HOW THE SUPERFUND CONGRESS CRAFTED A BILL OF ATTAINDER: MISAPPROPRIATION OF THE JUDICIAL POWER OF THE UNITED STATES — OF UNBOUNDED CIVIL LIABILITIES, RETROACTIVE TAXES, AND LEGISLATIVE ADJUDICATION

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I. INTRODUCTION

No-fault liability[1] means, simply, that the plaintiff need no longer plead

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[1]Specifically, no-fault liability constitutes liability imposed upon an individual "apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 534 (1982). In its simplest definition, strict liability is liability without fault. *Id.* It appears that liability without fault arose through the practice of holding owners strictly liable for damage inflicted upon their neighbors by their property, such as a slave or an animal. *Id.* at 538. *See* SIR FREDERICK POLLOCK & FREDERICK W. MAITLAND, HISTORY OF ENGLISH LAW 472 (2d ed. 1968); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 352 (1894); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 15-24 (1881). A more recent application of the doctrine of strict liability has been established by the courts regarding "abnormally dangerous conditions or activities," where the defendant's activities, while tolerated, must pay their way. Clarence Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952); PROSSER & KEETON, *supra*, at 545. *See* ALBERT ARMIN EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); *see generally* W.T.S. Stallybrass, *Dangerous Things and the Non-Natural User of Land*, 3 CAMBRIDGE L.J. 376 (1929); Erza Ripley Clarence Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916); Francis Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PA. L. REV. 298 (1911); Frederick Pollock, *Duties of Insuring Safety: The Rule in* Rylands v. Fletcher, 2 L.Q. REV. 52 (1886).

and prove a defendant's departure from an otherwise applicable standard of due care.[2] Any proof that the plaintiff simultaneously departed from such a standard of due care is treated as irrelevant.[3] The concept of no-fault liability abrogates any negligence requirement; nonetheless, the invocation of no-fault liability does not suspend the abiding requirement that causation-in-fact be pleaded and proved.[4]

The case from which the doctrine of strict liability developed is Rylands v. Fletcher, 1865, 3 H. & C. 774, 159 Eng. Rep. 737, *rev'd*, Fletcher v. Rylands, L.R. 1 Ex. 265 1866, *aff'd*, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). PROSSER & KEETON, *supra*, at 545. The often quoted language of this case reads as follows:

> We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.

Id. (citing Rylands v. Fletcher, L.R. 1 Ex. 265, 279-80 (1866)). What has emerged as the "rule" of strict liability in the hundred years since this English rule was established "is that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." *Id.* at 547-48; *cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (Sutherland, J., concurring).

[2]The "standard of due care" is "[j]ust, proper, and sufficient care, so far as the circumstances demand . . . . [The] degree of care that a reasonable person can be expected to exercise to avoid harm reasonably foreseeable if such care is not taken." BLACK'S LAW DICTIONARY 499 (6th ed. 1990).

[3]*See generally* PROSSER & KEETON, *supra* note 1, at 534-83.

[4]In negligence cases, a plaintiff cannot establish liability unless the plaintiff can demonstrate that the defendant actually caused the plaintiff's injuries. BLACK'S LAW DICTIONARY 221 (6th ed. 1990). The author's earlier explication of causation-in-fact may bear repetition:

> For decades, little more has been required to impose liability on those who conduct an "ultrahazardous activity" than that plaintiff prove a causal connection between his or her injury and the acts or omissions of a defendant. In all cases, however, it has been said that a "duty of care" must be found to exist . . . . Then a breach of duty must be found by a judge or jury, the trier of fact.
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> One commonly speaks of this breach of duty as actionable negligence. The generation before mine had fault in mind; but fault need be involved only if the duty of care was a "due care" that, inter alia, refused to recognize any obligation to victims of unavoidable accidents. But the duty of care can be a lesser one (to avoid inflicting injury knowingly — e.g., upon a trespasser) or it can be much greater (to avoid even the slightest deviation from the careful practices now expected of common carriers and of those who engage in "ultrahazardous

No-cause liability is something else entirely. Purportedly, liability can be attached to a defendant without a showing that the defendant's conduct caused damage or injury to the plaintiff.[5] This concept is embodied in the

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activities," or even to guarantee the workplace safety of railroad workers).

At various times duty of care has been freighted with fault; at other times not. The meaning of strict liability is, simply, that the plaintiff need no longer plead and prove a defendant's departure from this standard of due care; any proof that the plaintiff simultaneously departed from that standard is treated as irrelevant. Strict liability does indeed vitiate due care negligence standards, but nothing in the doctrine of strict liability can properly be understood to have negated the abiding requirement that the tortfeasor's acts must have caused the plaintiff's injury. Civil liability in the absence of fault can readily be imagined and imposed; civil liability in the absence of cause is surely more problematical.

Glenn Willett Clark, *Causation-in-Fact in Natural Resource Damages and in Assessment of Response Costs*, 5 ENVTL. CLAIMS J. 7, 14-15 (1992).

[5]The missing element in actions under a regime of no-cause liability — unlike actions for negligence or any other tort — is the requirement that there exist a reasonable casual connection between an act or omission of a defendant and the damage caused by said act. PROSSER & KEETON, *supra* note 1, at 263. With highly misleading effect, courts often refer to this connection as "proximate cause" or "legal cause." *Id.* An act or omission is not considered a cause of an event if that event would have transpired without it. *Id.* at 265. From this doctrine, courts have developed the "but for" or "*sine qua non*" rule, stating that "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." *Id.* at 266. *See* James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 (1925); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106, 109 (1911). Although causation does not determine liability, it is essential. McLaughlin, *supra*, at 156. Generally, the plaintiff bears the burden to prove that it is more probable than not that the defendant's conduct was a cause in fact of the result. *See* State of Maryland for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949).

The doctrine of "proximate cause" has been misnamed, and often misused. Properly understood, its purport has always been that a fault-negligent defendant causally linked to an event will yet be excused from liability if the *event* was an "unforeseeable consequence" of the actor's negligence. This linguistic and logical stew boils over when that notion is coupled with the rule that a negligent defendant is liable to the full *extent* of the victim's injuries (those of a bleeding hemophiliac, say), even if the extreme extent of the particular plaintiff's injuries could not have been foreseen.

The heart of the matter is that the doctrine of "proximate cause" could exonerate a negligent defendant whose acts did indeed bear a causal relation to the injury of which the plaintiff complains. Causation and negligence are present; why exoneration? Because there is, says Professor Posner, "a good reason for distinguishing . . . between the fact of injury and its extent." Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972), *reprinted in* H. MANNE, THE ECONOMICS OF LEGAL RELATIONSHIPS 230 (1975). Apropos "the fact of injury," he says: "The truly freak accident isn't worth spending money to prevent." *Id.* at 224. Not a cent to prevent? Possibly. No pieces-of-eight to compensate?

section providing for "response cost"[6] liabilities in the Comprehensive

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Hardly!

Let us assume that harm could indeed not have been forestalled had the defendant acted differently. Do we ask nothing of the defendant when a causal connection yet exists between its acts and the harm complained of? Lawgivers were not wholly comfortable with what *they took to be* "proximate cause" requirements when they contemplated Love Canal and like situations. Could it be right that want of "proximate cause" ever negates the liability of those who had deposited barrels of chemicals in the New Jersey swamps? To assure that those who do *cause* harm will yet be tagged as the source of compensation therefor (even when "proximate cause" fails), must true causation requirements be overridden? Not at all! One of the unfortunate lessons of CERCLA is this: when lawgivers assault the imagined ill effects of a potential lack-of-"proximate cause" defense, they can slip thoughtlessly into denigration of true causation requirements.

Surveying the enactment of CERCLA, we encounter an overlooked need to recall that absence of "proximate cause" does not imply absence of causation-in-fact. "Proximate cause" has nothing to do with simple proximity, in space or in time, to the untoward event, even though this is exactly the way a jury (and many a judge) would understand those words. Rather, to say that "proximate cause" is lacking is to say that a particular defendant, doing what she did, knowing what she knew, could not have "foreseen" the consequences of an act which bears an undoubted causal relation to the untoward event, i.e., he who causes a "freak accident" is not liable therefore. And why not? Because — as "unforeseeablity" postulates (and the "act of God" defense also) — fear of liability (existing at the time of the now-apprehended causal act) could not have prevented the event by altering the defendant's conduct. *See generally* Clark, *Causation-in-Fact, supra* note 4, at 15-16 (discussing misinterpretations of "strict liability"); *id.* at 23-24 (discussing public and private socialization of pollution costs); *id.* at 25-27 (discussing proximate cause and proportional liability under CERCLA).

In a ruling that makes great sense, if we are prepared to face up to the implications of multiple and complicated causality, e.g., by ending the sway of "joint and several liability" in CERCLA, California's Supreme Court has embraced a "substantial factor" rather than a "but for" negligence test. This jettisons "proximate cause" entirely, but retains, of course, the bedrock requirement of causation-in-fact. Mitchell v. Gonzales, No. SO18678 (Cal. Sup. Ct. 1991), *discussed in* Amy Stevens & Junda Woo, *California Eases Standard on Negligence*, WALL ST. J., Dec. 12, 1991, at B3.

[6]Response costs are costs incurred responding to releases or threatened releases of hazardous substances into the environment. 42 U.S.C. §9607 (a)(4) (1988 & Supp. 1993). This section provides that parties that *could be responsible* for an actual or threatened release of hazardous substances into the environment *are responsible* for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release; and

Environmental Response, Compensation, and Liability Act of 1980.[7] Under CERCLA's no-cause liability scheme, the response costs meant to be met thereby are the costs of mitigating a release or threatened release of

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(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).

Id. For the full text of § 9607(a), see *infra* note 26 (designating the parties that are liable for the government's response costs).

This description of the import of section 107(a) of CERCLA — casting owners, operators, generators, and transporters in the potentially responsible party (PRP) category without inquiring into causation-in-fact, has acquired the judicial gloss that the affirmative defenses of section 107(b), mentioning causation in the way that they do, would impermissibly be made superfluous by any interpretation of section 107(a)(1) "as including a causation requirement." State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) See, however, for the previously neglected and now devalued view that CERCLA might once have been read otherwise, Clark, *Causation-in-Fact*, *supra* note 4, at 11-14 (discussing affirmative defenses to "strict liability" under CERCLA).

[7]Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-65 (1988 & Supp. 1993) [hereinafter CERCLA or Superfund]. Prior to 1980, the legal mechanisms in place to deal with the improper disposal of hazardous waste had seemingly failed. David J. Benson, *CERCLA Vicarious Liability After* United States v. Aceto Agricultural Chemical Corporation: *More Than a Common-Law Duty?*, 76 IOWA L. REV. 641 (1991). Due to this perceived failure, and in response to the increasing volume of hazardous waste generated by American industry, Congress, in 1980, enacted CERCLA. *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1462-65 (1986) [hereinafter *Developments*]. CERCLA was enacted to address the expanding threat existing at both abandoned and current waste disposal sites and to provide a comprehensive response strategy to hazardous-substance release. Rachel Giesbar, Note, *Foolish Consistency? Compliance with the National Contingency Plan Under CERCLA*, 70 TEX. L. REV. 1297, 1298 (1992); *accord* Eugene P. Brantly, Note, *Superfund Cost Recovery: May the Government Recover "All Costs" Incurred Under Response Contracts?*, 59 GEO. WASH. L. REV. 968, 968 (1991) (setting forth the purposes of CERCLA). *See* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986) ("Congress enacted CERCLA in 1980 to provide a comprehensive response to the problem of hazardous substance release.").

One of the cornerstones of CERCLA was the $1.6 billion "Superfund," created mainly to finance Environmental Protection Agency (EPA) cleanup of abandoned sites. *See* 42 U.S.C. §§ 9601-15. If PRPs can not be located and compelled, under sections 106 and 107 of CERCLA, to either respond to a release or threatened release of hazardous substances or to reimburse the EPA's response costs for such actions, 42 U.S.C.A. §§ 9606-9607, the Superfund provides the financial resources to meet such costs. Giesbar, *supra*, at 1299. In addition, the Superfund deals with instances in which an identified PRP is unwilling or unable to take responsive actions. *Id.*

hazardous substances from a waste-disposal facility.[8]

This genre of no-cause liability was first enunciated in *State of New York v. Shore Realty Corp.*[9] The Second Circuit's holding in *Shore Realty* rests in large part upon CERCLA's omission of any requirement that a defendant act negligently, with fault, or be exonerated if unable to foresee a freak event.[10] The court relied upon supposed congressional commands, moreover, in justifying a suspension of the requirement that a Superfund defendant must actually have caused a "threatened release" in order to be liable.[11] The court's justification leaves unsettled the question — of

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[8]*See* Philippe J. Kahn, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999, 2001, 2003 n.15 (1993) (commenting that the polestar of CERCLA is cost allocation, not cause or guilt); Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1470 (1989) (same).

