditions of release, without deducting the period of release); *People v. Camperlingo*, 69 Cal. App. 466, 231 Pac. 601 (1924) (statute prohibiting possession of a pistol by one previously convicted of a felony); *Davis v. City of Savannah*, 147 Ga. 605, 95 S. E. 6 (1918) (city ordinance permitting local health officer to prohibit keeping of cows

Thus even before *United States v. Lovett* lawyers were prone to make long-shot bets on legislative attainder when it should have been obvious that no such horse was running. There are indications that the *Lovett* decision may stimulate the betting somewhat.⁴¹

V. THE LOVETT SPECIES OF ATTAINDER

A. *The Case*

It appears from what has been said so far that the Supreme Court had not upset an act of Congress as a bill of attainder from 1866 until the *Lovett* decision was rendered in June, 1946. Following are the facts which prompted the Court to brush eighty years' dust off the constitutional guaranty against such bills:

The three respondents prior to 1943 had held positions as officers⁴² of the federal government for several years. In 1943

in any congested section of city if such keeping in his opinion would endanger the public health); *People v. Lawrence*, 390 Ill. 499, 61 N. E. 2d 361 (1945), *cert. denied* 326 U. S. 731 (1945) (habitual criminal act making the punishment for a new offense heavier by reason of habitual criminality of which defendant has been judicially convicted); *Crampton v. O'Mara*, 193 Ind. 551, 139 N. E. 360 (1923) (statutes disqualifying for public office anyone sentenced to jail longer than six months for any offense, and declaring conviction of infamous crime a ground for election contest); *Losier v. Sherman*, 157 Kan. 153, 138 P. 2d 272 (1943) (statute permitting garnishment only up to 10% of debtor's earnings when they are necessary for family support, but providing further that creditor should not be entitled to any benefits of the act if he should have assigned his claim to a collection agency before seeking to garnish); *Moore v. Commonwealth*, 293 Ky. 55, 168 S. W. 2d 342 (1943) (statute prescribing forfeiture as a nuisance of property used for purpose of selling or possessing liquor in dry territory); *Mosher v. Bay Circuit Judge*, 108 Mich. 503, 66 N. W. 384 (1896) (statute authorizing attachment on a claim not due); *Moffett v. Commerce Trust Co.*, 354 Mo. 1098, 193 S. W. 2d 588 (1946) (statute requiring treble costs of any plaintiff in a civil suit who should file three or more successive defective pleadings); *State v. Graves*, 352 Mo. 1102, 182 S. W. 2d 46 (1944) (statute providing that accused in criminal case, when submitting himself as witness, may be impeached for veracity by proof of prior conviction of crime); *In re Platz*, 60 Nev. 296, 108 P. 2d 858 (1940) (statute permitting only active members of state bar to practice law in the state); *Friedman v. American Surety Co. of New York*, 137 Tex. 149, 151 S. W. 2d 570 (1941) (state unemployment compensation act exacting a social security tax); *State v. Caubal*, 248 Wis. 247, 21 N. W. 2d 381 (1946) (statute authorizing general injunction to restrain permanently a liquor or beer licensee from knowingly permitting any gambling device to be used on any premises controlled by him). See also the cases cited note 33 and last two paragraphs of note 33 *supra*.

In several other cases the attainder issue has been considered incidentally in connection with the *ex post facto* problem.

41. See §VI *infra*.

42. Mr. Lovett was Executive Assistant to the Governor of the Virgin

they were reported, along with others, by Congressman Martin Dies to the House of Representatives for "subversive activities." After closed hearings before a subcommittee, the House attached the following rider, hereinafter referred to as Section 304, to the Urgent Deficiency Appropriation Act of 1943:

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.⁴³

This rider was passed by the Senate and approved by the President only after the House was adamant (five separate Conference Reports were submitted to the Senate), and only to save the vitally needed appropriation made by the act for prosecution of the war. Respondents performed services for the government in their respective jobs after November 15, 1943, and eventually sued in the United States Court of Claims to recover compensation for such services after their demands for payment had been refused. Respondents attacked Section 304 as an unconstitutional encroachment by Congress on the executive power of removal, as a violation, substantively and procedurally, of the due process clause of Amendment V, and as a bill of attainder.

The Court of Claims entered judgment for the relief sought,⁴⁴ but only two of the judges were able to agree on the theory of recovery. Those two in "the opinion of the Court" found it unnecessary to decide any of the constitutional issues raised by the respondents, and held that Section 304 had merely cut off disbursal

Islands, and Messrs. Watson and Dodd were ministerial officers of the FCC.

43. 57 STAT. 431, 450 (1943).

44. 66 F. Supp. 142 (Ct. Cl. 1945).

of salaries without destroying the government's obligation to pay for services rendered by respondents after November 15, 1943. The other three judges in separate opinions found Section 304 unconstitutional, but on three different bases, *viz.*, as a bill of attainder, a deprivation of due process, and simply an excess of "the authority delegated to the Congress by the Constitution."

The Supreme Court granted the petition of the United States for certiorari. The appeal was unusual in that the petitioner, through the Solicitor General, asserted the unconstitutionality of Section 304 in harmony with respondents' attack, Congress being represented as *amicus curiae* to uphold the statute's validity. The Court unanimously⁴⁵ affirmed the judgments in favor of respondents, with Mr. Justice Black writing the majority opinion that Section 304 was a bill of attainder without deciding the other constitutional questions. Mr. Justice Frankfurter, joined by Mr. Justice Reed, concurred in the result, but agreed with the concerted minority of the Court of Claims that Section 304 had operated only to preclude normal disbursal of salaries and was not a bar to abnormal disbursal by suit.

