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The Supreme Court Sanctions the Conditioning of Financial Aid for College on Draft Registration: *Selective Service System v. Minnesota Public Interest Research Group*[1] — Section 1113 of the Department of Defense Authorization Act of 1983, popularly known as the Solomon Amendment, conditions federal financial aid for higher education on registering for the draft.[2] The Solomon Amendment excludes violators of the draft registration law[3] from Title IV federal assistance programs.[4] Pursuant to a congressional mandate,[5] President Carter reactivated draft registration in 1980 by ordering all eighteen

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[1] Selective Serv. Sys. v. Minnesota Pub. Interest Research Group (MPIRG), 104 S. Ct. 3348 (1984).

[2] 50 U.S.C. app. § 462(f) (1982). Section 1113 of the Department of Defense Authorization Act, Pub. L. No. 97–252, 96 Stat. 748 (1982) (codified at 50 U.S.C. app. § 462(f) (1982)), added a new subsection to the "Offenses and Penalties" section of the Military Selective Service Act. 50 U.S.C. app. § 451 *et seq.* (1982). The full text of the Solomon Amendment is as follows:

> Section 1113. (a) Section 12 of the Military Selective Service Act, 50 U.S.C. App. 462, is amended by adding after subsection (e) the following new subsection:
>
> > (f)(1) Any person who is required under section 3 to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under title IV of the Higher Education Act of 1965.
> >
> > (2) In order to receive any grant, loan, or work assistance under title IV of the Higher Education Act of 1965 [20 U.S.C. § 1070 et seq. (1982)], a person who is required under section 3 to present himself for and submit to registration under such section shall file with the institution of higher education which the person intends to attend, or is attending, a statement of compliance with section 3 and regulations issued thereunder.
> >
> > (3) The Secretary of Education, in agreement with the Director [of the Selective Service System], shall prescribe methods for verifying such statements of compliance filed pursuant to paragraph (2). Such methods may include requiring institutions of higher education to provide a list to the Secretary of Education or to the Director of persons who have submitted such statements of compliance.
> >
> > (4) The Secretary of Education, in consultation with the Director, shall issue regulations to implement the requirements of this subsection. Such regulations shall provide that any person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 and the regulations issued thereunder shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he has complied with the registration requirement under section 3. Such regulations shall also provide that the Secretary may afford such person an opportunity for a hearing to establish his compliance or for any other purpose.
>
> (b) The amendment made by subsection (a) shall apply to loans, grants, or work assistance under title IV of the Higher Education Act for periods of instruction beginning after June 30, 1983.

Pub. L. No. 97–252, 96 Stat. 748 (1982).

[3] Proclamation No. 4771, 3 C.F.R. § 82 (1980), *reprinted in* 50 U.S.C. app. § 453, at 233–34 (1982).

[4] 50 U.S.C. app. § 462(f) (1982). Title IV of the Higher Education Act of 1965 includes all federal financial aid for higher education programs including Pell Grants, Supplemental Educational Opportunity Grants, College Work Study, National Direct Student Loans, Guaranteed Student Loans, PLUS loans and Student Incentive Grant Programs. 20 U.S.C. § 1070 *et seq.* (1982) and regulations thereunder, 34 C.F.R. § 668.22 (1984).

[5] Section 3 of the Military Selective Service Act empowers the President to require by procla-

to twenty-one year old males to register with the Selective Service System.[6] In addition, each male subsequently to reach the age of eighteen was required to register within thirty days of his eighteenth birthday.[7] In 1982, in the wake of extensive non-compliance with the draft registration law,[8] Congress passed the Solomon Amendment in order to deprive non-registrants of the opportunity to attend college with financial assistance from the federal government.[9] In addition to disqualifying non-registrants from federal financial aid programs, the Solomon Amendment requires all financial aid applicants to submit to their schools a statement of compliance with the draft registration law.[10] Both the disqualification of non-registrants from financial aid programs and the requirement that they file statements of compliance with the draft registration law were challenged in *Selective Service System v. Minnesota Public Interest Research Group.*[11]

In 1982, Minnesota Public Interest Research Group (MPIRG),[12] seeking to enjoin enforcement of the Solomon Amendment, filed a complaint in the United States District Court for the District of Minnesota raising bill of attainder, self-incrimination and other constitutional challenges.[13] MPIRG alleged that in legislatively depriving non-registrants of the opportunity to receive federal financial aid for college without judicial process, the Solomon Amendment violates the Constitution's prohibition against bills of attainder.[14] Further, MPIRG alleged that in requiring financial aid applicants to submit statements of compliance with the draft registration law, the Solomon Amendment violates the fifth amendment's prohibition against compelled self-incrimination.[15] Although MPIRG's suit was dismissed for lack of standing,[16] the district court allowed simultaneous

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mation the registration of every male citizen and resident alien between the ages of eighteen and twenty-six. 50 U.S.C. app. § 453 (1982).

[6] *See* Proclamation No. 4771, 3 C.F.R. § 82 (1980), *reprinted in* 50 U.S.C. app. § 453, at 233–34 (1982).

[7] *See id.*

[8] The Solomon Amendment's sponsor in the House, Representative Jerry Solomon, estimated that approximately 700,000 young men had not registered and were thus in violation of the draft registration law at the time of the introduction of the Solomon Amendment bill. 128 CONG. REC. H4757 (daily ed. July 28, 1982) (remarks of Rep. Solomon).