[9]759 F.2d 1032, 1045 (2d Cir. 1985) (holding the defendant strictly liable for the release or threatened release of a hazardous substance without requiring the existence of a causal connection between the act of the defendant and the damage caused). In *Shore Realty*, the defendant, Shore, through Donald LeoGrande, its stockholder and officer, purchased land for condominium development, upon which was located an illegal hazardous-waste storage facility. *Id.* at 1038. Approximately 700,000 gallons of "hazardous substances" were located in various tanks, containers, and drums, the conditions of which were in varying states of disrepair. *Id.* Prior to Shore Realty's purchase of the land, an environmental consultant's detailed report warned of a costly environmental cleanup in excess of $1 million. *Id.* at 1038-39. Ignoring the warning of a possible costly cleanup, and failing to obtain a waiver of liability from the State Department of Environmental Conservation, Shore took title to the land. *Id.* Shore took few steps to remedy the deteriorating condition of the waste storage site. *Id.* at 1037. The State of New York, on February 29, 1984, brought suit in the United States District Court against Shore and LeoGrande for an injunction and damages pursuant to CERCLA. *Id.*

[10]The court in *Shore Realty* held that the Congress intended that responsible parties should be held strictly liable under CERCLA. *Id.* at 1042. Section 101(32) requires that "liability" under CERCLA is the same standard of liability provided under section 311 of the Clean Water Act, 33 U.S.C. § 1321. *Id.* Courts have consistently held this standard to be strict liability, *see, e.g.*, Stewart Transportation Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979), and that Congress intended to impose such liability. *Id. See* SENATE COMM. ON ENVTL. & PUB. WORKS, ENVTL. EMERGENCY RESPONSE ACT, 96th Cong., 2d Sess. 34 (1980).

[11]*Shore Realty*, 759 F.2d at 1044. The court in *Shore* stated that, under section 107(a), CERCLA holds four classes of persons liable, if "there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance," for "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan." *Id.* at 1043. "Removal" and "remedial" refer explicitly, the court explained, to actions "taken in the event of the threat of release of

constitutional dimensions — whether Congress may impose civil liability for environmental cleanup on parties who have never been identified as causal actors.

II. NO-FAULT LIABILITY UNDER RCRA

Well before CERCLA was enacted, Congress promulgated the Resource Conservation and Recovery Act,[12] a federal regulatory scheme covering the disposal, transportation, storage, and cleanup of solid and hazardous wastes.[13] Despite the comprehensiveness of this statute, the problems with

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hazardous substances." *Id.* at 1045. *See* 42 U.S.C. § 9601 (23), (24).

The court further noted that section 107(a)(1), which was read to hold both the owner and operator of a facility liable, imposes strict liability upon one who currently owns a facility where there exists a release or a threatened release of hazardous substance, "*without regard to causation.*" *Id.* at 1044 (emphasis added). The court added that several other courts had declined to interpret section 107(a) as imposing a causation requirement. *Id. See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 265 (3d Cir. 1992) (stating that legislative history indicated that Congress considered and rejected a requirement that a plaintiff prove that the defendant's waste had caused or augmented the release or the incurrence of response costs); United States v. Monsanto Co., 858 F.2d 160, 170 (4th Cir. 1988) (observing that the Congress deleted the causation requirement from CERCLA), *cert. denied*, 490 U.S. 1106 (1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152-54 (1st Cir. 1989) (stating that a plaintiff need not establish that a defendant's waste caused or contributed to response costs); United States v. Bliss, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987) ("[T]raditional tort notions, such as proximate cause, do not apply"). Applying its interpretation of liability without a causation requirement, the court held Shore and LeoGrande liable, pursuant to 42 U.S.C. § 9607, for the State's response costs. *Id.*

[12]Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976 & Supp. 1978) [hereinafter RCRA].

[13]*Developments, supra* note 7, at 1470-71. Prior to federal legislation regarding hazardous waste control, the common law guarded this area. *Id.* at 1467. Through common-law actions of nuisance, trespass, and negligence, plaintiffs brought actions against polluters. *Id.* These actions, however, proved ineffective to compensate victims of improperly disposed hazardous waste; also, to promote proper hazardous-waste management. *Id.*

Early attempts to enhance the protection of the environment, fueled by the increasing criticism of common-law remedies, focused initially on water pollution. *Id.* at 1469. *See, e.g.*, Note, *Rights and Remedies in the Law of Stream Pollution*, 35 VA. L. REV. 774 (1949). By the 1960's and 1970's, as the risks from improper disposal of hazardous substances became apparent, the legislature acted. *Id.* at 1470. The Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j (1982), was Congress' first attempt in addressing the problem. *Id.* This Act quickly proved insufficient in regard to hazardous-waste disposal since it primarily focused on improving the public drinking water system, not on the harm caused by contaminated water, other than from ingestion. *Id.*

The hazardous-waste problem was finally addressed by Congress in 1976 through

RCRA soon became apparent after its failure to provide for the adequate cleanup of toxic-waste sites such as Love Canal.[14] RCRA's elaborate record-keeping requirements and causation-based remedies limited its applicability to waste-disposal facilities that were still being operated.[15]

Concerned with the felt shortcomings of RCRA,[16] Congress soon enacted CERCLA to expand upon its predecessor.[17] Another justification for this enhancement of RCRA was a felt need to regulate the cleanup of,

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RCRA. *Id.* While RCRA provided a "cradle-to-grave" tracking system of hazardous substances from production to disposal, it failed to address the problems of hazardous wastes improperly disposed of prior to the enactment of the statute. *Id.* at 1471.

[14]Benson, *supra* note 7, at 641. Love Canal is a small town, located in the State of New York where, in 1980, carcinogenic chemicals improperly deposited for decades began to seep out of the ground and into the homes of the town's residents. *Id.* at 641 n.3. This seepage, considered responsible for the town's high rate of health problems, including birth defects, led to the declaration of a state of emergency at Love Canal. *Id.* One commentator wrote that the issue of hazardous-waste disposal generated public and media attention and compelled Congress to take action. Giesbar, *supra* note 7, at 1297. *See* S. REP. NO. 848, *supra* note 10, 96th Cong., 2d Sess., at 8 (stating that Love Canal "paints the clearest picture of just how serious the problems involving toxic chemicals can be"). The Love Canal incident is quite often regarded as the catalyst for the enactment of CERCLA. *See Developments*, *supra* note 7, at 1471; *Love Canal, U.S.A.*, N.Y. TIMES MAGAZINE, Jan. 21, 1991, at 23 (indicating that the Love Canal incident was part of the record of the debates regarding CERCLA).

By 1980 it was felt that RCRA was by no means suitable to deal with the problems existing at Love Canal and other sites where waste had been disposed of improperly prior to 1976. *Developments*, *supra* note 7, at 1471. *See* Amoco Oil v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) (stating that CERCLA was enacted to "fill the gaps . . . left in the RCRA statute"); Channel Master Satellite, Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp. 373, 381 (E.D.N.C. 1990) (same); Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (describing RCRA as inadequate to regulate the cleanup of hazardous-waste sites and stating that CERCLA picked up where RCRA stopped).

[15]*See* William W. Balcke, Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 123 (1988).

[16]One of the shortcomings that generated particular concern in Congress was RCRA's inability to regulate "midnight dumpers." Giesbar, *supra* note 7, at 1299 (stating that the legislative history reveals Congress' concern with the problems of imposing liability for response costs for cleanup of sites that were created by polluters who dumped in the middle of the night and could not be located). *See* 126 CONG. REC. H26,767 (daily ed. Dec. 3, 1980) (statement of Rep. Stockman) (expressing the conviction that, if inconsistencies exist in state laws, waste will be "moved at midnight" across state lines).

[17]*See* 42 U.S.C.A. §§ 9601-65.

and impose liability for, "orphaned dumpsites,"[18] respecting which there existed no identifiable parties to blame for the resulting pollution.[19] Consequently, CERCLA imposed upon the government the burden of financing the "response costs"[20] to forestall a "threatened release"[21] of a "hazardous substance"[22] from such orphaned sites — unless the polluters are subsequently identified.[23]

One way in which Congress could have financed the cleanup of orphaned dumpsites was through the imposition of a tax. Such a method is not very appealing — if CERCLA's "response cost" exactions be described as a tax[24] — given that this "tax" imposes joint and several liability only on any Potentially Responsible Parties[25] still solvent, in a measure that

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[18]"Orphaned dumpsites" are hazardous-waste disposal sites which have been abandoned by the individuals responsible for disposal of waste at that site. *See* David T. Moldenhauer, Note, *The Case Against Waste in Private Liability Actions Under CERCLA*, 60 N.Y.U. L. REV. 888, 896 (citing 126 CONG. REC. H30,985, H31,976 (daily ed. Dec. 3, 1980) ("[T]hese abandoned orphaned collections of unlabeled crud are not going to go away by themselves. They will not clear themselves up. All they will do is seep slowly into the rest of our water supply while we go on recess.") (statement of Rep. Martin)); Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191, 1231-32 (1993) (stating that "orphaned dumpsite" refers to sites where the entity that had caused or contributed to hazardous-waste pollution in the past is insolvent or otherwise unavailable for suit).

[19]42 U.S.C.A. § 9604(a). This section authorizes the President to commence cleanup pursuant to a "National Contingency Plan," *see id.* at § 9605, once the President determines hazardous substances have been unlawfully released into the environment. *Id.* § 9604. Once cleanup procedures commence, CERCLA then authorizes the President to conduct investigations to determine the identity of parties responsible for the unlawful release. *Id.* at § 9604(b). Section 9607 established the parameters of potentially liable parties and the extent to which those parties are liable. *See generally id.* at § 9607.

[20]See *supra* note 6 for a definition of "response costs."

[21]CERCLA does not define the term "threatened release." A release, however, constitutes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." 42 U.S.C.A. § 9601(1)(22).

[22]For a complete definition of "hazardous substance," see 42 U.S.C.A. § 9601(14).

[23]*See* 42 U.S.C.A. §§ 9604, 9607.

[24]*See infra* notes 76-94 and accompanying text.

[25]Hereinafter PRP.

accords with their means, not their responsibility for pollution.[26] It is likely that CERCLA's enactment was possible only upon the superficial understanding (incorrect, as it turns out) that the Superfund statute imposed a conventional civil liability on real polluters.

As previously discussed, however, one of CERCLA's principal functions in the scheme of environmental policing is to regulate the cleanup of sites for which no responsible party can be identified.[27] Assuming that

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[26]PRPs are defined at 42 U.S.C. § 9607(a), which provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
> (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
> (2) any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such persons, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —
> (A) all costs of removal or remedial action incurred by United States Government or a State not inconsistent with the national contingency plan;
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss from such release; and
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).

42 U.S.C. § 9607(a). Specifications (4)(A)-(D) represent the response costs for which PRPs will be held liable. For a discussion of response costs, see *supra* note 6 and accompanying text.

[27]*See* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (holding that CERCLA imposes liability on any entity which may have had any involvement with an unlawful actual or threatened release of hazardous substance into the environment). See *supra* notes 9-11 and accompanying text for a further discussion of *Shore Realty*. *See also* Weber, *supra* note 8, at 1470 (observing that CERCLA liability falls upon potentially related parties, regardless of whether the party was definitely involved with an unlawful release of hazardous substances into the environment).

CERCLA may be construed to regulate RCRA sites now extant as well as defunct dumpsites, the question arises whether such a statutory expansion was intended to impose no-cause liabilities under CERCLA on the identifiable operators of "pedigreed"[28] RCRA dumpsites. It is believed not. RCRA functions on the premise that entities engaged in the ongoing operation of hazardous-waste dumpsites are liable for the damage the sites have inflicted upon the environment, but only for the damage the parties have truly caused.[29] Pursuant to RCRA, a working operator of a hazardous-waste dumpsite accepted ongoing responsibility under a *no-fault* liability scheme, not under CERCLA's *no-cause* liability provisions.[30]

THE ROHM & HAAS DUMPSITES

In *United States v. Rohm & Haas Co.*, the Rohm & Haas Company disposed of chemical and general waste between 1917 and 1975[31] at the

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[28]"Pedigreed" RCRA dumpsites refers to those dumpsites which have obtained operating permits to dispose of hazardous substances pursuant to RCRA. *See* RCRA, 42 U.S.C. § 6925; *see also supra* note 15 and accompanying text.

[29]RCRA provides that the EPA must identify and list hazardous wastes pursuant to 42 U.S.C.A. § 6921. *Developments, supra* note 7, at 1471. Under § 6922, generators of listed hazardous wastes must provide records identifying the quantities of such wastes generated, and must use appropriate labeled containers when storing, transporting or disposing of such wastes. *Id.* Additionally, listed wastes must only be stored or disposed at sites that satisfy relevant EPA regulations pursuant to § 6924, and sites which have obtained special operating permits pursuant to § 6925. *Id.* RCRA, under § 6922(4), requires generators to inform storers, transporters, and disposers of the nature of their wastes. *Id.* In addition, pursuant to §§ 6922(6), 6923(a)(3), RCRA requires that generators and transporters report to state and federal agents the nature and quantities of waste which is generated, transported, or disposed. *Id.* RCRA, under § 6928, provides both civil and criminal penalties for those individuals who *knowingly fail* to comply with the Act, including but not limited to transporting hazardous wastes to a facility not in possession of a permit, or disposing of hazardous waste without a permit. 42 U.S.C.A. § 6928. *See Developments, supra* note 7, at 1472-73 n.34.