B. *The Majority Opinion*

Nobody participating in the *Lovett* case had any quarrel with Mr. Justice Field's definition of a bill of attainder as "a legislative act which inflicts punishment without a judicial trial."⁴⁶ The question what is punishment and how it must be inflicted in order to ensnare a legislative act was the essence of the controversy within the Court. Mr. Justice Black for the majority read the *Cummings* and *Garland* decisions as standing for the proposition that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."⁴⁷ Taken out of context, this is a fair statement of the old cases, but what Mr. Justice Black did with it is another thing.

Whatever the definition, the fact is that no case under the Constitution until *United States v. Lovett* had found a bill of attainder which differed in substance from those known to the

45. Mr. Justice Jackson was absent.

46. See text at note 19 *supra*.

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

Constitutional Convention. In every case the legislative provision on its face declared or assumed guilt of a designated act or condition and inflicted punishment therefor.

From a semantic point of view, it is difficult to isolate a punishment without at the same time finding that the recipient *is* something, *thinks* something, or *does* something to evoke the infliction. Furthermore, the same deprivation may be punishment in one case and not in another.⁴⁸ The penal or non-penal nature of the deprivation depends entirely on its purpose, and the controlling indices of its purpose are whether it is general or special and whether it reaches something which the depriving authority considers criminal or quasi-criminal. There can be no punishment unless an individual or identifiable group is called to task and abnormally restrained for a particular infraction, actual or supposed. If the individual has a fair day in court, he may incur a collectible debt to society. If a legislative body ordains that he has incurred such a debt, he is saddled with a bill of attainder. In either event, the presence or absence of a transaction and a resulting debt determine the fact of collection, the punishment.

A cursory re-examination of Section 304 of the Urgent Deficiency Appropriation Act of 1943,⁴⁹ adjudged a bill of attainder, is enough to show that it does not purport to punish the respondents in satisfaction of a debt (expressed or assumed in the form of guilt) springing from one or several of their past transactions (expressed in the form of what Congress deemed to be unallowable conduct).

It may be assumed that the majority opinions in *Cummings v. Missouri* and *Ex Parte Garland* are still good law so far as they go. It may also be assumed that Section 304 necessarily imposed a deprivation which against a proper background would amount to punishment. In rejecting the idea that Section 304 was a bill of attainder, Mr. Justice Frankfurter made both assumptions. On the whole he offers a sound historical analysis:

. . . The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence. . . . It was this very special, narrowly restricted,

48. For example, many adjudicated violations of due process might well have amounted to legislative punishment had they been directed against individuals for punitive purposes.

49. See text at note 43 *supra*.

intervention by the legislature, in matters for which a decent regard for men's interest indicated a judicial trial, that the Constitution prohibited. It must be recalled that the Constitution was framed in an era when dispensing justice was a well-established function of the legislature. . . . Bills of attainder were part of what now are staple judicial functions which legislatures then exercised. . . . Sec. 304 lacks the characteristics of the enactments in the Statutes of the Realm and Colonial Laws that bear the hallmarks of bills of attainder.⁵⁰

Not only does Sec. 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. . . .

Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by a governmental authority does not make it punishment.⁵¹

This analysis accords with our prior course of decision. In *Cummings v. Missouri* and *Ex Parte Garland*, the Court dealt with legislation of very different scope and significance from that now before us. While the provisions involved in those cases did not condemn or punish specific persons by name they prescribed all guilty of designated offenses.⁵²

Mr. Justice Black's majority opinion makes ample use of the legislative history of Section 304 in arriving at his conclusion that it was a bill of attainder; but it is not entirely clear whether he used it to demonstrate that respondents were being punished, or merely to satisfy himself that the actual purpose of Section 304 was to effect removals of office rather than simply to stop payment of salaries. That the latter was his objective is indicated strongly both by the subdivisional arrangement of the opinion and by his language. Thus in Section I of the opinion proper, which directly follows his statement of the case and review of the enactment's legislative history, Mr. Justice Black says, apparently for the sole purpose of showing the constitutional issue to be justiciable, that the phrasing of Section 304 in the light of its history operated to oust respondents from office and not just to halt normal disbursal of salaries:

In view of the facts just set out we cannot agree with the two judges of the Court of Claims who held that Sec. 304 required a "mere stoppage of disbursing routine, nothing more"

50. *United States v. Lovett*, 328 U. S. 303, 318, 321-2 (1946).

51. *Id.* at 323-4.

52. *Id.* at 327.

We hold that the purpose of Sec. 304 was not merely to cut off respondents' compensation through regular channels but permanently to bar them from government service, and that the issue of whether it is constitutional is justiciable. The section's language as well as the circumstances of its passage which we have just described show that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency⁵³

Having found with the aid of legislative history that the validity of Section 304 was justiciable, Mr. Justice Black then proceeds in Section II of his opinion to find that the statute is a bill of attainder. He holds that the ouster of respondents was punishment, but nowhere does he explicitly rely on legislative history to support that view. After observing that Section 304 was of the same noxious stripe as the enactments in the *Cummings* and *Garland* cases, he does afford an inference of such a reliance:

Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned, it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. . . . This permanent proscription from any opportunity to serve the government is punishment, and of a most severe type. . . .