[9] Representative Solomon expressed his intention to offer his Amendment repeatedly to several governmental benefit programs "until every young man is deprived of any kind of Federal assistance unless he has obeyed the law and fulfilled his obligation as a citizen . . . ." *Id.* In addition, Representative Edgar, speaking in opposition, noted that one of the purposes of the Solomon Amendment was to "punish the individuals who do not register." *Id.* at H4760. Many of those speaking in favor of the Amendment expressed their outrage over the fact that young men who did not register were reaping the benefits of citizenship, but not sharing in the responsibilities of citizenship. *See, e.g., id.* at H4757 (remarks of Reps. Mitchell and Montgomery). Supporters of the Amendment in the Senate expressed these same concerns. *See, e.g.,* 128 CONG. REC. S4943 (daily ed. May 12, 1982) (statement of Sen. Hayakawa); *id.* at S4945 (statements of Sens. Jepsen and Tower).

[10] 50 U.S.C. app. § 462(f)(1), (2) (1982), *see supra* note 1.

[11] Selective Serv. Sys. v. Minnesota Pub. Interest Research Group (MPIRG), 104 S. Ct. 3348, 3352 (1984) (*MPIRG*).

[12] Minnesota Public Interest Research Group [hereinafter MPIRG] is a student directed non-profit organization in Minnesota working on issues in the public interest. *See* MPIRG v. Selective Serv. Sys., 557 F. Supp. 925, 926 (D. Minn. 1983).

[13] *Id.*

[14] Doe v. Selective Serv. Sys., 557 F. Supp. 937, 941 (D. Minn. 1983) (*Doe*), *rev'd sub nom.,* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group (MPIRG), 104 S. Ct. 3348 (1984) (*MPIRG*).

[15] *Id.* at 946.

[16] MPIRG v. Selective Serv. Sys., 557 F. Supp. 925, 936 (D. Minn. 1983).

intervention as plaintiffs of Doe and two other anonymous non-registrants who desired to attend college, but who could not afford to do so without federal financial assistance.[17] Later, three additional anonymous non-registrants who were in the same predicament also were allowed to intervene as plaintiffs, and the case name became *Doe v. Selective Service System*.[18]

In March of 1983, the district court issued a temporary injunction against the government's enforcement of the Solomon Amendment.[19] In June of the same year, the district court ruled in favor of the plaintiffs on the merits of two of their constitutional challenges, declaring the Solomon Amendment both an unconstitutional bill of attainder and a violation of the prohibition against compelled self-incrimination, and issued a permanent injunction.[20] Thirteen days later, however, on June 29, 1983, the United States Supreme Court stayed the injunction, allowing the government to proceed with its enforcement of the Solomon Amendment pending final review by the Supreme Court.[21] Probable jurisdiction was noted on December 5, 1983.[22] In a six-to-two opinion[23] written by Chief Justice Burger, under the name *Selective Service System v. MPIRG* (*MPIRG*), the Supreme Court reversed the opinion of the district court in *Doe v. Selective Service System* (*Doe*), and held that neither the bill of attainder clause nor the self-incrimination clause had been violated.[24]

MPIRG arose out of two politically expedient actions: in response to the Soviet invasion of Afghanistan, the President reactivated draft registration,[25] and in response to massive non-compliance with the draft registration law, Congress excluded non-registrants from eligibility for federal financial aid programs.[26] Under the American

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[17] MPIRG v. Selective Serv. Sys., 557 F. Supp. 923, 925 (D. Minn. 1983).

[18] *Doe*, 557 F. Supp. at 937.

[19] The district court's temporary injunction against enforcement of the Solomon Amendment was based on its finding that the plaintiffs had shown a probability of success on the merits of their constitutional claims, and that they faced irreparable harm by the government's continuing enforcement of the law. *Id.* at 940–41, 950.

[20] The district court's permanent injunction against further enforcement of the Solomon Amendment was issued in a memorandum order incorporating by reference the findings and reasoning that it spelled out in issuing its temporary injunction in *Doe*, 557 F. Supp. at 937. Doe v. Selective Serv. Sys., No. 3–82, Civ. 1670 (D. Minn. June 16, 1983).

[21] Selective Serv. Sys. v. Doe, 103 S. Ct. 3574 (1983).

[22] Selective Serv. Sys. v. MPIRG, 104 S. Ct. 522 (1983).

[23] Chief Justice Burger wrote the majority opinion, in which Justices White, Powell, Rehnquist, Stevens and O'Connor joined. *MPIRG*, 104 S. Ct. at 3348. Justice Powell also filed a concurring opinion. *Id.* at 3359 (Powell, J., concurring). Justice Marshall wrote a dissenting opinion in which Justice Brennan joined in part. *Id.* at 3361 (Marshall, J., joined in part by Brennan, J., dissenting). Justice Blackmun did not participate in the case. *Id.* at 3359.

[24] *Id.* at 3359. In a footnote, the Court rejected the plaintiffs' assertion that the Solomon Amendment was also a violation of the equal protection clause of the fourteenth amendment because it discriminated on the basis of wealth. *Id.* at 3359 n.17. The Court noted that under the equal protection clause, a law need only have a rational basis for making a wealth classification, and the purpose of encouraging draft registration constituted that rational basis. *Id.* In lone dissent on this issue, Justice Marshall declared that he would have struck down the Solomon Amendment on equal protection grounds, because he could not find a rational reason for discriminating on the basis of wealth. *Id.* at 3368–71 (Marshall, J., dissenting). The district court had decided that it did not need to reach this issue in light of the fact that it had found the Solomon Amendment unconstitutional on bill of attainder and self-incrimination grounds. *Doe*, 557 F. Supp. at 950.

[25] *See supra* text accompanying notes 6–7.