[30]See 42 U.S.C.A. § 6928, discussed at *supra* note 29, for further elaboration.

[31]From 1917 to 1975, Rohm & Haas Company, Inc. (Rohm & Haas) owned and operated a landfill site primarily for the purpose of disposing of all types of waste produced by their two chemical and plastics manufacturing plants located adjacent to the site. United States v. Rohm & Haas Co., 790 F. Supp. 1255, 1257 (E.D. Pa. 1992). Rohm & Haas, in 1968 and 1971, sold a portion of the site to a company known as Chemical Properties, Inc. *Id.* Subsequent to 1970, a tank-truck hauling facility was operated at a portion of the site owned by Chemical Properties, which included maintenance, dispatch, and cleaning of the trucks. *Id.*

Bristol Township dumpsite north of Philadelphia.[32] Still governed under the regulatory scheme of RCRA, Rohm & Haas, in an attempt to discharge its cleanup obligations, revealed to Congress the pollution which had accrued at the dumpsite before the company ceased to use it.[33] In response, the Environmental Protection Agency ("EPA") deliberately and willingly opted to oversee the Bristol Township site under RCRA rather than CERCLA.[34] Surprisingly, this choice led the United States, in early 1992, to sue Rohm & Haas, representing the first-ever attempt to make industry pay the EPA's overhead costs in such cases.[35] In justifying the validity of its claim against the company, the United States asserted that CERCLA entitled the government to recoup overhead costs, even though RCRA did not.[36]

The Third Circuit held that the EPA, by invoking CERCLA through RCRA after the fact, may indeed recover its overhead and administrative costs.[37] Nevertheless, a close reading of both CERCLA and RCRA

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[32]In 1979, Rohm & Haas brought to the attention of the EPA the fact that it had disposed of hazardous wastes at the site. *Id.* Two years later, Rohm & Haas formally informed the EPA that approximately 309,000 tons of waste had been disposed of at the site. *Id.* The disposed waste included approximately 750 fifty-five-gallon drums of laboratory research wastes, which fell under the category of hazardous substances pursuant to 42 U.S.C. § 9601(14). *Id.* Subsequently, a study of the site by an environmental consulting firm determined the existence of numerous hazardous substances on the property owned by Rohm & Haas and Chemical Properties. *Id.* at 1257-58. In an attempt to mitigate the damages, Rohm & Haas removed some 11,700 cubic yards of hazardous waste from the site between October 1986 and July 1987. *Id.* at 1258.

[33]The EPA informed Rohm & Haas that the site cleanup would be managed under RCRA, given its willingness to investigate, remediate, and pay for the cleanup of the site. *Id.*

[34]*Id.* Facilities subject to CERCLA and RCRA are managed under RCRA except in the case of a bankrupt owner or operator or one unwilling to take corrective action. *Id.* *See* EPA, RCRA/NPL Listing Policy, 51 FED. REG. 21054, 21057-59 (1986).

[35]The United States sought recovery for expenses incurred by the EPA for contractors involved in sampling and field investigation, the EPA's payroll, travel and indirect costs, attorneys' fees, and interest. *Id.* at 1259.

[36]*Id.* at 1261.

[37]*Id.* at 1265. The court ruled: (1) Congress intended that CERCLA be cumulative and not an alternative to RCRA, i.e., that CERCLA could be implemented even though the site had been managed under RCRA; (2) that consent orders are not covenants not to release, sue, or waive limitations of any right, remedy, power and/or authority, which the EPA possesses under CERCLA, RCRA, or any other statute, regulation or common law of the United States; (3) indirect response costs or overhead costs are collectible under CERCLA; (4) as an owner of part of the landfill site, Chemical Properties Inc. was liable and was not entitled to invoke

indicates that overhead and administrative costs can hardly qualify as response costs needfully incurred to forestall a threatened release of a hazardous substance from an abandoned dumpsite.[38] RCRA recoveries are more representative of actual damage costs and are typically recovered on a more timely basis. As no-fault liability does in the case of RCRA, more generalized liability for non-"negligent" *causal* acts may produce greater net compensation for victims than liability based on fault or negligence ever did.[39]

III. NO-CAUSE LIABILITY UNDER CERCLA

In contrast to RCRA, many commentators have asserted that CERCLA's no-cause liability has failed to produce greater net compensation for anyone other than lawyers.[40] The Superfund statute has been interpreted by courts to provide that each party which has or had any connection whatsoever to a hazardous-waste disposal site (before or after the act of disposal) might bear a "joint and several" liability, the origins of which could extend back indefinitely.[41] In light of this statutory provision, many had assumed that

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any of the affirmative defenses provided by CERCLA; and (5) the EPA claim was not barred by a three-year statute of limitations provided by CERCLA. *Id.* The United States was awarded response costs under CERCLA in the amount of $401,348.78 and other response costs incurred after the filing of the suit, such as attorneys' fees and any future legal costs likely to arise. *Id.*

[38]*See* 42 U.S.C.A. § 6928. In fact, any indication that penalties and fees may be collected for administrative costs incurred by the government for RCRA violations are conspicuously absent from the statute. *See id.*

[39]*See generally* PROSSER & KEETON, *supra* note 1, at 534-38 (discussing the benefits of strict liability); *see also* Kahn, *supra* note 8, at 2002 n.15.

[40]Jonathan M. Moses, *Insurer Payouts over Superfund Flow to Lawyers*, WALL ST. J., April 24, 1992, at B1. As *The Wall Street Journal* reported in 1992, a seminal study by the Rand Institute for Civil Justice confirmed what cognoscenti have long suspected: in connection with the Superfund "cleanup," only the lawyers have! Rand's calculation was that, out of the $1.3 billion so spent by insurance companies between 1986 and 1989, 9% went for internal administrative cost, 79% was paid to lawyers, but only 12% went to cover policyholders' Superfund liabilities. *See id.*

[41]*See* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (1985) (discussing Congress' intent to hold PRPs strictly liable).

Interestingly, in *B.F. Goodrich Co. v. Murtha*, Judge Peter C. Dorsey of the District of Connecticut determined that municipalities may be exempted from reimbursement suits by polluting entities if the entities can not establish that the municipalities, in fact, contributed harmful toxins to the dumpsite. George Judson, *Towns Escape Cleanup Costs at Waste Sites:*

a PRP who declined to settle with the government's enforcer would automatically be forced to pay the outstanding balance on whatever cleanup bill the EPA had accrued.[42] In an attempt to alleviate these burdens, however, the Third Circuit in *United States v. Alcan*[43] required a factual

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Judge Rules Companies Can't Spread the Blame, N.Y. TIMES, Dec. 24, 1993, at B1. In *Murtha*, the EPA charged B.F. Goodrich, Dow Corning, and Uniroyal with cleanup costs after hazardous substances they disposed of in the Beacon Heights and Beacon Falls dumpsites were released into the surrounding environment. *See id.* at B5. The corporations then sued Murtha, the landfills' operator, who in turn sued twenty-three municipalities that also utilized the landfills in question, arguing that the municipalities produced many of the toxins that were present in the landfills and released into the surrounding environs. *Id.*

Originally, the municipalities had argued that CERCLA exempted municipalities, but this contention was rejected by the Second Circuit in 1992. *See* B.F. Goodrich Co. v. Murtha, 815 F.2d 1192 (2d Cir. 1992). On remand to the District of Connecticut, Judge Dorsey determined that the corporations could not join more than 1,000 homeowners and small businesses because the corporations had not proven that the local residents and businesses had actually contributed to the toxic waste in the landfills. B.F. Goodrich Co. v. Murtha, 754 F. Supp. 968 (D. Conn. 1993). *See* Judson, *supra*, at B5. Similarly, in the latest round of litigation, the Judge ruled that, although the municipalities may have produced toxins identified in the landfills, the corporations had not proven that the municipalities had actually disposed of the toxins at the dumpsites. *Id.*

John O'Leary, a lawyer representing a group of corporations previously sued by the EPA for Superfund violations, commented that Judge Dorsey's ruling runs counter to Second Circuit decisions that have ruled municipalities not exempt from CERCLA. *Id. Murtha* does not square with precedent in either *Shore Realty* or United States v. Alcan, 964 F.2d 252 (3d Cir. 1992). In those presumably controlling cases, the causal relation between a responsible party and a hazardous-substance release was not examined because, under judge-made Superfund law, such a causal relation is irrelevant. *See* Ohio v. Dep't of the Interior, 880 F.2d 432, 470-72 (D.C. Cir. 1989). See also *Shore Realty*, 759 F.2d at 1044, discussed at *supra* notes 9-11; *Alcan*, 964 F.2d at 252, discussed at *infra* notes 43-44. Unless the Second Circuit and Judge Dorsey are prepared to revisit and revise Superfund law in a wholesale manner, attorney O'Leary could confidently predict, as he did, that Judge Dorsey's decision would be overturned on appeal. Judson, *supra*, at B5.

[42]*See* 42 U.S.C.A. § 9622(b)(1). *See also* Balcke, *supra* note 15, at 137-38; Randall J. Burke, *Much Ado About Lending: Continuing Vitality of the* Fleet Factors *Decision*, 80 GEO. L.J. 809, 810 (1992) (discussing the negative effects of court decisions which extend CERCLA liability to deep pocket lenders).

[43]964 F.2d 252 (3d Cir. 1992). Alcan Aluminum Corporation ("Alcan"), through contracts with a waste transport company, disposed of 32,500-37,500 gallons of liquid waste into the Butler Tunnel site, which fed directly into the Susquehanna River in Pittston, Pennsylvania. *Id.* at 255-56. The liquid waste was produced through Alcan's manufacturing process, which uses, as lubrication, a water mineral oil emulsion containing extremely *low* levels of environmentally hazardous metallic substances. *Id.* at 256. Subsequent to Alcan's disposal of the waste, some 100,000 gallons of water containing hazardous substances were released from Butler Tunnel into the Susquehanna River. *Id.* As a result, the EPA incurred

examination of the possibility of dividing the cleanup responsibilities among all defendants involved.[44] This requirement, set forth by the court in *Alcan,* has been considered by commentators to be more flexible than the doctrine of joint and several no-cause liability and figures among the predicates and justifications for CERCLA's needed reform.[45]

The court in *Shore Realty* opined that Congress may have considered its joint and several liability scheme to be usefully imposed upon any identifiable PRPs "without regard to causation."[46] The court's point can be thought compelling respecting "response costs" associated with *threatened* release from a hazardous-waste facility.[47] In contrast, after Congress enacted the

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response costs due to the release and threatened release of the hazardous-substances disposed of at the site. *Id.*

The Government proceeded to file a complaint against twenty defendants, of which Alcan was one. *Id.* at 257. The Government was seeking the recovery of its response costs. *Id.* Nineteen of the defendants settled; the Government then moved for summary judgment against the twentieth, Alcan, to collect the remainder of its response costs. *Id.* The district court held Alcan jointly and severally liable for removal costs since Alcan's waste, though of extremely minimal quantity, did contain hazardous substances and was present at a site from which a release occurred. *Id.* In light of the court's decision, Alcan appealed. *Id.*

[44]*Id.* at 269. For a further discussion of the facts in *Alcan*, see Wade Lambert & Jonathan M. Moses, *Law*, WALL ST. J., May 20, 1992, at B5. On appeal, the court determined that the district court was correct in determining that "hazardous substances" as defined by CERCLA does *not* include a threshold requirement. *Alcan*, 964 F.2d at 259-61. The court also determined that a CERCLA plaintiff does *not* need to establish a causal connection between the defendant's hazardous wastes and a release or incurrence of response costs. *Id.* at 264-66. Additionally, the court held that Alcan's emulsion did not fall into the petroleum exclusion pursuant to § 9061(14). *Id.* at 266-67.

The court, however, limited the broad liability in Superfund cases by ordering the lower court to conduct a hearing to determine divisibility of harm caused to the Susquehanna River. *Id.* at 269. *See* Lambert & Moses, *supra*, at B5. The court stressed that if Alcan can establish that the damage is capable of being reasonably apportioned, then Alcan should only be liable for the portion of harm which it contributed. *Id.* at 271. The court additionally held that if Alcan establishes that its emulsion, added to other hazardous wastes, could not have caused or contributed to the release or the incurrence of response costs, then Alcan should not be required to pay any of the costs. *Id.* *See* Thomas R. Mounteer, *Proposed European Community Directive for Damage to the Environment Caused by Waste*, 23 ENVTL. L. 107, 125-26 (1993) (discussing the analysis in *Alcan* as giving hope to parties seeking to argue the divisibility of harm and a liability defense in CERCLA).

[45]*See* Editorial, *Time to Reform Superfund*, WASH. POST, Sept. 2, 1993, at A26.

[46]759 F.2d. 1032, 1044 (2d Cir. 1985).

[47]*Id.* at 1041-42.

Superfund Amendments and Reauthorization Act of 1986,[48] it has become strongly arguable that CERCLA liability for "natural resource damages" is once again premised on a plaintiff's showing of causation-in-fact ascribable to a defendant.[49] Moreover, this is likely true even if liability for "response costs" continues to exist as a species of no-cause liability. In either event exoneration was made almost impossibly difficult, but when the stakes were set as high as CERCLA set them a do-or-die parsing of the Superfund statute (by both the aggressors and the defenders) became inevitable in every major case.