. . . . The fact that the punishment is inflicted through the instrumentality of an act specifically cutting off the pay of certain named individuals *found guilty of disloyalty*, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, *stating that after investigation it had found* [respondents] "*guilty of engaging in 'subversive activities,'*" defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and "determined by no previous law or fixed rule."⁵⁴ [italics added]

Although Mr. Justice Black ignores the possibility that many violations of due process and other infringements, and indeed many valid statutes, may be considerably more "galling and effective" than was Section 304 without raising the slightest

53. 323 U. S. 303, 313-4 (1946).

54. *Id.* at 316-7.

suggestion of legislative attaint, he does definitely imply by his reference to "individuals found guilty of disloyalty" and to a hypothetical statute declaring "'guilt' of engaging in 'subversive activities,'" that punishment can be, and was, found in legislative history. On the other hand, the first paragraph of the quotation above and his opinion as a whole smacks of the extreme view that, once a removal from office is established, partly by recourse to legislative history, then so far as all the other critical indicia are concerned Section 304 is a bill of attainder *on its face*. If he does so hold, he tacitly agrees with Mr. Justice Frankfurter that a bill of attainder must independently reveal legislative punishment; but unlike Mr. Justice Frankfurter he does not require guilt of an actual or supposed offense as an anterior ingredient of punishment.⁵⁵

It is hardly believable that the majority would have held Section 304 a bill of attainder if its legislative history had exposed no more than purpose to remove respondents for a "good" cause, and had lent no support to the theory that the House of Representatives was out to "get" respondents without worrying too much about the justification. But whatever Mr. Justice Black intended to mean by his opinion, he veered sharply from a course of decision established within rather narrow limits by *Cummings v. Missouri*, *Ex Parte Garland*, and subsequent cases. The only difference in the two possible meanings of his opinion is one of degree: Although he pays lip service to the *Cummings* and *Garland* decisions and their adherence to a historical concept, in fact he short-circuits both the cases and the concept by saying either that Section 304 *per se* satisfies the requirements for legislative attaint, or that the necessary punishment may be adduced with the help of legislative history. Only the amperage is greater in one wire than in the other.

A remaining problem is whether the majority in *United States v. Lovett* was *justified* in reactivating the constitutional prohibition of bills of attainder in a form of unheard-of vigor and scope. If Section 304 is adjudged a bill of attainder on its face, the answer ought to be negative and short, for the decision in that event could fairly mean that a wide variety of deprivative

55. Mr. Justice Frankfurter seems to have interpreted the majority opinion as saying that the requisite declaration or assumption of guilt may be drawn from the circumstances of enactment as a basis for finding of punishment. 328 U. S. 303, 318, 330 (1946).

legislation in the reasonable exercise of police power or in a field where the legislature has plenary power would be subject to attack as legislative attaint.⁵⁶

More complex is the question whether Mr. Justice Black was warranted in curing by resort to legislative history a fatal defect in the "punishment" inflicted by Section 304—if that is what he did. In the first place, there is little doubt that one grant or limitation of the Constitution may inherently and in the circumstances of its inclusion be far more susceptible than another of reasonable judicial latitude in its application. Some provisions were intentionally made general and elastic in respect of the things they should embrace; others for good reason were made specific and rigid. Mr. Justice Frankfurter in his concurring opinion is persuasive that the bill of attainder clauses properly belong to the latter category:

Broadly speaking, two types of constitutional claims come before this court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (e. g. "due process," "equal protection of the laws," "just compensation"), and the division of power as between States and nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.⁵⁷

If there is a germ of truth in Mr. Justice Frankfurter's postulate, there can be no justification in experience for digging half of a bill of attainder out of the statute's legislative history, even conceding that the legal fact of removal from office may be substantiated by reference to the chronicle of enactment.

The suggestion that in construing Section 304 it was reasonable for the majority to examine the legislative record in order to help ascertain the fact of removal raises another possible objection to using that record for a determination of punish-

56. See the Hatch Act discussion, Section VI *infra*.

57. *United States v. Lovett*, 328 U. S. 303, 318, 321 (1946).

ment. The distinction has often been made judicially that the Court should not inquire into the *motive* of Congress but only into its purpose or *intent*. Thus if legislative history reveals in a doubtful case that Congress intended to act upon a subject matter over which it has power to act and the means used could be reasonably calculated to effectuate its intent, its motive in so acting is not judicially cognizable.⁵⁸ An analogous principle that a state legislature's motive is immaterial where the legislature employs reasonable means within the sphere of its police power has been so generally invoked as to need no citation. It is true that if Congress or a state legislature exceeds its constitutional power because its *purpose* is to reach something beyond the range of that power, the statute may be invalidated,⁵⁹ but in that case the legislative motive, avowedly at least, is still ignored and only the purpose and actual effect of the statute are controlling.