[26] *See supra* notes 2, 8–10.

system of government, a challenge to the constitutionality of Congress' action is resolved by a third governmental action — judicial review by the Supreme Court.[27] This article will ask the question whether the Supreme Court fulfilled its obligation as interpreter and defender of the Constitution, or whether it avoided the constitutional issues raised, in yet a third act of political expediency. Analysis of the Supreme Court's opinion in *MPIRG*, and comparison with the district court's opinion in *Doe*, will illustrate that the Supreme Court deferred resolution of the issues in this case to the legislative and executive branches, each of which is accountable to the political will of the electorate.[28] This note will conclude, therefore, that the Court did not serve as that vital third link in the system of checks and balances which is the very foundation of the two hundred year old American experiment in democracy.[29]

This note will begin in Section I by tracing first the significance and the Supreme Court's historical treatment of the bill of attainder clause, and then the significance and the Supreme Court's historical treatment of the fifth amendment's prohibition against compelled self-incrimination, as it relates to *MPIRG*. Section II then will present the district court's resolution in *Doe* of these two issues. Next, Section III will lay out the Supreme Court's resolution in *MPIRG* of these same issues. Finally, Section IV will compare and contrast the disparate treatment of the bill of attainder and self-incrimination clauses by the two courts, and attempt to extract the significance of the Supreme Court's ruling. Critical analysis of the Supreme Court's opinion on the bill of attainder and self-incrimination issues in *MPIRG* will suggest that the district court in *Doe* was correct in its decision that the Solomon Amendment violates both constitutional provisions involved, and that the Supreme Court was misguided in reversing *Doe*. Ultimately, this article will conclude that the Supreme Court set an unfortunate precedent in its holding that the Solomon Amendment violates neither the bill of attainder nor the self-incrimination clause of the Constitution.

My conclusion is founded in the fact that the constitutional scheme of the separation of powers set up procedural protections of individual rights, which the Supreme Court traditionally has felt compelled to enforce. This article will attempt to show, therefore, how a very loose construction of the Solomon Amendment, coupled with an overly strict reading of the privilege against compelled self-incrimination and an overly narrow view of the prohibition against bills of attainder, has weakened the Constitution's procedural protection of individual rights.

I. Constitutional Background

The Framers desired that the Constitution would serve the dual purpose of establishing the authority of a central democratic government and limiting the power of such government.[30] The Framers, wary as they were about tyranny of the majority as well as tyranny of a minority,[31] included in the Constitution and its first ten amendments a

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[27] The Supreme Court's opinion in *MPIRG* resolves the plaintiffs' challenge to the legislative and executive actions involved by declaring the Solomon Amendment neither a violation of the Constitution's prohibition against bills of attainder nor a violation of the fifth amendment's prohibition against compelled self-incrimination. *MPIRG*, 104 S. Ct. at 3352.

[28] *See* United States v. Brown, 381 U.S. 437, 445–46 (1965).

[29] *See generally id.* at 443–48 (discussing importance of separation of powers doctrine).

[30] *See id.* at 443.

[31] *See id.*

myriad of procedural protections of individual rights against the power of the government. The bill of attainder clause and the self-incrimination clause are among these protections.[32] Both of these safeguards of individual liberties are among the extensive array of checks and balances found in the Constitution's separation of powers edifice.

The separation of powers doctrine is a structural means by which the Framers sought to protect the individual against government abuse through a specific distribution of powers among three co-equal branches of the federal government.[33] Mindful of the potential for the legislature to take shortcuts through the Constitution's procedural protections of individual freedoms in the name of governmental efficiency, the Framers fractionalized power among the three branches, reserving for the legislature the power only to promulgate laws of general applicability.[34] In the area of criminal justice, the Framers believed that the politically independent judiciary is better suited than the politically accountable legislature to render impartial justice in individual cases.[35] The bill of attainder clause mandates that the impartial courts of the judiciary, accountable to the rule of law, rather than the legislature which is designed to be influenced by the pressures of the political will of the electorate, should determine the guilt of, and levy punishment on, the accused.[36] The bill of attainder clause thereby strengthens the system of checks and balances which is the foundation of the separation of powers protection of the individual against legislative abuse.[37]

As the bill of attainder clause protects the individual from unbridled power of the legislature, the fifth amendment's prohibition against compelled self-incrimination protects the individual, guilty or innocent, from abuse by the executive branch of government.[38] The Framers believed that a civilized system of criminal justice has to be based on accusatorial rather than inquisitorial principles.[39] That is, in a criminal case, the burden of proof must be on the prosecution,[40] and the determination of guilt must be made by an impartial tribunal. Accordingly, the Framers made the judgment that it would be better for an occasional guilty person to go unpunished than to have a criminal justice system in which the government could force an individual into the "cruel tri-

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[32] *Id.* In *Brown* the Court noted James Madison's statement that: "[t]he accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny. *Id.* (quoting THE FEDERALIST No. 47, at 373–74 (J. Madison) (Hamilton ed. 1880)); *see also* Ullmann v. United States, 350 U.S. 422, 426–29 (1956).

[33] *Brown*, 381 U.S. at 442. The Court stated:

> The Constitution divides the National Government into three branches — Legislative, Executive and Judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose his unchecked will.

Id. at 442–43.

[34] *Id.* at 443.

[35] *Id.* at 445.

[36] *Id.*

[37] *Id.* at 444.

[38] *See Ullmann*, 350 U.S. at 426–28.

[39] Malloy v. Hogan, 378 U.S. 1, 7 (1964).

[40] *Id.* at 8.

lemma" of choosing among self-accusation, contempt and perjury.[41] Under the fifth amendment's prohibition against compelled self-incrimination, therefore, the government is required to make its case without any pressure on the accused to help the prosecution.[42] In light of the Framers' desire to protect the individual against the coercive power of government, the Supreme Court consistently has admonished that the fifth amendment privilege should be given a liberal interpretation so that it successfully may protect against the evils that it was designed to prevent.[43]

In the remainder of this section, the Supreme Court's historical treatment of the bill of attainder clause and the self-incrimination clause will be traced. Part A will concentrate on the Court's definition of bills of attainder, and the tests that the Court has formulated for applying the elements of that definition to specific cases. Part B will focus on the Court's historical interpretation of the fifth amendment's privilege against compelled self-incrimination, and the applicability of the components of that interpretation to situations, such as that created by the Solomon Amendment, where individuals are required by Congress to submit to the government written answers to potentially incriminating questions.