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[48]Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675 (1988) [hereinafter SARA]. SARA expanded Superfund coverage for environmental emergencies. Pub. L. No. 99-499, 100 Stat. 1619 (1986) (codified at 42 U.S.C. 9604 (1986). For commentary critical of SARA, see Weber, *supra* note 8, at 1470-71 (arguing that CERCLA's expanded liability scheme under SARA entraps fault-free companies into paying for cleanup costs caused by other entities).

[49]*See generally* Clark, *supra* note 4. "Natural resource damages" are costs arising from CERCLA-related damages to natural resources that polluters must pay to federal or state governments, or Native American tribes, depending upon which entity owns the property. *See* 42 U.S.C.A. § 9607(f)(1). The President, governor of the state or the Native American tribal leader respecting the territory in which the release occurs acts as trustee for the compensation received from the polluting entity. *See* 42 U.S.C.A. § 9607(f)(1)(A)-(C).

CERCLA imposes liability upon defendants who fail to demonstrate by a preponderance of the evidence that they did not cause a release of a contaminant into the environment. 42 U.S.C.A. § 9607(b). The defendant is limited to the defenses that the damages were caused solely by:

> (b) . . .
> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party, other than an employee or agent of the defendant, or [a party in a contractual relationship with the defendant] if the defendant establishes by a preponderance of the evidence that (a) [the defendant] exercised due care with respect to the hazardous substance concerned, taking into consideration the character of such hazardous substance, in light of all relevant facts and circumstances, and (b) [the defendant] took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions, or;
> (4) any combination of the foregoing paragraphs.

42 U.S.C.A. § 9607(b). Once liability is found, damages are assessed by the trustee for the entity receiving the compensatory damages. 42 U.S.C.A. § 9607(f)(2)(A). The statute imposes a rebuttable presumption in favor of the trustee's assessment. 42 U.S.C.A. § 9607(f)(2)(C).

THE ORIGINS OF SUPERFUND NO-CAUSE LIABILITY

In December 1980, the lame-duck 96th Congress, anticipating the inauguration of President Ronald Reagan and Republican control of the United States Senate, focused upon regulating the problematic orphaned hazardous-waste dumps.[50] Congress identified four categories of persons (PRPs) with specified relationships to a waste-disposal facility[51] who were to be liable.[52] To establish joint and several liability, the EPA or the complainant must prove only that a firm or individual falls within one or another of the PRP categories, not that any defendant-PRP caused the complained-of damage.[53]

Such liability attaches to a Category Two PRP if it is determined that the PRP occupied PRP status "at a time of disposal of any hazardous substance."[54] A Category One PRP, on the other hand, bears liability whether or not the PRP owned or operated a vessel of facility "at the time of disposal of any hazardous substance."[55] The plain text of CERCLA most reasonably bears the interpretation that one must be an owner-operator to fall into Category One.[56] Yet, the common judicial interpretation of CERCLA section 107(a)[57] imposes liability upon any owner *or* operator rather than

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[50]*See generally* 126 CONG. REC. H31, 973 (daily ed. Dec. 3, 1980).

[51]42 U.S.C.A. § 9607(a)(1)-(4). Category One PRPs are (as the statute is now read) current owners or operators of facilities manufacturing or housing hazardous substances or vessels that transport those substances. *Id.* § 9607(a)(1). A Category Two PRP is one who was an owner or operator of a facility or vessel at the time the facility or vessel unlawfully released hazardous substances into the environment. *Id.* § 9607(a)(2). A Category Three PRP is any person or entity that, by contract or agreement with a Category One or Two PRP, arranged for the disposal, treatment, or transportation of a hazardous substance. *Id.* § 9607(a)(3). A Category Four PRP is a transporter of hazardous substances. *Id.* § 9607(a)(4).

[52]42 U.S.C. § 9607(a).

[53]42 U.S.C. § 9607(b). For the presently definitive explication of the notion that Superfund "response cost" liability is a species of no-cause liability, see *Shore Realty*, 759 F.2d at 1044-45, discussed *supra* notes 9-11 and accompanying text.

[54]42 U.S.C.A. § 9607(a)(2).

[55]42 U.S.C.A. § 9607(a)(1).

[56]*See id.*

[57]See *supra* note 26 for the full text of 42 U.S.C.A. § 9607(a).

"owner and operator."[58]

Pursuant to the courts' interpretation of the statute, liability may be imposed on a successor landowner or mortgage lender who was never an operator and who had no connection whatsoever with the property when the pollution-generating acts took place.[59] Such a reading of CERCLA, advanced in *Shore Realty*, had a pervasively chilling effect on non-pollution-causing PRPs who faced later EPA demands for unconditional surrender.[60] *Shore Realty* and another case decided five years later, *United States v. Fleet Factors Corp.*,[61] provided the impetus towards ratification of the EPA's attempt to create no-cause civil liability. In *Fleet Factors*, the Eleventh Circuit held that a mortgage lender on the afflicted property at issue will be categorized as a PRP if it has a mere "capacity to influence the [operating] corporation's treatment of hazardous wastes."[62]

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[58]42 U.S.C. § 9607(a)(1).

[59]*See generally* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1043-45 (2d Cir. 1985); United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1990); *see also* Mounteer, *supra* note 44, at 128-29 (stating that foreclosing lenders may be liable for cleanup costs if they had taken part in the financial management of a facility to an extent indicating an ability to influence the facility's treatment of hazardous waste).

[60]*See* Balcke, *supra* note 15, at 142.

[61]901 F.2d 1550 (11th Cir. 1990). In 1972, upon the declaration of bankruptcy, pursuant to Chapter 7, of Swainsboro Print Works ("SPW"), Fleet Factors Corporation ("Fleet") foreclosed on its secured interest in the inventory and equipment of SPW. *Id.* at 1552-53. Subsequent to an auction of some of the collateral, the remaining equipment was removed pursuant to an agreement between Fleet and Nix Riggers ("Nix"). *Id.* at 1553. Nix was to receive the equipment after leaving the facility "broom clean." *Id.*

Upon the discovery of toxic chemicals and asbestos in the facility, and after incurring $400,000 to respond to the environmental threat, the ("EPA") sued the officers of SPW and Fleet for recovery of the cleanup costs. *Id.* Motions for summary judgment were denied and Fleet appealed. *Id.*

[62]*Id.* at 1557. The court first interpreted 42 U.S.C. § 9607(a)(1), which states that the present "owner *and* operator" of a facility is liable for costs incurred responding to an environmental and/or health hazard caused by improperly disposed waste in that facility, to hold the owner *or* operator of the facility liable when a lawsuit is filed. *Id.* at 1554. The court, however, did not hold Fleet liable under this section, because Fleet did not own, operate or control the premises immediately before the county took over the facility. *Id.* at 1555.

The court, pursuant to 42 U.S.C. § 9607(a)(2), ultimately held Fleet liable for owning or operating the facility at the time disposal of hazardous waste occurred. *Id.* at 1556. Additionally, the court determined that Fleet did not fall into the secured creditors' exemption

IV. WHEREIN MIGHT THE CERCLA LIABILITY SCHEME BE UNCONSTITUTIONAL?

If CERCLA's scheme of "picking the deepest pocket" is constitutionally valid, all PRPs must then bear joint and several no-cause liability under CERCLA for "all costs of removal or remedial action . . . not inconsistent"[63] with EPA's overall Superfund cleanup plan. This scheme stands in stark contrast to the SARA-restored causation requirement for actions seeking recovery of "natural resource damages."

Federal courts have long affirmed the notion that Superfund civil liabilities need not flow from a trial court's adjudication of alleged causal connections.[64] To the extent Congress mandates the federal courts not to require proof of causation under Superfund, this notion suggests that the statute has imposed either: (1) a due-process-violating "irrebuttable presumption"; (2) a tax, which may be imposed on successor property owners, but, contrary to present practice, may not be imposed on a PRP's general commercial liability insurers; or (3) an unconstitutional attainder.

A. Irrebuttable Presumptions and Substantive Due Process

During the 1920's, notions of substantive due process dominated the approach of the American judiciary to economic regulation.[65] This

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under 42 U.S.C. § 9601(20)(A). *Id.* at 1559-60. Thus, the court did not exclude Fleet from liability as a mere holder of indicia of ownership to protect its security interest, without sharing management of the facility. *Id.* at 1557-58. The court concluded that Fleet participated in the financial management of the facility to such a degree that it could be inferred that Fleet could influence decisions regarding hazardous-waste disposal. *Id.* at 1558. This decision effectively narrowed the secured creditors exemption in CERCLA from the previous requirement of day-to-day participation in managerial affairs. *See id.* at 1557-58. The court, in accordance with its holding, determined that Fleet's motion for summary judgment was properly denied. *Id.* at 1560.

[63]42 U.S.C. § 9607(a).

[64]United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988) (holding that, once the requisite nexus to the hazardous-waste site had been established, each PRP was strictly liable unless it could prove that the threat of release or actual release was caused solely by unrelated events or persons), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) (holding that, where the defendants caused an indivisible harm, each defendant is subject to liability for the total harm).

[65]*See* Jay Baking Co. v. Bryan, 264 U.S. 504 (1924) (invalidating a state law setting the weight of bread loaves); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down a state law that set minimum wages for women); Coppage v. Kansas, 236 U.S. 1 (1915)

domination, rightly or wrongly, has come to an end.[66]

Yet, in *Vlandis v. Kline*,[67] the Supreme Court of the United States rejected as constitutionally invalid a Connecticut statute carrying an irrebuttable presumption of non-residence to justify the denial of "in-state" tuition rates to any non-married college applicant who, at any time within the prior year, had resided out-of-state.[68] The Court noted that the State statute had foreclosed any examination of the circumstances in any individual case.[69] Accordingly, the Court concluded that Connecticut's statutory method of classifying persons as non-residents based on a permanent irrebuttable presumption was violative of due process.[70]

Many commentators have criticized the Court's holding in *Vlandis*, asserting that the "irrebuttable presumptions" of the statutory scheme were

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(nullifying a state law that proscribed "yellow dog" contracts because the law impaired the rights of employers and employees to enter into contracts); Lochner v. New York, 198 U.S. 45 (1905) (invalidating laws setting maximum work hours for bakers because the laws interfered with the right of employers and employees to enter into contracts). See generally Anthony S. McCaskey, Comment, *Thesis and Antithesis of Liberty of Contract: Excess in* Lochner *and* Johnson Controls, 3 SETON HALL CONST. L.J. 409 (1993), for an exhaustive discussion of substantive due process and liberty of contract.

[66]*See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731 (1965) (refusing to interfere with a Kansas statute prohibiting the business of "debt adjusting" except as an incident to "the lawful practice of law"). In so holding, the Court simply washed its hands of ideological choices: "[w]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours." *Id.* at 731-32.

[67]412 U.S. 441 (1973).

[68]*Id.* This case involved the State's statutory definition of non-residents for the purpose of establishing whether the student will be charged the higher out-of-state tuition rate. *Id.* at 442.

[69]*Id.* at 445-46.

[70]*Id.* at 446. The Court stated that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* *See* Heiner v. Donovan, 285 U.S. 312, 329 (1932) (invalidating a federal statute which created an irrebuttable presumption that gifts given within two years before the donor's death were made in contemplation of death because "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."). *See also* Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating statute creating irrebuttable presumption in favor of mothers during child custody proceedings because it denied fathers due process); Bell v. Burson, 402 U.S. 535 (1971) (holding that a Georgia statute suspending without a hearing uninsured motorist drivers was inconsistent with due process).

"nothing more than [legitimate] statutory classifications."[71] CERCLA created such a permanent irrebuttable presumption when it listed the PRPs subjected to no-cause civil liability.[72] If no other constitutional provisions can be found to inhibit the imposition of joint and several "polluter" liability on a sizeable number of Superfund PRPs who are not even alleged to have caused anything, the time has surely come to ask hard questions about "statutory classifications," perhaps even to contemplate the resurrection of substantive due process.[73] But this proposition, important as it may yet become, is not essayed here. For the contemporary Supreme Court, substantive due process on economic matters is not a viable argument.[74] Observe, for example, the vigor with which Chief Justice Rehnquist applauded the historic demise of concepts of economic substantive due process, even as *Vlandis v. Kline* became, and presumably remains, good law.[75]

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[71]Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). "There appears to be no justification for the irrebuttable presumption doctrine. The Court's analysis . . . fail[s] to recognize that irrebuttable presumptions are nothing more than statutory classifications." *Id.* at 1556.

[72]*See id. See also supra* note 26 and accompanying text.

[73]Or perhaps only its resuscitation; United States v. Carolene Products, 304 U.S. 144, 152 (1938), had kept alive this convoluted concession respecting the need to allow those who challenged the rationality of legislation to make their case — in judicial proceedings: "[A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis."

A question put by Robert G. McCloskey is still relevant:

> Why did the Court move all the way from the inflexible negativism of the old majority to the all-out tolerance of the new? Why did it not establish a halfway house between the extremes, retaining a measure of control over economic legislation but exercising that control with discrimination and self-restraint?

Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 40-41 (1962).

[74]*See generally* McCaskey, *supra* note 65. *See also* DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 357-62 (1989); GERALD GUNTHER, CONSTITUTIONAL LAW 690-705 (9th ed. 1975).

[75]*Vlandis*, 412 U.S. at 469 (Rehnquist, J., dissenting). "The majority's reliance on cases such as Heiner v. Donovan, 285 U.S. 312 (1932), harkens back to a day when the principles of substantive due process had reached their zenith in this Court. Later and sounder cases thoroughly repudiated these principles in larger part." *Id.* at 467-68.

B. Taxes, Congress, and the Courts

The Constitution empowers Congress to impose taxes[76] — Congress is given the authority to establish taxes, and they are not reviewable by the judiciary unless those taxes violate some other provision of the Constitution.[77] With this bedrock proposition in mind, can explicit no-cause Superfund civil liabilities legitimately be characterized as taxes?

Surely not, to the extent that general commercial liability insurers of PRPs are expected to bear such "liabilities" imposed on PRPs. (Insurers have had to pay surprising indemnities, but can not plausibly be asked to pay taxes imposed on their insureds.) In addition, CERCLA allows "response costs" to be recovered directly from PRPs by private plaintiffs.[78] These payments certainly cannot be classified as taxes.

A commonplace observation, that Congress may tax while the courts may not, identifies the single most significant external constraint on the power of Congress to exact revenues. Congress is empowered to tax, but generally this power may only be exercised prospectively. The courts, on the other hand, have the ability to levy judgments and fines, which by their nature are retrospective.[79] To this extent, courts differ from legislatures.[80]

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[76]U.S. Const. art. I, § 8.

[77]The first constitutional requirement is that direct taxes (originally, taxes on land and slaves), potentially inimical to the southern states, had to be apportioned as representation in the House of Representatives was apportioned. *See* Adrienne Koch, Notes of the Federal Constitutional Convention of 1787 by James Madison 632-34 (1965). A second group of taxes were indirect taxes, which had to be imposed uniformly (in a geographic sense, i.e., not more harshly in one region than in another). Neither requirement is now a significant limitation on the fisc. Perhaps the pithiest explication of the Congress' power to levy taxes is found in a case that almost pushed the power too far (requiring all dealers in marijuana to register and pay a special tax). United States v. Kahriger, 345 U.S. 22, 28-31 (1953) ("As is well known, the constitutional restraints on taxing are few . . . . Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power."), *overruled by* Marchetti v. United States, 390 U.S. 39 (1968).

[78]42 U.S.C. § 9607(a)(4)(B).

[79]During the greater part of the constitutional history of the United States, indeed, the assumed "normal" rule was that newly announced doctrines are given fully retroactive effect by American courts. Pragmatic considerations, stemming largely from the huge volume of new decisional law re criminal procedure, led the Court — over the heated dissent of Justices Black and Douglas — to declare, in Linkletter v. Walker, 381 U.S. 618, 629 (1965), that "the Constitution neither prohibits nor requires retrospective effect" for new rulings. These are still troubled waters, e.g. with respect to retroactivity in application of altered statutes of limitation doctrine in securities law private actions arising under the Securities Exchange Act. Westinghouse Electric Corp. v. B.H. Franklin, 993 F.2d 349 (3d Cir. 1993). It exceeds the

The Federal courts are law-givers also — inescapably so — but their law-making prerogatives are properly restricted to the cases and controversies brought to them by real parties in interest, without solicitation on the part of those courts, to specify what law will be given retrospective effect with respect thereto.

1. Looking Backwards: Retroactive Taxation

Congress should revisit CERCLA, correcting both its constitutional improprieties and the now-evident impracticality of seeking to impose, in Superfund cases, a no-cause joint and several liability ensnaring all identified PRPs.[81] In an unfortunate, almost accidental way, the vessel carrying forward questions of retrospective lawmaking — in the press, in the minds of the public, and in the federal courts — is the ongoing argument respecting the constitutional propriety of retroactive imposition of higher marginal income tax rates.[82]

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scope of this article to trace that development fully. The important point is that the inherited doctrine was: judicial law-giving speaks retrospectively.

[80]Americans find retroactive application of "new" law vaguely discomfiting — no presumption attends legislative law-making that this law-giver is but "finding" the law as it always was (such is the myth associated with adjudication)! In concept, law that is admittedly "new" should be given prospective effect only, or so it is commonly thought. Legion are the devices and doctrines used to implement this vague insight: the Contracts Clause, the Ex Post Facto Clauses, and the Due Process Clauses. None have been fully successful over any extended period of time. Often as not, a sufficiently overriding public interest has swept the field. *See generally* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960). But the problem may have been misstated. It might be that retrospective legislation of generalized import is very often acceptable, but that no legislative adjudications (except impeachments) can ever be.

[81]See *supra* note 70 and accompanying text, discussing the irrebuttable presumption imposing liability on PRPs. See also *infra* note 149 discussing potential reforms.

[82]On Friday, August 27, 1993, the battle in the courts began when the National Taxpayers Union filed suit seeking to invalidate parts of President Clinton's budget bill. David S. Hilzenrath, *Retroactive Rise in Estate Tax is Challenged; National Taxpayers Union Sues to Invalidate Increase*, WASH. POST, Aug. 28, 1993, at B1. Conceding that an assault on retroactivity was hopeless, as it touched on federal income taxes, the plaintiff restricted its complaint to retroactive gift and estate taxes. *See id.* The grounds for complaint were that the retroactive levies deprived taxpayers of property without due process of law and that the taxes in question were "direct taxes" on property, respecting which the Constitution requires apportionment. *Id.* The conventional wisdom is, of course, that both gift and estate taxes are levies on the act of transfer (i.e., conditions required to be fulfilled to enable transfer); never a tax on property as such.

The argument is made that a retroactive increase in federal income tax rates violates Article I, section nine, the Ex Post Facto Clause.[83] This argument has a surface plausibility only; it would be supportable only if one could invoke the twin prohibitions on Bills of Attainder and ex post facto laws.[84] Arguing, in isolation, that retroactive application of a taxing statute constitutes an ex post facto law is insupportable. In this century, courts have not applied the Ex Post Facto Clause outside of a criminal law context;[85] even in the 19th century case of *Burgess v. Salmon*,[86] the focus of the Court's objection was that this would subject the taxpayer to a "[c]riminal punishment or a penalty [in the amount of the increase]."[87]

This logic is flawed, however, as Congress cannot impose a tax as a criminal punishment or penalty[88] — rather, a distinct and separate criminal

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[83]Stephen C. Glazier, writing in the *Wall Street Journal*, argued that the retroactive imposition of higher marginal federal income tax rates was unconstitutional because it was an ex post facto law. Stephen C. Glazier, *Tax Bill: Retroactive, Unconstitutional*, WALL ST. J., Aug. 5, 1993, at A12. Glazier's argument was that "[t]he Founders' purpose here was to ensure that laws are general and prospective, rather than specific and retroactive." *Id.*

[84]U.S. CONST. art. I, § 9, cl. 3: "[N]o Bill of Attainder or ex post facto law shall be passed." These separate prohibitions are rightly linked; respecting *legislation*, both inhibit retrospective particularity, e.g., that of an adjudication. Note also that the power t pardon particular malefactors is an *executive* prerogative. *See* U.S. CONST. art. II, § 2, cl. 1.

[85]Glazier, *supra* note 83, should have conceded both the 19th and 20th centuries. On the authority of Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the Ex Post Facto Clause has been applied only to criminal cases — to cases where "punishment" was essayed. Apropos bills of attainder, the doctrine was different — whatever the technical extent of the constitutional prohibition, as interpreted at any given time, it reached both civil and criminal cases.

[86]97 U.S. 381 (1878) (holding that a sales tax increase signed into law during the afternoon may not constitutionally be applied to transactions taking place that morning). *Id.* at 384.

[87]*Id.*

[88]Commonly, the Court simply did not examine the motives of Congress as penalty tax after penalty tax was imposed to inhibit or destroy activities that were otherwise outside the scope of Congress' delegated powers. But, when Congress too obviously punished employers of child labor by imposing a purported tax of immoderate severity that was not in any way proportional to the quantum of labor, Chief Justice Taft had something important to say about the abiding distinction between penalties and taxes:

> If it were an excise on a commodity or other thing of value we might not be permitted, under previous decisions of this court, to infer solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in

punishment or penalty may be imposed for failure to pay the levied tax.[89] CERCLA liability, even if properly characterized as a tax, will survive an attack based merely on the retroactive nature of the liability.[90]

2. Retroactive Taxes: Problems with the Notice Congress Has Given

Legal writers, after they ineffectively argue that retroactive taxes are unconstitutional on their face, then turn to lack of notice to invalidate a federal tax. In other words, no tax may be given retroactive application beyond the date on which affected taxpayers reasonably had notice of the legislature's still inchoate (but ruminated) levy of that tax.[91] After some early point, if taxpayers have (or could have) become aware of what Congress might do, it is appropriate, and almost surely constitutional, to make the taxpayers retroactively liable under the revised scheme of taxation, especially in light of the tax-avoidance maneuvering they might otherwise have effected during the time the tax bill was being debated.[92]

This leaves considerable room for legitimate debate about "fairness" and

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> business . . . . The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. *Scienters are associated with penalties, not with taxes.*

Bailey v. Drexel Furniture Co., 259 U.S. 20, 36-37 (1922) (emphasis added).

[89]*See id.*

[90]United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[91]Glazier, *supra* note 83, at A12.

[92]Pension Benefit Guar. Co. v. Gray & Co., 467 U.S. 717 (1984). In *PBGC*, the Court upheld a congressional scheme to retroactively penalize employers that withdrew from a pension plan, holding that the scheme did not violate Fifth Amendment due process because: (1) Congress presented a rational legislative purpose; (2) the statute did not impose liability until the employers acted unlawfully, thus giving employers advance notice that their conduct would be penalized; and (3) the Fifth Amendment has never prohibited government interference with private contracts. *Id.* at 728-35. This retroactive tax law, imposing obligations to make and secure private pension benefit payments, was upheld, in Glazier's own words, "to prevent employers from taking advantage of lengthy legislative processes and withdrawing from covered pension plans while Congress debated the change." Glazier, *supra* note 83, at A12.

the timing of notice; it also exposes yet another difficulty inherent in seeking to save no-cause Superfund "response cost" liability by characterizing it as a tax. This "tax" targeted a unique class of malefactors, "polluters" whose causal acts (if any) were, often, neither unlawful nor improper when committed. They were to be punished by congressional imposition of joint and several liability for an environmental condition, the causation of which no judge was to re-examine.

3. Separation of Powers: Problems with the Role Congress Has Presumed to Play

The major problem with imposition of a generic no-cause liability lies not in the notice Congress has given or failed to give; it lies, rather, in the role Congress has dealt itself in the drama. Once Congress has presumed to assign no-cause liability to a party, it has foreclosed the courts from adjudicating the liability. To the question presented by an arguable usurpation of judicial power by Congress, the Supreme Court must speak, and alone can speak, but only in a properly presented case or controversy.

If a no-cause liability does not fit within the plain meaning of a tax, its imposition by Congress is rightly viewed as unconstitutional, but not merely on the ground that Congress has enacted an ex post facto law. Rather, the liability imposed violates the Constitution's twin prohibitions on Bills of Attainder and ex post facto laws.[93] When these two parts are read and applied together, it is possible to put forward a genuine challenge to CERCLA's no-cause liability scheme.[94]

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[93]U.S. CONST. art. I, § 9, cl. 3.

[94]It is not the historic "criminal" application of the Ex Post Facto Clause that is in issue, but, rather, the application of the Separation of Powers Doctrine. Commenting upon this reality, Steven Glazier argued:

> Clearly, this Congress doesn't care who says what about the Constitution, when it comes to taking more of our money . . . .
>
> The larger issue here, though, is not economic or legal — it is political. This type of unconstitutional legislation is the norm that will continue until the current majority of Congress is removed. Self-satisfied incumbents in Washington might like to take a look at the current draft of the new Russian constitution. That document's own Article 57 states that "laws introducing new taxes . . . are not retroactive."

Glazier, *supra* note 83, at A12.

C. ANATOMY OF THE OBSCURED ATTAINDER: MISAPPROPRIATION OF JUDICIAL POWER

1. Antique Phrases in a Long-lived Constitution

A bill of attainder has been defined as "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."[95] One prescient commentator, however, has argued that such a definition of a bill of attainder is not conclusive; rather, the commentator urged that attainder is the operative product of the illegitimate process of legislative adjudication.[96] The problem with bills of attainders is that they allow Congress to usurp a function of the courts when Congress makes an empirical determination that an individual or group of individuals should incur a burden conceived of as either a criminal sanction or a civil liability, a determination which should remain purely within the province of

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[95]BLACK'S LAW DICTIONARY 165 (6th ed. 1990). *See* United States v. Brown, 381 U.S. 437, 448-49 (1965). In *Brown*, the Court, per Chief Justice Warren, held unconstitutional the Labor-Management Reporting and Disclosure Act, which prohibited members of communist organizations from holding office in labor unions. *Id.* at 463. The Chief Justice reasoned that the Act constituted a bill of attainder because Congress enacted the statute to deprive persons of a liberty interest without benefit of a trial. *Id.* at 451. Interestingly, Dean John Hart Ely served as a clerk to the Chief Justice after Ely authored a note reviewing the history and application of the Bill of Attainder Clause. *See infra* note 96.