In applying the distinction toward a proper judicial construction of Section 304, one might conclude that the purpose of Congress to remove or not to remove respondents was a question the Court might answer with the aid of legislative history, but that Congress' motive of inflicting punishment or action for some other reason was not the Court's concern at all. However, the motive-intent dichotomy is a tenuous one at best, and particularly in the bill of attainder field its use is likely to trap the user in a circuitous maze. The peculiar difficulty of the *Lovett* situation is that punishment is a necessary element of legislative attainder. Whereas the issue of punishment in most cases is not essential to deciding the nature of a statute, in the bill of attainder case it may tenably be considered a part of the legislature's purpose. Motive here shades indistinguishably into intent, and it is easy to say that Congress intended both to remove respondents and to punish them by removal. If it be countered that such a position leaves no motive at all and that Congress must have harbored *some* motive, the defense is that the motive of Congress was simply to cleanse the government of subversives. If one would

58. See Mr. Justice Holmes, dissenting in *Hammer v. Dagenhart*, 247 U. S. 251, 277 *et seq.* (1918); see also *United States v. Darby Lumber Co.*, 312 U. S. 100, 115 (1941); *Sonzinsky v. United States*, 300 U. S. 506, 513-4 (1937); *United States v. Doremus*, 249 U. S. 86, 93 (1919).

59. *United States v. Butler*, 297 U. S. 1 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 542-51 (1935); *Weaver v. Palmer Brothers Co.*, 270 U. S. 402 (1926).

deny the propriety of falling back on legislative history to establish the penal nature of Section 304, and this writer does deny it, it seems far safer to rely upon the obstacle raised against that procedure by Mr. Justice Frankfurter, *viz.*, that the historical character of bills of attainder as narrowly and specifically understood by the Framers of the Constitution precludes a legitimate alteration by the Court.

But assuming, *arguendo*, that the majority should have looked behind the statute to discover whether punishment was lurking about, there is some reason to believe that in this case they looked with myopic effect. It seems tough to argue that the intent of Congress in attaching Section 304 is determinable from the legislative history beyond mere conjecture, despite the fact that Mr. Justice Black's opinion extracts an intent to punish respondents (or can be read that way) from the hotchpot of debate in the House of Representatives. Mr. Justice Frankfurter criticizes this extraction by observing that the Senate also belongs, and that by accepting Section 304 the Senate in nowise intended to punish respondents or to pass judgment on their conduct or political views. Perhaps it would be more accurate to say that the Senate did not *want to* intend to punish respondents, as attested by its first vote of 69 to 0 against the rider. But if the statute worked a punishment in fact, it seems clear that the Senate with its eyes open intended that result. What is done reluctantly is nonetheless done.

Mr. Justice Frankfurter might better have pointed to the lower chamber's proceedings as failing to demonstrate that Section 304 was ever intended as a retributive measure and hence should have been given the benefit of a remedial characterization. The House debates on the matter provide an amorphous framework for a judicial finding of the House's intent, because the proponents of the rider advanced various discordant theories of its purpose and operation. Only some of those theories included the idea of punishment. A Note at 45 MICH. L. REV. 98, 100-1 (1946) belabors the point well:

. . . . The majority seek support for the theory that punishment was intended from the legislative history of the measure in the House. In the resort to such words as "guilt," "indictment," "innocent," and "accused"⁶⁰ during the debates . . . they find clear indications of a retributive purpose

60. 89 CONG. REC. 651, 711, 741 (1943); 328 U. S. 303, 325 (1946).

on the part of the legislators. . . . A survey of all the debates, however, reveals as many positive averments that no question of crime or punishment was involved. The supporters of the resolution appointing the Kerr Committee and of Sec. 304 based on its findings, interpreted the proceeding as one for determining the fitness of those charged to serve the government in a time of national emergency and to eliminate those of doubtful loyalty. It was insistently argued that "it does not mean that they are even charged with any crime," that the "committee has convicted no one," that the respondents were not being "persecuted for their ideas," but that the question was simply whether "the Congress of the United States feels these men are qualified to serve" ⁶¹

Finally, it may not be unreasonable to guess that the majority's judgment was influenced to some degree by the "smear" campaign and grossly unfair procedure to which respondents had been subjected. Mr. Justice Black, though he does not say so, was clearly indignant over the irresponsible tirades of Congressman Dies and his cohorts on the floor of the House,⁶² as well as the star chamber subcommittee hearings from which counsel for respondents or lawyers representing their employer agencies were barred.⁶³

Suppose on the other hand that the procedural treatment of respondents had been fair in every way and that the subcommittee had uncovered fresh and strong evidence of respondent's actual leadership in the Communist Party. Suppose further that respondents had voluntarily admitted well-laid plans to assassinate the president and blow up the Capitol after another six months of infiltration. Suppose that otherwise the facts had been exactly the same as they actually were when the Court took the case. It is no reflection on the majority to suggest that they might then have found no punishment in Section 304, but merely a removal of respondents in the interest of safety.

Yet punishment is punishment, whether it is justified or not, and the bill of attainder clauses protect the wicked as well as the innocent.

C. *Mr. Justice Frankfurter's Position*

It has been seen that Mr. Justice Frankfurter agreed in result with the *Lovett* decision, but that he approved "the opinion" of

61. 89 CONG. REC. 653, 4601, 4554, 4596 (1943).

62. 328 U. S. 303, 308-9 (1946).