A. *The Supreme Court's Historical Treatment of the Bill of Attainder Clause*

Article I, section 9, clause 3 of the United States Constitution establishes a limit on the power of Congress: "No bill of attainder or ex post facto law shall be passed."[44] A bill of attainder is a law which legislatively, and without judicial process, determines guilt and inflicts punishment on an identifiable person or group.[45] The bill of attainder clause prevents the legislature from doing what the courts were set up to do — adjudicate individual cases and levy individual punishment.[46] As such, the bill of attainder clause is a vital ingredient in the separation of powers doctrine, which is one of the organizing principles on which the federal government is formed.[47] The Constitution's Framers, the Supreme Court has found, intended Congress to pass laws of general applicability under which the courts must try people whom the executive branch brings before them for prosecution.[48] Whereas Congress possesses full legislative authority, the task of adjudication is left to the courts.[49]

The first definitive rulings on the bill of attainder clause by the Supreme Court came during the period following the Civil War known as Reconstruction, when legislators attempted to punish former adversaries in the war.[50] The Court took this occasion

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[41] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); *see also Ullmann*, 350 U.S. at 427.

[42] *Malloy*, 378 U.S. at 8.

[43] *See, e.g., Ullmann*, 350 U.S. at 426–28.

[44] U.S. CONST. art. I, § 9, cl. 3.

[45] Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977).

[46] United States v. Brown, 381 U.S. 437, 442 (1965).

[47] *Id.* at 442–43.

[48] *Id.* at 446.

[49] *Id.* at 461.

[50] During the period of Reconstruction, which immediately followed the end of the Civil War, the northern Republicans in Congress used their considerable power and influence to punish people who had participated in the Rebellion against the Union. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867), and its companion case Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (discussed *infra* in text accompanying notes 51–58), are exemplary. In *Garland*, the Court invoked the bill of attainder clause to strike down a statute which excluded from practice before the federal bar those lawyers who would not, or could not, take a loyalty oath to the Union. *Id.* at 381.

to strike down laws which made an individual's entry into certain occupations illegal, absent the taking of a loyalty oath.[51] In *Cummings v. Missouri*,[52] for example, the Court struck down a law denying entrance into the priesthood to people who could not, or would not, swear to past and present allegiance to the Union in a loyalty oath.[53] In doing so, the Court first formulated a three-element definition of a bill of attainder as a law which legislatively, and without judicial process, determines the guilt of and levies punishment on an identifiable person or group.[54] The *Cummings* Court observed that a specific group deemed disloyal by the legislature had been singled out for punishment by that legislature, without the protections of a judicial trial.[55] Accordingly, the Court found a violation of the bill of attainder clause.[56]

Having found present all three elements of the bill of attainder prohibition, the *Cummings* Court proceeded to address and reject the idea that the law's escapability — by the taking of the loyalty oath — defeated the constitutional challenge. The Court considered this notion of escapability, which suggests that if a member of the specified group singled out for punishment were able to take herself out of that group — here, by taking the prescribed loyalty oath — the law might be legitimate regulation of future conduct rather than improper legislative punishment of a group singled out for past conduct, because the person who took the loyalty oath would no longer be a member of the specified group, nor would she suffer any punishment.[57] The Court ruled, however,

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[51] *See, e.g.*, *Cummings*, 71 U.S. at 316, 332 (the Court struck down a state law which denied access to the priesthood to people who did not take a loyalty oath to the Union); *Garland*, 71 U.S. at 381 (the Court struck down a federal statute which denied access to the federal bar to lawyers who did not take a loyalty oath to the Union).

[52] 71 U.S. (4 Wall.) 277 (1867).

[53] *Id.* at 323.

[54] *Id.* at 320–25.

[55] *Id.* at 325.

[56] *Id.* at 320.

[57] *Id.* at 324–25. Escapability of a statute means that a member of a group punished by the statute can avoid the punishment by refraining from engaging in the prohibited conduct. By definition, therefore, if a statute actually punishes a person for a past and ineradicable act, the statute is not escapable. If, however, the legislature passes a law of general applicability, as it is constitutionally obliged to do, the statute will merely regulate present and future conduct. Its punishment, therefore, can be avoided — or escaped — by a person who does not engage in the prohibited conduct, or who ceases to engage in that conduct.

This notion of the escapability of a statute's deprivation has been raised occasionally by the government as a defense to bill of attainder challenges. *See, e.g.*, *id.* In *Cummings*, the Court rejected the contention that a law's escapability means that future acts are being regulated rather than past acts punished, and therefore the Court rejected the notion that escapability defeats the specificity element of the bill of attainder clause. The *Cummings* Court tried to put the escapability defense to rest by also holding that escapability does not defeat the punishment element in bill of attainder analysis. *Id.*

Nevertheless, the idea that escapability may defeat a bill of attainder challenge did enjoy a short period of success. In Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 88 (1961), for example, the Court considered escapability as one factor in determining whether a specific group had been singled out for punishment. *Id.*, *construed in Brown*, 381 U.S. at 457 n.12. In American Communications Ass'n v. Douds, 339 U.S. 382, 413 (1950), the Court considered escapability as one factor in analyzing the punishment element of the bill of attainder clause. *Id.*, *construed in Brown*, 381 U.S. at 457 n.12. The *Brown* Court, however, summed up this brief period of limited success in the government's assertion of the escapability defense by severely narrowing, if not eliminating, the scope of the defense. *Brown*, 381 U.S. at 457. The *Brown* Court criticized the use of the defense, declaring that it flew in the face of the Court's holding in *Cummings*. *Id.* The

that the constitutional separation of powers consists not of technicalities which semantically can be eluded, but of strict procedural safeguards to which the government must always adhere, if the provisions are to accomplish what the Framers intended.[58]