Similarly, in *United States v. Lovett*, the Court invalidated a congressional statute that required the President to reappoint all non-military personnel not hired after a certain date. United States v. Lovett, 328 U.S. 303, 305, 315 (1946) (footnote omitted). The Court found that the statue was a bill of attainder because the statute's legislative history indicated that this law was passed to remove three federal officials for their association with "subversive" political organizations. *Id.* at 315.

[96]While John Hart Ely was a law student at Yale, he had adduced that the Bill of Attainder Clause is directed "not to the intent of the legislature, but to the preservation of the separation of powers." Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 356 (1962). In justifying this assertion, Ely had noted that it was originally adopted not to prevent legislative "punishment," but to prevent legislative trial. *Id.*

In this same article, Dean Ely observed that:

> [T]he bill of attainder clause is not a limitation upon the size or sort of sanctions which the legislature can prescribe; it is rather a command that the legislature shall never, regardless of the type of deprivation the rule imposes, try persons to see if they come within the [general] rule [it has prescribed].

Id. at 357-58.

the courts.[97]

2. Separation of Powers: Implemented by a Set of Prohibitions

The Constitution of the United States declares that neither Congress nor any state shall pass any bill of attainder or ex post facto law.[98] It has been argued that these prohibitions, which proscribe legislative adjudication, cumulatively serve as a counterpart to the Case and Controversy Clause, which limits judicial adjudication.[99]

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[97]*See generally Brown*, 381 U.S. at 462; *see also Bill of Attainder*, *supra* note 96, at 352.

[98]U.S. CONST. art. I, §§ 9, 10. This author urges that the crucial issue underlying the Bill of Attainder Clauses is neither the problem of retroactivity nor a procedurally deficient imputation of criminality but, rather, the continued vitality of our separations of powers practice. *See generally Bill of Attainder*, *supra*, note 96 (describing in detail the Separation of Powers Doctrine, the Case and Controversy Clause, the Bill of Attainder Clauses, and their relationship to one another).

Emphasizing the need to utilize the whole relevant structure of the United States Constitution in order to justify adjudicative results, Justice Jackson once wrote:

> A judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves . . . . The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

[99]U.S. CONST. art. III, § 2, cl. 1. Limiting thereby the jurisdiction of the federal courts (as compared to the state courts), the Case or Controversy Clause provides in full:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amid contemporary concerns regarding no-cause Superfund liability and retroactive imposition of substantial federal tax liabilities, one can argue that the implications of bills of attainder have resurfaced, pleading for contemporary reexamination.[100] In light of the diminishing definition of bill of attainder commonly applied, resulting in a broadening of the power of Congress to the point where it threatens legislative encroachment upon judicial powers,[101] the federal government has failed to identify situations mandating the application of the Bill of Attainder Clauses.

Otherwise put, the federal government has failed to comprehend that the Constitution's prohibition against bills of attainder must apply to any circumstance in which Congress or any state legislature attempts to: (1) short-circuit the inherently (and historically) judicial process of adjudicating

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Id.

[100]*See Bill of Attainder*, *supra* note 96, at 347-48 (identifying the underlying rationale of the conjoined Bill of Attainder Clauses and the Case and Controversy Clause). Of Congress, the writer noted that "*only* it can enact broad prospective rules without reference to particular persons, and it can enact *only* [such] rules . . . ." *Id.* at 348. Of the federal courts, he wrote, "they can decide *only* cases and controversies, and *only* they can decide cases and controversies." *Id.* at 347.

In a similar vein, the commentator wrote:

> Not only was there a general fear of legislative power on the part of the founding fathers, but there was also a specific realization that the legislative branch of government is more susceptible than the judiciary to such influences as passion, prejudice, personal solicitation, and political motives, and that it is not bound to respect all the safeguards placed upon judicial trials. The bill of attainder clause is an implementation of their judgment that these factors render the legislature a tribunal inappropriate to decide who comes within the purview of its general rules . . . .

Id. at 345-46.

In the Full Faith and Credit Clause, moreover, the Constitution explicitly commands Congress, when it undertakes to "prescribe the Manner in which [public] Acts, Records, and [judicial] proceedings shall be proved, and the Effect thereof," to do so only by means of "general laws." U.S. CONST. art. IV., § 1. In this context, too, legislative prescription of adjudicative results on any specific and particular basis is constitutionally illegitimate.

[101]As Dean Ely noted, the Framers were extremely concerned that Congress would usurp the powers of the judiciary and ignore or circumvent procedural protections the Constitution had afforded citizens by establishing an independent judiciary. *See Bill of Attainder*, *supra* note 96, at 343-48 (citations omitted). *See, e.g.*, THE FEDERALIST PAPERS NO. 44 280-88 (Clinton Rossiter ed., 1961) (James Madison) (arguing that the Constitution avoided the known dangers of "trial by legislature" — ex post facto laws and bills of attainder).

an individual's responsibility respecting either civil or criminal liability;[102] (2) inappropriately truncate the judicial (or administrative) process of assessing an individual's causal relation to an abjured consequence;[103] or (3) destroy or effectively disable the whole judicial process of measuring the "fit" of an individual or group of individuals to a statutory definition, which the legislature is indeed entitled to promulgate.[104] Perhaps the proper function of the Article I, section nine Bill of Attainder Clause (relating to Congress) will best be understood by re-examining a case in which this author argues that it plainly should have been applied, but was not.

3. *Korematsu v. United States*: The Attainder to End All Attainders

Without quite intending the evil that eventuated, the 76th Congress, holding office in 1942, just after Imperial Japan's attack on Pearl Harbor,[105] enacted the Japanese relocation statute, which criminalized any act of disobedience to U.S. military orders "relocating" all persons of Japanese ancestry away from the Pacific coast.[106] This statute was later upheld by the United States Supreme Court in *Korematsu v. United States*.[107] In justifying this decision, Justice Black, writing for the

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[102]See Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 280-81 (1866); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866), where the Court invalidated statutes prohibiting public officials from taking office without first reciting a loyalty oath because the statutes inflicted punishment without a judicial trial. *See also Bill of Attainder*, *supra* note 96, at 334.

[103]*See Bill of Attainder*, *supra* note 96, at 334.

[104]*Bill of Attainder*, *supra* note 96, at 348 (citing Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 136 (1810)).

[105]Imperial Japan attacked Pearl Harbor on December 7, 1941.

[106]Korematsu v. United States, 323 U.S. 214, 215-16 (1944). The order proclaimed that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities . . . ." Civilian Exclusion Order No. 34, *reprinted in Korematsu*, 323 U.S. at 217.

[107]*Korematsu*, 323 U.S. at 214. In *Korematsu*, the petitioner, a U.S. citizen of Japanese descent, was convicted in federal district court for violation of Civilian Exclusion Order No. 34. *Id.* at 215. Prosecution commenced under an Act of Congress, of March 21, 1942, 56 Stat. 173, which stated that:

> [W]hoever shall enter, remain in, leave or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the

majority, deferred to the congressional enactment, noting that the exclusion mandated under the order was promulgated as a proper security measure to protect American civilians during times of war.[108] Thus, as an "expedient

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> President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Id. at 216 (quoting Pub. L. No. 77-503, 56 Stat. 173 (1942).

The exclusion order under which the petitioner was convicted was based in large part upon Exclusion Order No. 9066, 7 FED. REG. 1407, which declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities . . . ." *Id.* at 216-17. Among the protections instituted under this exclusion order was a curfew order, which, like the exclusion order in this case, "subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m." *Id.* at 217.

The curfew order, the Court explained, was upheld in Hirabayashi v. United States, 320 U.S. 81 (1943). *Id.* at 217. In *Hirabayashi* it was argued that the curfew order, and Executive Order 9066 also, were unconstitutional delegations of power, beyond the war power of the President, Congress, and military authorities, and that such a curfew solely against citizens of Japanese ancestry constituted racial discrimination. *Id.* The Court concluded, however, that the curfew order was a necessary exercise of governmental power "to prevent espionage and sabotage in an area threatened by Japanese attack." *Id.*

[108] *Id.* Determining that the exclusion order, like the curfew order, rested upon the same congressional act and executive and military orders promulgated to prevent espionage and sabotage, the Court held that it was not beyond the war power of Congress and the Executive to exclude Americans of Japanese descent from an area threatened by invasion. *Id.* at 217-18. Additionally, the Court noted that the military, charged with the responsibility of defending the threatened area, has the authority to determine who may remain and who must be excluded from that area, in order to dispel attempts at espionage and sabotage. *Id.* at 218. In an attempt to reconcile the exclusion order with the Constitution, the Court further contended:

> [W]e are not unmindful of the hardships imposed by [the exclusion order] upon a large group of American citizens. *Cf. Ex parte* Kawato, 317 U.S. 69, 73 (1942). But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But

military precaution,"[109] Congress authorized the exclusion, seemingly ignoring the citizenship status of persons affected by the statute and the civic loyalty that the vast majority of Japanese-Americans had demonstrated before the attack on Pearl Harbor.

The majority opinion is colored with martial law[110] limitations[111] imposed by the United States on an ethnic group unreasonably suspected of "levying War against [the United States], or, in adhering to their Enemies, giving them Aid and Comfort."[112] The question whether the internment of Japanese-Americans was an "expedient military precaution" is highly suspect, considering the Government's failure to institute a similar order in Hawaii, where, if anything, military peril might reasonably have been feared to be greater.[113] Rather, exclusion areas were set up mainly in California, where anti-Asian animus was neither new nor wholly derived from war-time passions and fears.[114] What the exclusion order really effectuated was the

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> when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Id. at 219-20.

[109]*Id.* at 225 (Frankfurter, J., concurring).

[110]Martial law is generally imposed in times of war or when the effectiveness of civil authority has ceased. BLACK'S LAW DICTIONARY 974 (6th ed. 1990). At such times, military personnel look to martial law as authority to institute control over civilians located in domestic territory. *Id.* *See* Ochibuko v. Bonesteel, 60 F. Supp. 916, 928, 929, 930 (D.C. Cal. 1945).

[111]Justice Black first addressed the validity of Exclusion Order No. 9066, which imposed a curfew order as a protective measure for U.S. citizens during war-time. Korematsu v. U.S., 323 U.S. 214, 217 (1944). Using similar reasoning, the Justice upheld the validity of Exclusion Order No. 34. *Id.* at 219.

[112]*See* U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

[113]*See* Nanette Dembitz, *Racial Discrimination and the Military Judgment*, 45 COLUM. L. REV. 175, 200-02 (1945).

[114]Dembitz, *supra* note 113, at 191-93. *See also* A.W. Brian Simpson, *Detention Without Trial in the Second World War: Comparing the British and American Experiences*, 16 FLA. ST. U. L. REV. 225, 236 (1988). Simpson observed that the justification for detaining Japanese-Americans was based upon stereotypes doubting the loyalty of Japanese-Americans. *Id.* at 238. The military did not base the detainment and exclusion policies upon any evidence that Japanese-Americans as a group — or individually — possessed a proclivity to be disloyal

forcible dispossession of United States citizens and unrelieved banishment from their homes and communities, without any judicial adjudication whatsoever of their proclivities, if any, to act as spies and saboteurs.

Article III, section one, of the Constitution generally vests the judicial power in courts.[115] But the provision of the Constitution which empowers Congress to punish treason (found in Article III, not Article I) treats treason differently from other crimes that might fall under Article III's "judicial Power of the United States."[116] This clause is divided into two phrases — the first reading: "The Congress shall have Power to declare the Punishment of Treason . . . ."[117] This phrase empowers Congress to establish the instances when conduct is treasonous,[118] the procedures by which treason may be proved,[119] and the punishments therefor that courts may im-

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or engage in treasonous conduct. *Id.* In fact, the detainment and exclusion orders were implemented despite the findings of a pre-war F.B.I. report which concluded that Japanese-Americans and foreign nationals were loyal members of the community and were unlikely to engage in espionage. *Id.* at 238 n.51.

[115]Article III, section 1, reads: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art III, § 1.

[116]U.S. CONST. art. III, § 3, cl. 2. But treason is not the only crime wherein the legislature has a decidedly more active role in the outcome. The Constitution places the power to charge impeachment in the House of Representatives, *see* U.S. CONST. art. I, § 2, cl. 5, and the power to try impeachments in the Senate, *see* U.S. CONST. art I, § 3, cl. 6. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."). Any trial on impeachment vests some part of the "judicial Power of the United States" in the Senate. "When the President of the United States is tried the Chief Justice shall preside . . . ." *See* U.S. CONST. art I, § 3, cl. 6.

[117]*See* U.S. CONST. art. III, § 3, cl. 2. The verb is "declare," with its intimation of direct operational effect, as also in Article I, to "declare war." U.S. CONST. art. I, § 8, cl. 11. Very different is the verb "determine," as in Article II, where the Constitution limits the power of Congress to mere specification of a standard: "The Congress may determine the Time of chusing the Electors, and the day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. CONST. art. II, § 1, cl. 4.