63. *Id.* at 310-11.

the Court of Claims that the statute was valid because it did no more than to cut off ordinary disbursement of respondents' salaries. Note his painstaking admonition to proceed with caution:

It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. . . . And so "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts"⁶⁴ [quoting Mr. Justice Holmes in *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 270 (1904)]

. . . . Sec. 304 undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. And so the "Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., concurring, in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341, at 346. . . .⁶⁵

. . . . The approach appropriate to such a case as the one before us was thus summarized by Mr. Justice Holmes in a similar situation: ". . . the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. . . ." "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U. S. 22, 62." Brandeis, J., concurring, in *Ashwander v. Tennessee Valley Authority*, *supra*, at 348.⁶⁶

The concurring justice then rationalizes as follows the construction he deems mandatory:

. . . . The obvious, or at the least, the one certain construction of Sec. 304 is that it forbids the disbursing agents of the Treasury to pay out of specifically appropriated moneys sums to compensate respondents for their services

64. *United States v. Lovett*, 328 U. S. 303, 318, 319 (1946).

65. *Id.* at 320.

66. *Id.* at 329-30. Apparently, Mr. Justice Frankfurter had to steady himself here and there with a nip of Old Holmes or Old Brandeis.

. . . . there is much in the debates not only in the Senate but also in the House which supports the mere fiscal scope to be given to the statute. That such a construction is tenable settles our duty to adopt it and to avoid determinations of constitutional questions of great seriousness.⁶⁷

No one will deny that the rule of construction invoked by Mr. Justice Frankfurter is a salutary one, but query, whether his construction saving the statute is "fairly possible." At the outset it imputes to Congress the intent that respondents might pursue their government jobs without pay, "subverting" all the while, until their normal tenure should expire or until they should be properly removed by executive authority. This theory would be bizarre enough on its face, but the language of Section 304 also militates against it. It is asking too much to believe that Congress did not intend to oust respondents from office when it commanded that "No part of any appropriation, allocation, or fund (1) which is made available under this Act, or (2) under any other Act, to any department, agency, or instrumentality of the United States, shall be used to pay any part of the salary [of respondents]." ⁶⁸ The legislative intent is brought into even sharper relief by the subsequent provision that salaries should not be cut off if prior to the date of stoppage "such person has been appointed by the President, by and with the advice and consent of the Senate. . . ." It is an obscure process whereby a person may be "appointed" to office, effective on a specified date, if on that date he is not to be considered either out of or removed from office.

It is of course true that some of the legislative history of Section 304 supports the notion of its "mere fiscal scope." But that cannot explain away the clear import of the statutory language itself, and the task is not eased by much of what transpired in the House before enactment. For instance the investigating subcommittee's reports stated that the investigations were regarded as having the ultimate purpose of purging the public service of anyone found guilty of "subversive activity."⁶⁹ Again, the subcommittee's findings specifically as to respondents concluded that "he is, therefore, unfit for the present to continue in Government

67. *Id.* at 330.

68. For §304 in full, see text at note 43 *supra*.

69. H. R. REP. NO. 448, 78th Cong., 1st Sess. 5 (1943).

employment," or that "this official is unfit to hold a position of trust with this Government. . . ."⁷⁰

By and large, the language of Section 304 and the whole pattern of its history must be tortured in order to escape the verdict that Congress intended to remove and did remove the respondents. That the removal was poorly disguised as an innocent exercise of the spending power does not justify a salvaging of the statute, no matter how strong the policy of avoiding a condemnation.

VI. SOME IMPLICATIONS OF THE LOVETT CASE AND ITS APPARENT ISOLATION

Among the other serious constitutional issues raised by the *Lovett* case,⁷¹ Congress' alleged infringement of the executive removal power was probably ripest for decision.⁷² The hazards

70. *Id.* at 6, 12.

71. See second paragraph, Section V (A) *supra*.

72. The Court has never decided whether Congress may constitutionally assume any part of the removal power, except, of course, by impeachment. The removal power questions decided so far may be summarized as follows:

(1) The president does not possess the power of summary removal exclusively. It may be exercised by heads of departments or by federal courts when the appointing power is vested in them by Congress pursuant to U. S. CONST. Art. II, § 2, cl. 2. *Ex parte Hennen*, 13 Pet. 230 (U. S. 1839) (sustained removal by federal judge of a clerk appointed by the removing court under congressional authority); see *United States v. Perkins*, 116 U. S. 483, 485 (1886) (secretary of the navy might not discharge a naval cadet engineer at will, but must conform to removal restrictions imposed by Congress when it gave the secretary power to appoint such officers).

(2) The president may remove at will any "purely executive" officer appointed by him with the advice and consent of the Senate, or by him alone where Congress expressly waives the Senate's advice and consent, notwithstanding Congress may have fixed the tenure and in addition provided that the officer might be removed only for specified causes. *Myers v. United States*, 272 U. S. 52 (1926) (sustained president's summary removal of postmaster even though the act authorizing appointments required that removals be made "by and with the advice and consent of the Senate," 19 STAT. 80, 81 [1876]); *Shurtleff v. United States*, 189 U. S. 311 (1903) ("general power" of the president to remove is not restricted as to government appraisers of merchandise by congressional authorization to remove "for inefficiency, neglect of duty, or malfeasance in office"); *Parsons v. United States*, 167 U. S. 324 (1897) (fixing of federal district attorney's term of office by Congress does not affect president's power to remove such attorney before expiration of the term); *Morgan v. T. V. A.*, 115 F. 2d 990 (6th Cir. 1940), *cert. denied* 312 U. S. 701 (1941) (sustained president's removal at pleasure of T. V. A. board chairman despite fixing of term and provision of the appointment authorization act that president might remove only for stated causes, since the T. V. A. "is predominantly an administrative arm of the executive department . . ."); *United States ex rel. Bigler v. Avery*, 24 Fed. Cas. 902, No. 14,481 (C. C. N. D. Cal. 1867) (" . . . the power of removal [in that case, removal of

district internal revenue assessor] must be conceded to the executive by the courts. Congress had practically so conceded it, for three-fourths of a century . . ." 24 Fed. Cas. at 906). See *Humphrey's Ex'r v. United States*, 295 U. S. 602, 626, 632 (1935) (admitting the president's power to remove at will "purely executive officers" but disapproving dicta in the *Myers* case *supra* which seemed to give the president's power even broader scope).