The second major set of bill of attainder cases to reach the Supreme Court arose out of the post World War II Cold War period known as the McCarthy Era.[59] In *United States v. Brown*,[60] a typical case generated by the political climate of the era, the Supreme Court again was faced with legislative attempts to bar those it branded disloyal — this time suspected communists — from occupations of their choice.[61] The *Brown* Court found that in passing legislation forbidding communists from becoming officers in labor unions, Congress legislatively singled out a specified group for punishment without judicial process, and, thus, impermissibly violated all three elements of the bill of attainder prohibition.[62] Once again the Court reaffirmed the maxim that the separation of powers doctrine, as enforced by the bill of attainder clause, prohibits Congress from singling out for the deprivation of rights those it deems disloyal to the nation, without affording them the protections of a judicial trial.[63] Observing that the Framers included the bill of attainder clause in the Constitution at a time when legislative determination of guilt and infliction of punishment commonly was used against people deemed disloyal by the legislature,[64] the Court noted that, when determining whether or not a bill of attainder exists, it must continue to look at the circumstances surrounding the enactment of the challenged legislation to see if the legislature is engaging in this type of persecution.[65]

Court went on to declare that escapability is not, in fact, a legitimate defense to a bill of attainder challenge. *Id.*

[58] *Cummings*, 71 U.S. at 322–25. The *Cummings* Court had the following to say about its holding that escapability does not take a law, which is otherwise a bill of attainder, out of bill of attainder danger:

> [B]ills [of attainder] may inflict punishment absolutely, or may inflict it conditionally.
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> . . . .
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> The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows . . . . It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.
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> . . . .
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> And further, if these clauses had declared that all such priests . . . should be held so guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

Id. at 324–25.

[59] During the Cold War period following World War II, as during Reconstruction, the Court was faced with legislative attempts to deprive those deemed disloyal of the rights that others enjoyed. The now infamous McCarthy hearings, which added fuel to the fire of Cold War paranoia, also spawned legislative action aimed at depriving alleged "subversives" of the rights enjoyed by "other" Americans. The cases which reached the Supreme Court during and soon after this period often addressed these controversies on bill of attainder grounds. *See, e.g., Brown*, 381 U.S. 437 (the Court struck down a law which made it a crime for a communist to serve as an officer in a labor union); United States v. Lovett, 328 U.S. 303 (1946) (the Court struck down a federal statute which barred government pay to federal employees who were communists).

[60] 381 U.S. 437 (1965).

[61] *Brown*, 381 U.S. at 438.

[62] *Id.* at 461.

[63] *See id.* at 461–62.

[64] *See, e.g., id.* at 447; *Cummings*, 71 U.S. at 322.

[65] *See, e.g., Brown*, 381 U.S. at 448–49; *Cummings*, 71 U.S. at 320.

In *Nixon v. Administrator of General Services*,[66] its most recent major explication of the bill of attainder clause, the Supreme Court summarized its historical analysis of this constitutional protection and reaffirmed the relevance of the context of the law's passage to the specificity and punishment elements of the bill of attainder prohibition. In applying this historical analysis to the political milieu of the Watergate scandal, the Court rejected former President Nixon's claim that congressional legislation authorizing the Administrator of General Services to preserve his presidential papers and tapes violates the bill of attainder clause.[67] The *Nixon* Court looked for, but failed to find, the first element of a bill of attainder — the legislative determination of guilt without judicial process — in the language of the statute itself.[68] On the other hand, in failing to find the second and third elements of the bill of attainder clause — the legislative infliction of punishment and the singling out of a specified person or group — the Court found it necessary to turn to the extrinsic political circumstances surrounding the enactment of the statute in question.[69]

The *Nixon* Court abstracted from its precedent a three-prong test for determining the existence of the second element — legislative punishment. Each prong inquires into the political circumstances surrounding the adoption of the bill of attainder clause and the political quandary surrounding the enactment of the law in question.[70] The Court declared that the punishment element of the bill of attainder prohibition exists if the challenged deprivation falls within the historical meaning of "legislative punishment," if it reasonably cannot be said that the deprivation has "non-punitive legislative purposes," or if the legislative history "evinces an intent to punish."[71] As a result, in order to resolve the punishment element of a bill of attainder challenge, courts must muse the historical ethos of the authors of the bill of attainder clause as well as consider the temperament of the specific legislature which enacted the statute at issue.[72]

The first inquiry of the three-prong test for the determination of whether a statute constitutes the infliction of legislative punishment, as prohibited by the bill of attainder clause, focuses mainly on what the Supreme Court previously has held to be within the ambit of prohibited "legislative punishment."[73] The *Nixon* Court noted that bills of attainder historically have included punishments such as death, imprisonment or the confiscation of property.[74] The Court further noted that it previously had extended the definition of legislative punishment in its bill of attainder analysis to include interference with a person's occupational choice.[75] Though concluding that the preservation of former President Nixon's presidential records could not be construed to fall within the historical definition of legislative punishment, the Court explicitly stated that none of its opinions should be read to preclude future findings that new deprivations formulated by the legislature also may violate the bill of attainder clause.[76]

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[66] 433 U.S. 425 (1977).

[67] *See id.* at 468–80. The *Nixon* Court reaffirmed the definition of a bill of attainder as a law which legislatively, and without judicial process, determines guilt and levies punishment on an identifiable person or group. *Id.*

[68] *See id.* at 468.

[69] *See id.* at 471–84.

[70] *Id.* at 473–84.

[71] *Id.* at 473, 475–76, 478.

[72] *See id.* at 468–84.

[73] *Id.* at 473–74.

[74] *Id.*

[75] *Id.* at 474.

[76] *Id.* at 475.