[118]Of course, Congress is limited in this regard by Article III, section 3, clause 1, which commands that treason can exist only during time of war. See U.S. CONST. art. III, § 3, cl. 1, set forth at *supra* note 112.

[119]Article III, section 3, requires that at least two persons must witness an act of treason, or the defendant must confess to treasonous conduct. *See* U.S. CONST. art. III, § 3, cl. 1. *See also* Tomoya Kawakita v. United States, 343 U.S. 717, 736 (1952) (holding that two persons must testify that a disloyal act occurred, not a mere seditious statement or belief); United States v. Greiner, 26 F. Cas. 36 (E.D. Pa. 1861).

pose.[120] It may even empower the Congress to act directly — by way of adjudication — to "declare the Punishment of Treason."[121] The second

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[120]*See* U.S. CONST. art. III, § 3, cl. 2. *See also* Chandler v. United States, 171 F.2d 921, 929 (1st Cir. 1948) (holding that Congress has the authority to punish treason against the United States committed by American citizens in foreign nations), *cert. denied*, 366 U.S. 918, *reh'g denied*, 336 U.S. 947 (1948); United States v. Greathouse, 26 F. Cas. 18 (N.D. Cal. 1863) (holding that, although Congress can prescribe the punishment for treasonous conduct, Congress can not extend, restrict, or redefine the elements of the crime of treason).

[121]*Bill of Attainder, supra* note 96, at 346 n.107, explicates the historic relation between impeachment and attainder, whereunder the Parliament was a force-unto-itself to conceive and adjudicate — possibly even to execute — its untrammeled judgment that traitors might summarily be dealt with, even with "extreme prejudice":

> Historically, the "bill of attainder" and the "impeachment" were regarded as two alternative ways of accomplishing the same results. *See, e.g.*, CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION . . . 98-144 (1956); ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 288 (Rev. ed. 1934).
>
> To ensure that the bill of attainder clause's prohibition of legislative adjudication would not be evaded by the device of calling the proscribed action an "impeachment", the legislature's traditional impeachment power was severely narrowed. Congress was forbidden to impeach anyone other than a government official; and even then the sanction was limited to removal and disqualification from office.
>
> > Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States . . .
>
> U.S. CONST. art. I, § 3. This clause may therefore be viewed as a grant to Congress of the power to pass one highly restricted kind of bill of attainder. *See* CHAFFEE, *[op. cit.]*, at 143-44.

Id.

Though the "punishment" associated with impeachment was thus narrowed (in comparison with a straightforward criminal conviction for treason), the grounds for impeachment were probably broadened. *See* U.S. CONST. art. II, § 4 (giving as grounds for impeachment: "Treason, Bribery, or other high Crimes and Misdemeanors."). *See also* Joel Brinkley, *The Cover-Up that Worked: A Look Back*, N.Y. TIMES, Jan. 23, 1994 (The Week in Review), at 5 (arguing, with historical references, in a review of Independent Counsel Lawrence Walsh's final report on his Iran-Contra investigation, that mere executive "mal-administration" may properly be viewed as a sufficient ground for impeachment). *See generally* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

Largely unnoticed, in the controversy surrounding Walsh's report, is the commonplace insight that Congress' power to impeach, possibly even on "political" grounds, was contemplated by the Constitution; an Independent Counsel's power to ascribe criminality to unindicted and untried actors was not! Again, the adjudicative function of the courts (and the carefully limited corollary power of the Senate to "try all Impeachments," *see* U.S. CONST. art. I, § 3, cl. 6), has arguably been undercut in an extra-constitutional manner by the very existence of the Independent Counsel.

phrase reads: "but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[122] Like the sixth and seventh clauses of Article I, section three (impeachments), this second phrase ("Attainder of Treason") carves out an exception to Article I's proscription on bills of attainder (as it relates to Congress).[123]

In a vigorous dissent, Justice Murphy concluded that the Court was obligated to examine the military orders.[124] In justifying this position, the Justice set forth the judicial test applied by the courts to examine the validity of governmental actions taken during time of war under the guise of compelling military necessity.[125]

Justice Jackson dissented in a separate opinion, setting forth two

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Has it been overlooked, in the Iran-Contra fracas, that the President's "Power to grant Reprieves and Pardons for Offenses against the United States" is subject to a highly significant limitation, viz., "except in Cases of Impeachment"? U.S. CONST. art II., § 2, cl. 1.

Respecting yet another "improvisation of a constitutional structure on the basis of currently perceived utility," see *infra* note 134 (questioning the role played by the U.S. Sentencing Commission). As there noted, Justice Scalia, alone among his fellow Justices, questioned this widespread ostensible commingling of power between Congress and the courts. Respecting the "judicial Power of the United States," the very limited commingling of legislative and judicial functions contemplated by the Constitution occurs in connection with impeachments and, separately, any promulgation, by Congress, of an "Attainder of Treason."

[122]U.S. CONST. art. III, § 3, cl. 2.

[123]*See* U.S. CONST. art. I, § 9, cl. 3. *See also* Wallach v. Van Riswick, 92 U.S. 202 (1878) (setting forth the historical justification for limiting attainders of treason to the lifetime of the person attained).

[124]Korematsu v. United States, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting) (stating that the exclusion of civilians of Japanese decent from domestic areas for safety purposes in times of war not only is unconstitutional but "falls into the ugly abyss of racism."); Sterling v. Constantin, 287 U.S. 378, 401 (1932).

Justice Murphy's position can be understood to mean that the basic constitutional flaw at issue was, simply, that no provision had been made for adjudication, by a court, of the consequent applicability, to a given individual, of a generalized command issued by a non-judicial branch of government.

[125]*Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting) ("The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.") (citing Raymond v. Thomas, 91 U.S. 712, 716 (1875); United States v. Russell, 13 Wall. 623, 627-28 (1871); Mitchell v. Harmony, 13 How. 115, 134-35 (1852)).

principles.[126] First, in rejecting the validity of the military order as inherently unconstitutional, the Justice noted that the Court's jurisprudence dictates that "guilt is personal and not inheritable."[127] Second, the Justice disavowed on principle the notion that any military order, promulgated simply on "reasonable military grounds" during time of war, is "constitutional and can become law."[128]

This treatment of Japanese-Americans might have been considered presumptively constitutional if Congress had undertaken to effect an "Attainder of Treason" for each Japanese-American detained by the Government. Habeas corpus and treason cases arising during and after the American Civil War had established the general proposition that the Commander-in-Chief may take some liberties with the Constitution, if based on pressing claims of military necessity implemented under martial law.[129] Even in the most egregious abuses of habeas corpus suspensions by the Union, however, at least the defendants were tried and convicted on an individual basis — the most rudimentary due process protection that the exclusion orders denied to Americans of Japanese ancestry eighty years later.

Although the event has been put in other constitutional pigeonholes,[130]

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[126]*Korematsu*, 323 U.S. at 242-48 (Jackson, J., dissenting).

[127]*Id.* at 243 (Jackson, J., dissenting) ("But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.").

[128]*Id.* at 244 (Jackson, J., dissenting) (stating that, during time of war, it "would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality.").

[129]*Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that defendants before a courts-martial are not constitutionally entitled to grand jury indictment); *Ex Parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1864) (holding that the Court does not possess constitutional authority to grant certiorari to review the judgments of the courts-martial, even where civilians are tried for treasonous conduct); *Ex Parte* Merryman, 17 F. Cas. 144 (1861) (recognizing that the courts are powerless to enforce constitutional rights where the chief executive is unwilling to support the courts).

[130]Part of the Court's difficulty with the case stems from the fact that the Equal Protection Clause does not restrain action taken by the United States Government. Accordingly, the question put (but not convincingly answered) was this: may United States military authorities, consistent with the Due Process Clause of the Fifth Amendment, exclude suspected spies and saboteurs from a coastal zone the authorities aver to be militarily sensitive? If so, whose suspicions are to be acted upon, and with what safeguards against overreaching, duplicity, or implementation of a hidden and racist agenda?

the internment of innocent Nisei in desert concentration camps[131] cries out to be reevaluated as an attainder:[132] first, because the affair bears close relation to an "Attainder of Treason";[133] and second, because the affair was a patent attempt to arrogate to Congress much more of the "judicial Power of the United States" than Article III ever gave to the Congress.[134]

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[131]"Concentration camps" is a term first used during the Anglo-Boer War by the British Army, which originally built the camps to protect the families of National [Afrikaans-speaking] Scouts who were aiding the British. T.R.H. DAVENPORT, SOUTH AFRICA: A MODERN HISTORY 141-42 (Macmillan South Africa, 2d ed. 1978). Thereafter, to Britain's shame and ultimate prejudice, they were used to confine patriotic Boer women and children (of whom some 26,000 died therein, 20,000 of them children, under conditions where the mortality rate reached 344 per one thousand during October 1901, precipitating a shift away from military control). *Id.*

[132]Notice that Justice Murphy was not treating *Korematsu* as a paradigm of race-based denial-of-equal-protection (nor, vis-a-vis the United States, of denial-of-due-process). His was a straightforward reasonableness test, a test meant to "insure that courts would not trespass upon what is properly the legislative province — the promulgation of the rules by which our society is governed." *Bill of Attainder*, *supra* note 96, at 349-50. A reasonableness test is appropriate when used to define the scope of judicial review of broad legislative policy judgments. *Id.* at 349 n.123. It is not wholly appropriate if used to test the validity of an application of a broad policy judgment to a particular group. *Id.* at 349. In any event, Justice Murphy refrained from invoking the "suspect classification" — "strict scrutiny" test:

> [T]he military claim must subject itself to the judicial process of having its reasonableness determined . . . .
>
> [T]he exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation [to the removal of the dangers] . . . . [T]hat relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage. (Emphasis in original).

Korematsu v. United States, 323 U.S. 214, 234-35 (1944) (Murphy, J., dissenting).

Justice Murphy added, albeit in a footnote, that the British government had been able to determine, in individualized hearings, whether 74,000 German and Austrian aliens resident in Great Britain at the outbreak of World War II, were genuine security risks or mere "friendly enemies." *Id.* at 242 n.16 (Murphy, J., dissenting). This is a process reminiscent of the approach commended to lower courts in the irrebuttable presumption cases. *See supra* note 70 and accompanying text.

[133]U.S. CONST. art. III, § 3, cl. 2.

[134]Just over the legal horizon, moreover, the question may loom whether Congress, in creating the United States Sentencing Commission, *see* 28 U.S.C. § 994(a) (creating the Sentencing Commission, purportedly as an independent agency within the judicial branch), has once again arrogated to itself a very large part of the "judicial Power of the United

Upon reading the Court's opinion in *Korematsu*, one might emerge with

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States." Congress may presumably establish (as long it has) the range of sentences (respecting both fines and incarceration) attached to legislatively defined crimes. If it is telling the Sentencing Commission to specify the range of permissible sentences, is not that commission more properly viewed as a part of the legislative branch?

Apart from impeachments and "Attainders of Treason," the "judicial Power of the United States" resides in courts. U.S. CONST. art III, § 1. One searches in vain for any provision of the Constitution that vests any part of the "judicial Power of the United States" in an advisory commission. *See* Mistretta v. United States, 488 U.S. 361, 371 (1988) (upholding the creation of the Sentencing Commission as a lawful "commingling" of power between Congress and the judiciary). Historically, the prerogative of sentencing judges to evaluate the totality of circumstances, including the character of a defendant, as the judge presiding in the case had come to view it, was the very epitome of the final act of "judging" in a criminal case. *Id.* at 363. *See also* Hon. Boyce F. Martin, Jr., *The Foundation Has No Cornerstone: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 SETON HALL CONST. L.J. 25, 26-27 (1993).

Dissenting from the eight-Justice majority in *Mistretta*, Justice Scalia opined that:

> I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch [of government] altogether, a sort of *junior-varsity* Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure which we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.

Id. at 427 (Scalia, J., dissenting). The Justice's ominous predictions have in large part come to fruition, as now the complaint is growing, in volume and frequency, that the Sentencing Guidelines effectively deprive judges of their prerogative to fully implement their candid evaluations of a given defendant's *character*. *See generally* Martin, *supra*. In criminal sentencing, one might now suggest that federal judges are no longer free to "judge"; a servant of Congress is doing the "judging." Worse, the Sentencing Guidelines *require* that judges consider all *conduct* that may be "relevant" to the defendant's crime. U.S.S.G. § 1B1.3(a). The relevant conduct provision does not require that relevant conduct be limited to illegal conduct. *Id.* (stipulating that relevant conduct constitutes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense or conviction."). Apart from the due process concerns that arise from an amorphous definition of conduct "relevant" to the defendant's crime, *see generally*, Martin, *supra*, the relevant conduct provision can be viewed as an attainder — might not the provision convict and sentence defendants for conduct never adjudicated in a court of law? Have our federal judges been reduced — by a sort of surrogate adjudication which the Sentencing Commission carries out — to the dwarf status of agents of an agent of the Congress? For a robust criticism of the work of the U.S. Sentencing Commission (which does not, however, reach nearly so far as this author's tentative suggestion), see generally Martin, *supra*, and Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 233 (1993).

the impression that it involved nothing more than a violation of a military "exclusion order."[135] That was not the case, as the prosecution took place in a civilian court on account of an alleged violation of a criminal statute enacted by Congress.[136] Neither Justice Black's majority opinion nor Justice Jackson's dissent[137] deals adequately with the fact that all violations of the military exclusion orders had been criminalized by Act of Congress. Respecting this criminal offense, it was made wholly irrelevant — by command of Congress — that Korematsu might have demonstrated his loyalty. In every meaningful sense, Congress had adjudicated in re Korematsu. It had misappropriated the "judicial Power of the United States."