(3) The president cannot remove a quasi-judicial or quasi-legislative officer whose removal is limited by Congress to a stated cause or causes, unless removal is made as required. In such a case the fixing of tenure by Congress does not seem to be material except as a factor in determining the legislative intent that the term is not to be curtailed in the absence of a specified cause for removal. *Humphrey's Ex'r v. United States*, 295 U. S. 602 (1935) (president could not remove at pleasure a commissioner of the FTC who was removable for cause only by the terms of the act authorizing his appointment, and who had been appointed thereunder for a seven-year term); see *Morgan v. T. V. A.*, *supra*.

Congress clearly thinks that it may assume the power to remove two quasi-legislative officers, the comptroller general and assistant comptroller general. Under the Budget and Accounting Act of 1921, 42 STAT. 20, 23-4, 31 U. S. C. §41 (1940), these officers are removable *only* by joint resolution of Congress for specified causes or by impeachment. Notwithstanding the necessity of presidential approval of a joint resolution, the effect of this statute is to place initiation of the removal process entirely in the hands of Congress and to proscribe removal by the president in any event. The statute gives the president no more affirmative power to remove the officers concerned than he would have been granted had Congress insisted on removal solely by concurrent resolution. (The original bill authorized removal by concurrent resolution, but this was vetoed by President Wilson as an unconstitutional limitation on the president's power of removal. 59 CONG. REC. 8609 [1920].)

It would seem that the broad rationale of separation of powers announced in the *Humphrey* case *supra* would have permitted the Court in *United States v. Lovett* to decide that Section 304 had infringed the president's power to remove "purely executive" officers, without the necessity of deciding whether Congress has the power summarily to remove other kinds of officers. The basic departure of the *Humphrey* case from the strong judicial deferences to the executive power in the *Myers* case and earlier cases *supra* is implicit in the following language:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there . . ." [*Humphrey's Ex'r v. United States supra*, 295 U. S. at 629-30]

This principle ought to operate against congressional infringements just as effectively as against those of the president, while at the same time lending support to the proposition that the president's power to remove "purely executive" officers is not only unrestricted, but also exclusive.

The Court in the *Lovett* case, in order to resolve the removal power issue, would probably have found it necessary to determine whether respondents Watson and Dodd were "purely executive" officers or quasi-legislative agents of Congress. Although they were employees of the FCC, the United States argued forcefully in its brief that Watson and Dodd were really executive officers because they worked for the Foreign Broadcast Intelligence Service in "exclusively executive matters" and without performing any regulatory function. Brief for Petitioner, p. 31-2. There was no such difficulty, of course, as to respondent Lovett, who, as Execu-

in tackling that problem had already been exposed by the Court's previous dealings with it.⁷³ But enlarging the area of legislative attainment to the extent accomplished by the *Lovett* decision could also prove troublesome.

For example, no one suggests that Congress does not have the power to prescribe the qualification of loyalty or other qualifications reasonably related to security and efficiency for holding federal office. Congress did so in Sections 9 and 9A of the Hatch Act, of which Section 9A in particular appears close to the *Lovett* concept of attainder:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.⁷⁴

The class at which this statute is aimed is, of course, readily ascertainable, no trial is required for removal,⁷⁴ and the only

tive Assistant to the Governor of the Virgin Islands, was a virginally executive officer.

73. Mr. Justice Frankfurter points out in concurring with the *Lovett* result that "So far as the issues [in the *Myers* case, note 72 *supra*] could be foreseen they were elaborately dealt with in opinions aggregating nearly two hundred pages. Within less than a decade an opinion of fifteen pages [in the *Humphrey* case, note 72 *supra*] largely qualified what the *Myers* case had apparently so voluminously settled . . ." 328 U. S. at 328.

74. 53 STAT. 1148 (1939), 5 U. S. C. A. § 118j (Supp. 1948). See Note, 45 MICH. L. REV. 98, 101 (1946). In 1941 Congress began to include similar qualifications in all its appropriations for salaries and wages of federal employees. See *e. g.*, 55 STAT. 92, 123 (1941), 55 STAT. 446, 465 (1941), 61 STAT. 361, 377 (1947).

74a. Perhaps Section 9A contemplates implementation by the removing agencies so as to guarantee some sort of administrative hearing for employees under loyalty investigations. At any rate, there are indications that that has been the practice. For example, in *United Public Workers v. Mitchell*, text at note 78 *infra*, one of the appellant-employees had been charged by the Civil Service Commission with ordinary political activity prohibited by Section 9 of the Hatch Act, and a removal order had been proposed by the Commission subject to the employee's right under Commission procedure to reply to the charge and to present evidence in refutation. One of the Commission's rules requires "due notice and opportunity for explanation." 4 CODE FED. REGS. § 15.1 (Cum. Supp. 1943), *United Public Workers v. Mitchell*, 330 U. S. at 81, 92. As to the permissible scope of a fitness investigation by the Civil Service Commission

apparent obstacles to calling the act a bill of attainder are (1) that it operates prospectively, *i. e.* applies from the date of enactment to future activity by federal employees, and (2) that, although it proscribes a named type of subversive activity, it does not exact punishment therefor, but merely protects the inner organs of the government from such activity.