As the Court in its historical inquiry focuses on the Framers' intent in banning bills of attainder, in the two remaining inquiries in the three-prong legislative punishment test — the consideration of non-punitive legislative purposes and the search of the legislative history for a motive to punish — the Court contemplates the political environment in which the challenged statute was passed.[77] After assessing the particular economic and political status of former President Nixon, and after considering the deprivation to which he was subjected by Congress, the *Nixon* Court found legitimate non-punitive legislative purposes, but found no legislative motive to punish.[78]

The inquiry into the circumstances surrounding the law and those persons that the law affects also sheds light on the determination of the third prohibited element — that of specificity. In analyzing this third element of bills of attainder — the singling out of an identifiable person or group for deprivation of certain rights — the Court also looks to the circumstances surrounding the enactment of the statute. This element, called the specificity requirement, will be met, the Court has held, if the person to be deprived is singled out either by name or by description of such person's past actions.[79] Consequently, under the *Nixon* Court's formulation, both the legislative attitude at the time of the law's passage and the political status of the person named or described are essential facts in deciding that the specificity element is or is not met.[80]

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[77] *See id.* at 471–73, 475–84 (construing *Brown*, 381 U.S. at 448–49, and *Cummings*, 71 U.S. at 320).

It should be noted, however, that in Nestor v. Flemming, 363 U.S. 603, 619 (1960), the Court held that the denial of Social Security benefits to deported aliens did not constitute punishment in terms of the bill of attainder clause. *Id.* This raised the question of whether the nature of the deprivation to which Congress subjects an individual is determinative of the punishment element. The *Nestor* Court emphasized, however, that it could find no punitive motive in the congressional action. *Id.* Moreover, the Court explicitly relied on the *Cummings* Court's ruling that prohibited punishment, rather than legitimate regulation, exists, when the law in question is designed to "'reach the person, not the calling.'" *Id.* at 614 (quoting *Cummings*, 71 U.S. at 320). In *Nestor*, the Court ultimately found that, under *Cummings*, the challenged law was a valid regulation of the Social Security System's disbursement of non-contractual governmental benefits, and was not prohibited punishment of a specific person or group. *Nestor*, 363 U.S. at 616–17.

In *Nestor* the Court focused on congressional motive, not on the nature or severity of the benefit denied, in determining whether the legislation in question violated the bill of attainder clause. Nevertheless, doubts seemed to linger until the *Brown* Court reiterated the declaration by the *Cummings* Court that "'[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.'" *Brown*, 381 U.S. at 448 (quoting *Cummings*, 71 U.S. at 320). Furthermore, in *Nixon*, its latest major application of the bill of attainder clause, the Court resoundingly reaffirmed this *Cummings-Brown* line of reasoning emphasizing the punitive intent of Congress, rather than the nature and extent of the punishment, as the major criterion for determining whether or not the bill of attainder punishment element is met in a given case. *See Nixon*, 433 U.S. at 468–84.

[78] *See Nixon*, 433 U.S. at 475–84.

[79] *See id.* at 471–72; *see also Brown*, 381 U.S. at 461.

[80] *See Nixon*, 433 U.S. at 469–72. Although the challenged statute referred to Nixon by name, the Court held that the specificity element was not met because Congress' intent was not to single out Nixon, per se, but to prevent any president, former, present or future, from disposing of valuable presidential documents in his or her possession. *Nixon*, 433 U.S. at 472. Nixon, coincidentally, had been the only president to date to threaten such action. *Id.* The Court added, however, that even if the specificity element had been satisfied, the statute was not an impermissible bill of attainder because the legislative determination of guilt element and the punishment element had not been satisfied. *Id.*

It thus seems clear that the bill of attainder clause, which prohibits Congress from determining guilt and inflicting punishment on an identifiable group of persons without judicial process, is to be applied broadly by the Supreme Court. Although the legislative determination of guilt absent judicial process element is determined by assessing the language of the challenged statute itself, the punishment and specificity elements are decided in light of relevant historical and political considerations. The punishment element, especially bound up in a necessary judicial inquiry into the political motives of the legislators, has been refined by the Court into a finely tailored, easy to apply, three-prong test. In sum, regardless of any speculative ability of a person to escape the punishment implemented by a law, if that law contains all three elements of the Supreme Court's definition of proscribed bills of attainder — legislative determination of guilt absent judicial process, punishment and the singling out of a specified person or group — the reviewing court is obliged to apply forcefully the broad prohibition and strike down the law as violative of the Constitution.[81]

B. *The Supreme Court's Historical Treatment of the Self-Incrimination Clause*

The fifth amendment to the Constitution mandates that "no person . . . be compelled in any criminal case to be a witness against himself."[82] The Supreme Court has interpreted this prohibition against compelled self-incrimination to apply to all governmental proceedings, be they criminal or civil, administrative or judicial, investigatory or adjudicatory.[83] Two main issues generally are involved in a fifth amendment challenge to a statute: whether the information required is incriminatory,[84] and whether such information is compelled.[85]

In analyzing the incrimination component, the Supreme Court has interpreted broadly the fifth amendment privilege to encompass any disclosure which the person reasonably may believe could be used against her in any criminal prosecution, or which merely may lead to evidence which could be used in such a criminal prosecution.[86] While it is often clear when information may or may not be incriminating, the compulsion component is often the subject of controversy because, as the Supreme Court has recognized, the meaning of compulsion is more amorphous than that of incrimination.[87] The confusion is somewhat eased, however, because the Court has given a liberal, though not specific, interpretation to the compulsion requirement.[88]

The Court has described the compulsion component of the privilege against self-incrimination as the right of a person to remain silent unless that person chooses to speak in the unfettered exercise of her own will, and to suffer no penalty for such

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[81] *See supra* text accompanying notes 44–80. In no uncertain terms, the *Nixon* Court reaffirmed *Brown*, which likewise had reaffirmed *Cummings*, stating that "*Brown* . . . and earlier cases *unquestionably gave broad and generous meaning* to the constitutional protection against bills of attainder." *Nixon*, 425 U.S. at 469 (emphasis added).