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[135]Nor is a reader informed, perusing one of the better of modern constitutional law casebooks, GERALD GUNTHER, CONSTITUTIONAL LAW 698-701 (9th ed 1975), that Korematsu was prosecuted for violating a criminal statute enacted by Congress. Rather, the Gunther text stated:

> *Race as a "suspect" classification: The Korematsu Case* . . . Ironically, Korematsu is one of the very rare cases in which a classification based on race or ancestry survived Court scrutiny. The majority sustained the conviction of an American of Japanese descent for violating a military order during World War II excluding all persons of Japanese ancestry from designated West Coast areas.

Id. at 698.

[136]*See Korematsu*, 323 U.S. at 215-16.

[137]Justice Jackson would have refrained from lending any dignity whatsoever to such a breach of constitutional norms as there occurred. The Justice did not request judicial review of the military order, and eschewed any demand for adjudication of any individual's propensity to engage in acts of espionage and sabotage:

> I do not suggest that the Court should have attempted to interfere with the army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law or under the Constitution.
>
> . . . .
>
> A judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency . . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that [it] sanctions such an order, the Court for all time has validated the principle of race discrimination in criminal procedure . . . .

Korematsu v. United States, 323 U.S. 214, 245-48 (1944) (Jackson, J., dissenting).

4. Another Unredeemed Attainder of Recent Antiquity

Leonard Boudin, the eminent New York civil liberties lawyer, once commented, in a constitutional law seminar at Yale, attended by the author, that the United States never did, never would, countenance "guilt by association." Yet, in *Davis v. Beason*,[138] which upheld Idaho's attainder of non-polygamous Mormons so long as the leaders of that church failed to repudiate belief in the propriety of "plural marriage,"[139] the Supreme Court did just that. The Court had held — nothing less — that "expression of belief, and even associating with persons of the same belief, may constitute action subject to governmental restriction."[140] It must be noted that the late

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[138]133 U.S. 333 (1890). Appellants, Samuel D. Davis and additional unnamed individuals, pursuant to Idaho statute § 501, were indicted and found guilty of attempting to register to vote by going before the registrar of the election precinct and taking the oath dictated by the statute. *Id.* at 334. The appellants swore, under oath, that they were "not a member of any order, organization or association which teaches, advises, counsels or encourages its members . . . to commit the crime of bigamy or polygamy, or any other crime defined by law." *Id.* Each appellant, including Davis was, however, a member of the Church of Jesus Christ of Latter-day Saints, an organization which they knew advised, counseled, encouraged, and taught its members to commit bigamy and polygamy. *Id.* at 335.

Upon his conviction and detention Davis applied and obtained a writ of *habeas corpus*, alleging the illegal restraint of his liberty. *Id.* Davis argued that the facts of his indictment and record failed to constitute a public offense, and thus were not criminal or punishable. *Id.* Additionally, he argued that the statute under which he was indicted under dealt with the establishment of religion, thus violative of the First Amendment of the Constitution. *Id.* at 336-37. The court below held that Davis failed to show sufficient cause to warrant his discharge, and remanded him back into custody. *Id.* at 337. Pursuant to this decision, Davis appealed. *Id.*

The Court began by stating that the criminal nature of bigamy and polygamy and that the extension of an exemption for such behavior would shock the morality of the community. *Id.* at 341. The Court went on to state that the advocacy and teaching of such crimes are themselves criminal. *Id.* at 342. In addition, the Court professed that the First Amendment provided that religious beliefs and expressions may not be interfered with. *Id.* The Court narrowed this freedom, however, by determining that such expressions are subordinate to criminal laws of the nation and stating that while laws may not interfere with religious beliefs and opinions, laws may interfere with practices. *Id.* at 343.

Following the aforementioned reasoning, the Court determined that the statute requiring all registering voters to take an oath declaring they do not belong to an organization which teaches its followers to disregard the criminal laws is not legally objectionable. *Id.* at 347. Bigamy and polygamy are criminal and are taught, advised, counseled, and encouraged to members of the Mormon Church; thus, Davis violated the applicable statute and the Court affirmed the lower court's holding. *Id.* at 348.

[139]*Id.* at 344.

[140]*Id.*

19th century Supreme Court did nothing to temper a vicious onslaught, by Congress, on this paradigm of a "discrete and insular minority."[141] Indeed, certain of the pronouncements of Congress respecting the Mormon polity were illegitimately given effect as legislative adjudications.[142] That is, they were unredeemed attainders.

Against the easily inflamed passions of legislators, one can appropriately urge a recognition or revival of the Bill of Attainder Clause. Appropriately too, one might give meaning to other obscure constitutional provisions.[143]

When quasi-religious passions are engaged — in the 1880's, defense of "virtue" and of monogamous motherhood; in the 1940's, defense of Old Glory and the Golden State against "the yellow horde"; in the 1980's, defense of "the environment" — it is thoroughly unremarkable that the constitutional entitlements of discrete individuals (equal protection, due process, enjoyment of privileges and immunities, freedom from unconstitutional attainder, all alike) are given short shrift by popularly elected legislators or officials. Under these circumstances, the problem is that individuals — without particular examination of the facts touching on any given case or controversy — can easily be stigmatized merely because they have generally been associated with a miscreant movement, cause, caste,

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[141]United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938).

[142]*See, e.g.*, Late Corp. of the Church of Jesus Christ v. United States, 136 U.S. 1, 42 (1890) (upholding the provision of the Edmunds-Tucker Act that provided for the escheat of the property of the Church to the United States); Clawson v. United States, 114 U.S. 477 (1885) (upholding the Edmunds Act's blanket exclusion of all Mormons from a grand jury in a polygamy case); Cannon v. United States, 116 U.S. 55 (1885) (upholding a conviction for unlawful cohabitation under the Edmunds Act even though the government had failed to prove that Cannon had engaged in marital relations with another besides his lawful spouse after the Act's passage), *vacated and dismissed for lack of jurisdiction*, 118 U.S. 355 (1886). *See generally* Ashby Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 1 (1993).

[143]That provision most pregnant — which has not yet given birth — is Amendment IX: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Query: is protection from every imposition of no-cause liability included therein? Another is Article 4, section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." Had the Territory of Utah constituted a "State in this Union" during the 1850's, '60's, '70's, or '80's — when Utah statehood was long overdue, in comparison with less populated Territories — it is this provision which might properly have been invoked to justify Federal moves against the Mormon polity — if it were true that Brigham Young's state of "Deseret" was an incipient theocracy.

clan, or sodality.[144]

5. Congress Alone May Make Such Rules — Congress, Alone, May Not Execute Them

Congress may specify a general rule such as: "[a]ll persons disloyal, or dangerous to America's security, are to be deported." A statute so phrased, leaving adjudication to the courts, would not be a bill of attainder. What Congress may not do — as it specifies whatever *general* rule it will (prospective or retrospective, so long as it does not inflict "punishment")[145] — is to irrebuttably foreclose adjudication, by a court, of a target's assertion that she is not "disloyal, or dangerous to America's security," and thus subject to deportation.[146] Congress may define,[147] but may not empirically determine (in a "trial") whether its definition fits either an individual or a defined-attribute-possessing group.[148]

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[144]For an extended discussion of the alarming degree to which even First Amendment civil rights dependent on the Free Exercise Clause have been denatured, see generally Boyle, *supra* note 142, and, respecting the Mormon cases in particular, *id.* at 11-16, 24-26, 42-45.

[145]Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[146]*Bill of Attainder*, *supra* note 96, at 360.

[147]To find that a legislative enactment is a bill of attainder, it is not essential (nor disabling) that the target be named. Dean Ely stated the proposition this way:

> Even a statute specifically naming the party to whom its deprivations are to attach need not, in every case, be a bill of attainder. A legislature might determine, for example, that persons whose last names exceed twenty letters shall not be permitted to list their names in the telephone directory. It might implement this broad judgment by specifically enacting that "John Kensington-Heidelburg-Coyle shall not be permitted to list his name in the telephone directory." Suspect though it may be on other constitutional grounds, such a statute would probably not be a bill of attainder. For the judgment that John Kensington-Heidelburg-Coyle's last name exceeds twenty letters is . . . definitional. No trial was necessary; the erection of judicial safeguards would be of slight importance.

Bill of Attainder, *supra* note 96, at 353.

[148]Dean Ely explained:

> The bill of attainder clause was adopted to keep the legislature from making judgments the framers considered the legislative branch unable to make in a calm, unbiased fashion; it would be nonsense to say that the legislature is subject to pressures which render it incapable of making fairly the definitional judgment —

In CERCLA, Congress has presumed to foreclose adjudication of a PRP's highly plausible assertion that it did not cause the alleged environmental damage.[149] As Superfund law stands today, there is a well justified

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> if it can be termed a "judgment" — that grand mal epileptics are subject to fits. The legislative process is fully as capable of insuring fairness and certainly in applying its broad rule to grand mal epileptics as any tribunal would be. No evidence is relevant; no case or controversy exists; no trial is needed.

Bill of Attainder, *supra* note 96, at 352. Continuing, Dean Ely illustrated:

> A return to the rationale underlying the bill of attainder clause . . . discloses that the statute ["No person afflicted with grand mal epilepsy shall drive an automobile"] does not possess the evils of a bill of attainder. For the legislature has not "tried" the class of persons called grand mal epileptics at all. Starting with the principle that persons who are subject to uncontrollable fits should not be allowed on the road, the legislature has, it is true, specified a class of persons who are to be so restricted. But the judgment that grand mal epileptics are persons susceptible to fits . . . requires no "trial" of the persons involved, no collection and evaluation of empirical data concerning them. That "grand mal epileptics" are "persons susceptible to fits" follows from the very meaning of the words involved. The judgment is tautological; empirical evidence about the persons is totally irrelevant to the decision.

Id. But what if courts are entitled to take judicial notice that a regimen of medication exists which makes untrue the premise that "grand mal epileptics are persons susceptible to fits"? Would not the same statute then verily "possess the evils of a bill of attainder"?

[149]The more self-evident (but doctrinally less satisfactory) means for dealing with an overbroad, grossly offensive legislative classification, producing contrary-to-fact results if the classification be respected, is the reputedly "new" irrebuttable presumptions approach. Vlandis v. Kline, 412 U.S. 441, 452 (1973). Especially in the context of dealing with a tax felt to be almost self-evidently overbroad (notwithstanding the traditional deference due the tax-writer), it may be appropriate to recall that the irrebuttable presumption approach is not new. *See, e.g.*, Heiner v. Donovan, 215 U.S. 312, 324 (1932), dealing with a rule seeking to characterize, irrebuttably, any gift made within two years of death as made "in contemplation of death." This provision, whether viewed "as a rule of evidence or of substantive law," said Justice Sutherland's majority opinion, "constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality." *Id.* at 329. A law, the Justice opined, "creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause." *Id.* The better approach — if ever it could be recognized that the Bill of Attainder Clause is clearly the better proscription for dealing with attempted legislative adjudications — is to invalidate the statute. Then the reviewing court should command, as the overall design of the Constitution contemplates, that all adjudications be entrusted to courts — except impeachments, of course, and the never-invoked Attainder of Treason. U.S. CONST. art. III, § 3, cl. 2. It now appears likely, however, that the EPA's current plans for reform, apart from a fairly obvious need to admit that an industrial-site cleanup qualifies as such even if the soil is not edible, and the leachate not drinkable, will be superficial and self-centered, concentrating, as SARA did also,

apprehension that the Supreme Court, in Dean Ely's worlds, has "read the bill of attainder clause out of the Constitution as an anachronistic surplusage."[150] In the process, Superfund PRPs have been the losers. But many others should reflect, when they read *Shore Realty* and *Fleet Factors*, that — as Dean Ely put it when he was still an anonymous law student — we may already have "lost the right to be judged by persons other than those who enact the law."[151]

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on an attempt to "persuade" PRPs to settle and not to sue. *See* John H. Cushman, Jr., *Administration Plans Revision to Ease Toxic Cleanup Criteria*, N.Y. TIMES, Jan. 31, 1994, at A1, A14. See generally Balcke, *supra* notes 15, 28, 42, 60; Weber, *supra* notes 8, 27, 48; Clark, *supra* notes 4, 5, 49; Mounteer, *supra* notes 44, 59; together with the accompanying text, for a discussion of the 1986 SARA amendments to RCRA and the reasonable apportionment of liability for response costs and natural resource damages.

[150]*Bill of Attainder*, *supra* note 96, at 365-66 n.195.

[151]*Id.*