Yet several of the old English bills of attainder, and there is no mistaking their identities as such, operated prospectively; and there is no reason to suppose that they contemplated anything more than arrest on information and belief, if that much, as a preliminary to the attaind and punishment.⁷⁵ Hence it would appear that bills of attainder are not necessarily *ex post facto*,⁷⁶ even though in the usual nature of things they have been. A legislative act which, without a trial, inflicts punishment for specified conduct, past or future, should be a bill of attainder within the meaning of the Constitution.

under Section 9A, see *United States v. Marzani*, 71 F. Supp. 615 (D. C. 1947), *aff'd* 168 F. 2d 133 (D. C. Cir. 1948), *aff'd per curiam* 335 U. S. 805 (1948). Removals under Section 9A would now seem clearly to be subject to the procedure and standards of "loyalty" prescribed by the President's Loyalty Order of March 21, 1947. Exec. Order No. 9835, 12 FED. REG. 1935 (1947).

Although "due process" is not always synonymous with judicial process to the extent that an administrative hearing will satisfy the basic requirements of due process in many situations, there is little doubt that a judicial trial is a necessary prerequisite to *punishment*. Both Justices Field and Black in the *Cummings, Garland, and Lovett* cases emphasize that a legislative act which inflicts punishment without a "judicial trial" or "trial in court" is a bill of attainder. It follows that if Section 9A of the Hatch Act inflicts punishment by removal from office, a "fair hearing" would not keep it from being a bill of attainder. Nor would the rationale of the *Lovett* decision have permitted a different result in that case even if respondents had been given a fair hearing by the congressional subcommittee recommending their removals.

75. See the act quoted in the text at note 9 *supra*. It is difficult to explain the language "and are hereby attainted" as constituting anything less than legislative attaind, notwithstanding the attainder was imposed for acts done "from and after the First day of February next ensuing."

76. Mr. Justice Frankfurter's concurring opinion in the *Lovett* case apparently concedes that not all bills of attainder have been *ex post facto*, but makes the following argument as to Section 304: (1) "If Section 304 is a bill of attainder, it is also an *ex post facto* law," because the basis for calling it a bill of attainder is that it punishes for past "subversive" acts for which no punishment had previously been provided. (2) But "No one claims that Section 304 is an *ex post facto* law." (3) Therefore, "if it is not an *ex post facto* law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder." 328 U. S. 303, 318, 322-3 (1946). The fallacy in this argument lies in the fact that no one *had* to claim that Section 304 was an *ex post facto* law in order to call it a bill of attainder.

It is true that Section 9A of the Hatch Act, placed alongside any typical criminal statute, would not appear to reflect at retributive purpose, but neither did Section 304 in the *Lovett* case. That the latter was directed toward named individuals might help to indicate punishment, but calling names is not a requisite of attainder. On the other hand, Section 9A looks much more like a bill of attainder than does Section 304 in that the former cites the particular conduct for which a deprivation will be imposed—the deprivation itself being almost the same as in Section 304.⁷⁷

Despite the *Lovett* case, however, the Supreme Court has since furnished reason to believe that Section 9A is safe from the fate of Section 304. In *United Public Workers of America v. Mitchell*⁷⁸ the Court upheld Section 9⁷⁹ of the Hatch Act as it was applied to effect removals of certain federal employees for ordinary political activity. The attainder issue was neither raised by the parties nor mentioned by the Court, the principal challenge being based on Amendment I. But the Court's holding that Section 9 violated neither that Amendment nor the due process clause of Amendment V precludes conjecture that Section 9 is a bill of attainder. For a single statute to meet the requirements of due process and yet to be a bill of attainder would seem constitutionally improbable, if not impossible. And if the necessary effect of the *Mitchell* case is that Section 9 is not a bill of attainder, Section 9A should be similarly immune. It would be possible to distinguish Section 9A and to characterize its sanction as punishment, on the ground that the kind of activity it prohibits, though non-criminal absent a conspiracy to overthrow the government, is more reprehensible and closer to crime than ordinary political activity; and the worse the conduct, the more reasonable a suspicion of punitive reaction. But contrariwise, the worse the conduct, the more likely to be reasonable is the connection between reaction and the legitimate object of security.

77. The only substantial difference between the deprivation of Section 9A and that of Section 304 is that the former reaches appropriations only for the particular office from which an employee might be removed, whereas Section 304 cut off salaries for any government jobs the respondents might hold in the future as well as at the time of enactment, except for jury or military service.

78. 330 U. S. 75 (1947), *affirming* *United Federal Workers of America v. Mitchell*, 56 F. Supp. 621 (D. C. 1944).

79. 53 STAT. 1148 (1939), as amended, 5 U. S. C. A. § 118i (Supp. 1948).