[82] U.S. CONST. amend. V, cl. 3.

[83] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring).

[84] *See* U.S. CONST. amend. V, cl. 3.

[85] *See id.*

[86] *Murphy*, 378 U.S. at 94 (White, J., concurring).

[87] *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 496 (1967); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

[88] *See Malloy*, 378 U.S. at 8.

silence.[89] The general rule for determining whether or not disclosure is compelled, the Court has held, is that compulsion occurs where the right to remain silent is made "costly."[90] For example, the Court has held that such sanctions for remaining silent as the denial of government contracts to a private businessperson,[91] the removal of a person from her job[92] or office,[93] and the denial of one's eligibility to practice law[94] constitute compulsion under the fifth amendment.[95] The range of applicability of the privilege to different types of government proceedings is as extensive as the broad scope of its incrimination and compulsion components.

The Court has extended the privilege to situations where a government agency compels the filing of a written form on which incriminating questions are asked.[96] In *Minnesota v. Murphy*,[97] though refusing to extend the fifth amendment privilege to arguably voluntary statements made to one's probation officer, the Supreme Court reaffirmed the principle that where a person is directed to file a governmental form which asks incriminating questions, that person must silently refuse to file the form in order to preserve the privilege against compelled self-incrimination.[98] The *Murphy* Court referred to a line of cases in which the Court overturned the conviction of gamblers for refusing to list their illegal sources of income on their tax returns.[99] The government argued in those cases that gamblers are not compelled to incriminate themselves by the requirement that they list the source of their income on tax returns because gamblers are not compelled to engage in illegal gambling.[100] The Court rejected this argument as missing the point.[101] The issue, the Court held, is not whether a person could choose not to gamble, but whether, once a person has chosen to gamble, the government may compel such person to answer incriminating questions.[102] The *Murphy* Court stated that the fifth amendment privilege affords a right not only not to answer incriminating

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[89] *Id.*

[90] Spevack v. Klein, 385 U.S. 511, 515 (1967). The Court has held that compulsion exists where the choice given is between "the rock and the whirlpool." *Garrity*, 385 U.S. at 496. The question to be asked is whether the person is deprived of the "free choice to admit, to deny, or to refuse to answer." *Id.* The option to lose one's means of livelihood or to be forced to incriminate oneself has been called by the Court "the antithesis of free choice to speak out or to remain silent." *Id.* at 497.

The Court has further defined a "costly" choice in terms of economic coercion. *See* Lefkowitz v. Turley, 414 U.S. 70, 82–83 (1973). The Court has extended the protection beyond the loss of employment to the mere loss of a limited number of contracts in private business. In *Turley*, the Court held that the denial of government contracts for five years to a private businessperson was costly, in terms of sanctions against the right to remain silent, as included in the protection against compelled self-incrimination. *Id.* Furthermore, the Court has held that "[a] significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage." *Id.* at 84.

[91] *Turley*, 414 U.S. at 83.

[92] *Garrity*, 385 U.S. at 500.

[93] Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977).

[94] *Spevack*, 385 U.S. at 514.

[95] *See supra* notes 91–94 and accompanying text.

[96] *See* Minnesota v. Murphy, 104 S. Ct. 1136, 1149 (1984) (construing Marchetti v. United States, 390 U.S. 39, 48 (1968), and Grosso v. United States, 390 U.S. 62, 66 (1968)).

[97] 104 S. Ct. 1136 (1984).

[98] *Id.* at 1149 & n.8.

[99] *Id.*

[100] *See Marchetti*, 390 U.S. at 51.

[101] *Id.*

[102] *Id.*

questions, but also not to file the form, if the very filing of the form could be incriminating.[103] Accordingly, the *Murphy* Court noted that a person waives the privilege against compelled self-incrimination if that person fails to claim the privilege by silently refraining from filing the form.[104]

In sum, the Supreme Court liberally interprets and applies the privilege against compelled self-incrimination. The Court especially is mindful of the compulsory character of numerous governmental sanctions and the incriminating nature of various governmental proceedings. The Court, therefore, has extended the broad protections of the fifth amendment privilege to situations in which the government punishes an individual's refusal to answer incriminatory written questions on a form which must be submitted to a governmental agency.[105]

II. *Doe v. Selective Service System*

Relying on the Supreme Court's historical treatment of the bill of attainder and self-incrimination clauses, the United States District Court for the District of Minnesota ruled against the government in *Doe*, holding that the Solomon Amendment violates both the bill of attainder and the self-incrimination prohibitions in the United States Constitution.[106] The first part of this section will discuss the district court's finding of an unconstitutional bill of attainder, notwithstanding the government's argument that the Solomon Amendment is escapable. This section's second part will expound the district court's finding of compelled self-incrimination in the Solomon Amendment's requirement that financial aid applicants submit a statement of compliance with the draft registration law.

A. *The Bill of Attainder Challenge*

In its analysis of the bill of attainder challenge to the Solomon Amendment,[107] the *Doe* court relied on the Supreme Court's decision in *Nixon*.[108] In particular, the *Doe* court applied the historical definition of a bill of attainder as formulated by the *Nixon* Court,[109] and found in the challenged provision a legislative determination of guilt without judicial process,[110] bill of attainder punishment under the three-prong inquiry into the surrounding circumstances of the statute's enactment,[111] and the singling out of an identifiable group to receive such punishment.[112] The district court concluded, therefore, that the statute is an unconstitutional bill of attainder.[113]

In applying the first element of the Supreme Court's definition of a bill of attainder — legislative determination of guilt without judicial process — the district court noted that the Solomon Amendment deprives all non-registrants of the opportunity to receive

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[103] *Murphy*, 104 S. Ct. at 1149 & n.8.