In the cases since *United States v. Lovett* which have forced the attainer issue, the courts, including the Supreme Court, have shown no inclination to utilize the expanded but vague contours of legislative punishment drawn by the *Lovett* case. Rather they have uniformly relied on the older precedents and the older limits of punishment. Thus Section 9(h) of the Taft-Hartley Act,⁸⁰ in requiring non-Communist affidavits of union officers as a prerequisite to certification of the union as exclusive bargaining agent, or to union initiation of an unfair labor practice complaint, has been held not to be a bill of attainder in *National Maritime Union of America v. Herzog*.⁸¹ The District Court for the District of Columbia held in that case that the affidavit was a valid condition of granting the privileges authorized by the act, and that denying a privilege to one who will not meet such a condition is not punishment. The Court did not make clear just why this is not punishment, when revoking the privilege of federal employment for non-compliance with the valid condition of unquestioned loyalty may be punishment under the *Lovett* case. The Court merely said, "Cf. Mr. Justice Frankfurter's concurring opinion in *United States v. Lovett*."⁸² The Supreme Court affirmed the decision in a memorandum opinion⁸³ without finding it necessary to consider the validity of Section 9(h).

The same section was again sustained by another federal court in *Inland Steel Co. v. N. L. R. B.*,⁸⁴ where the Court thought that Section 9(h) "operates not to impose punishment but to safeguard important public interests against potential evil. . . ."⁸⁵ The Court, rather pointedly it seems, did not cite the *Lovett* case, but instead relied on the ancient language of *Cummings v. Missouri*. Similarly, the respondent in *N. L. R. B. v. Edw. G. Budd Mfg. Co.*⁸⁶ urged to no avail that the *Lovett* case required invalidating the Taft-Hartley Act as a bill of attainder insofar as it removed supervisory employees from the protection of the

80. 61 STAT. 136, 143 (1947), 29 U. S. C. A. § 159(h) (Supp. 1948).

81. 78 F. Supp. 146 (D. C. 1938).

82. *Id.* at 164.

83. 334 U. S. 854 (1948).

84. 170 F. 2d 247 (7th Cir. 1948), cert. granted 69 Sup. Ct. 480 (1949).

85. 170 F. 2d at 267.

86. 169 F. 2d 571 (6th Cir. 1948), cert. denied sub nom. Foreman's Ass'n of America v. Edw. G. Budd Mfg. Co., 69 Sup. Ct. 411 (1949).

Wagner Act.⁸⁷ And the Supreme Court of Tennessee, without mentioning the *Lovett* case, has held that a statute repealing a prior statute, which had authorized licensing of naturopaths, and prohibiting the practice of naturopathy in the state, was not a bill of attainder.⁸⁸ Before 1946 this would have been a routine decision, and probably it still is so far as Tennessee is concerned.

VII. CONCLUSION

At a round table meeting of law teachers in December, 1948,⁸⁹ Mr. Charles P. Curtis⁹⁰ developed the thesis that protection of our civil liberties has too often been thrust upon the Supreme Court. Mr. Curtis contended that in "living up to our expectations" the Court has repeatedly "taken a big lead off first base," and commented on the *Lovett* case as a prime example of that lead.⁹¹

Even if the Court really went further and stole second base, the result was and is widely approved. But there is little reason to suppose that the *Lovett* method of reaching that result was a pioneering move into an unexplored territory of constitutional protection. Subsequent decisions to date do not bear it out. It is entirely possible that the attainder theory was the best available expedient in view of a combination of partly hidden but weighty factors: (1) the severe difficulty, despite Justices Frankfurter and Reed, of finding a tenable basis for avoiding all the constitutional issues, the difficulty perhaps being aggravated by the Court's obvious disapproval of Congress' witch-hunt attitude in the matter; (2) the Court's much greater and understandable reluctance either to resolve the removal power issue or to question on a due process basis the investigation methods of Congress; and (3) the logical impasse to deciding

87. 61 STAT. 136, 137, 151 (1947), 29 U. S. C. A. § 152(3), 152(11), 164(a) (Supp. 1948).

88. *Davis v. Beeler*, 185 Tenn. 638, 207 S. W. 2d 343 (1947). See also *Perez v. Board of Police Com'rs of Los Angeles*, 78 Cal. App. 2d 638, 178 P. 2d 537 (1947) (resolution by police commissioners barring police officers from joining any union not exclusively made up of city employees held not a bill of attainder).

89. Round Table. "Security, Loyalty, and Civil Rights," December 29, 1948, at the annual convention of the Association of American Law Schools, Cincinnati, Ohio.

90. Prominent Boston attorney and student of the United States Supreme Court; author, *LIONS UNDER THE THRONE* (1947).

91. Mr. Curtis' prescription for this condition was to accelerate popular self-help, with lawyers and teachers carrying the major load.

that Section 304 violated substantive due process without necessarily deciding either the removal power or the attainder question.⁹²

Quite probably the *Lovett* case will prove to have been more of a *tour de force* than a potent threat to deprivative, or even discriminatory, legislation.

92. It would seem that removal of respondents could not have infringed their substantive rights under the due process clause of Amendment V if, as to them, Congress had the constitutional power of summary removal. See Mr. Justice Frankfurter's concurring opinion, 328 U. S. at 328. On the other hand, if Congress had such a removal power but abused it by a punitive exercise, the resulting due process violation merged with a bill of attainder. That leaves open the question whether a congressional removal power might be abused so as to violate due process and yet fall short of punishment. The answer is "no" if the scope and reach of that power over the officers concerned is the same as the president's power to remove "purely executive" officers.