[104] *Id.* at 1149.

[105] *See supra* text accompanying notes 82–104.

[106] *Doe*, 557 F. Supp. at 145–46, 150. *Doe* was reversed in Selective Serv. Sys. v. MPIRG, 104 S. Ct. 3348 (1984). *See infra* text accompanying notes 178–223.

[107] *See supra* notes 2–10 and accompanying text.

[108] *Doe*, 557 F. Supp. at 941–50.

[109] *See supra* notes 66–80 and accompanying text.

[110] *Doe*, 557 F. Supp. at 943.

[111] *Id.* at 943–45.

[112] *Id.* at 942.

[113] *Id.* at 945–46.

federal financial aid for college.[114] This is so, the court found, even though conviction under the draft registration law requires a judicial finding of a knowing failure to register.[115] The court concluded, therefore, that because non-registered financial aid applicants are denied financial aid whether or not they have been found by a court to possess the requisite intent to violate the draft registration law, Congress legislatively determined the guilt of these non-registrants without the protections of a judicial trial.[116] Having found a legislative determination of guilt without judicial process,[117] the district court proceeded to analyze the challenged statute in terms of the punishment and specificity elements of the bill of attainder prohibition.[118]

In addressing the specificity element of the bill of attainder challenge, the district court reiterated that the Solomon Amendment would meet this requirement if it either named the group to be deprived of financial aid, or if it specifically described such a group in terms of that group's past conduct.[119] The plaintiffs in *Doe* contended that the statute singles out the identifiable group composed of all draft-aged men who have violated the draft registration law.[120] The government countered with the argument that the specificity requirement is not met because the deprivation is escapable by late registration.[121] Because applicants may avoid the denial of financial aid by registering late for the draft, the government asserted, the future conduct of non-registration by the unidentifiable group of men who will fail to register is at issue rather than the past conduct of presently non-registered men.[122]

In ruling that the statute meets the specificity element of the bill of attainder prohibition, the district court rejected the government's arguments that the punishment is escapable, and that this asserted escapability would defeat the specificity requirement.[123] The court noted that to receive financial aid under the Solomon Amendment an applicant must comply with the draft registration law by registering for the draft within thirty days of his[124] eighteenth birthday.[125] Because there are no means by which an applicant can comply with the registration law once this thirty-day period expires, the court concluded, the Amendment's punishment cannot be escaped.[126] The *Doe* court found, therefore, that the identifiable group of men who have violated the draft registration law by failing to register for the draft within thirty days of their eighteenth birthdays are singled out for their past conduct, and the Solomon Amendment thereby meets the specificity element of the Supreme Court's definition of an unconstitutional bill of attainder.[127]

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[114] *Id.* at 943.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 943–45.
[119] *Id.* at 941 n.1.
[120] *Id.* at 942.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] The male pronoun will be used in all instances when referring to the Solomon Amendment because the draft registration law applies only to men. *See* Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (the Court upheld the all-male, peacetime draft registration law).
[125] *Doe*, 557 F. Supp. at 942.
[126] *Id.*
[127] *Id.*

The district court went on to rule that even if it had accepted the government's escapability construction, the Solomon Amendment would still violate the specificity element.[128] The court found that, regardless of whether the Solomon Amendment is escapable by late registration, the law lacks bona fide financial or academic criteria which might refute the premise that Congress sought to single out non-registrants for the denial of eligibility for federal financial aid programs.[129] The court concluded, therefore, that the clear intent of the Solomon Amendment is to reach those who have already failed to register for the draft in compliance with the law.[130] The court continued by criticizing the circularity of the government's argument that an otherwise unconstitutional law becomes constitutional simply by violators refraining from violating it.[131] Furthermore, the district court noted that the Supreme Court long ago rejected the notion that escapability is an absolute defense to a finding that the legislature had singled out a specific group for legislatively found guilt and legislatively assessed punishment.[132] Having concluded that the Solomon Amendment legislatively determines the guilt of a group singled out for past conduct,[133] the district court moved to the remaining issue in bill of attainder analysis — legislative punishment.[134]

In analyzing this legislative punishment element, the district court turned to the three-prong inquiry for finding punishment set out by the Supreme Court in *Nixon*.[135] Arguing that no punishment was present in *Doe*, the government first contended that the deprivation of financial aid for college does not fall within the historical definition of "legislative punishment" because the Supreme Court has never so held.[136] The district court rejected this argument, noting that the Supreme Court has not precluded the possibility of the legislature fashioning new punishments that would violate the bill of attainder clause.[137] Furthermore, the district court reasoned, the deprivation of one's opportunity to attend college is analogous, in modern society, to the closing of certain occupations to that person.[138] The court accordingly concluded that because the Supreme Court has found the denial of the opportunity to enter the occupation of one's choice an example of bill of attainder punishment, especially when the person is excluded due to a legislative determination of "disloyalty," the Solomon Amendment fits within the

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[128] *See id.*

[129] *Id.*

[130] *Id.* The court relied on *Cummings*, 71 U.S at 320, where the Supreme Court had declared the provision denying "disloyals" entrance into the priesthood an unconstitutional bill of attainder because it had found that the provision was passed "in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment . . . ." *Id.* In the absence of any bona fide academic or financial criteria in the Solomon Amendment, the district court concluded that it too was passed in order to reach the person, rather than to legitimately regulate Title IV educational funding. *Doe*, 557 F. Supp. at 942.

[131] *Doe*, 557 F. Supp. at 942. The court explained: "To say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement . . . ." *Id.*

[132] *Id.*

[133] *Id.* at 942–43.

[134] *Id.* at 943.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 944.

historical definition of legislative punishment, and thereby satisfies the first inquiry of the three-prong punishment element test.[139]

The government further argued that, under its asserted construction of escapability, the Solomon Amendment is an encouragement to register for the draft rather than a punishment for not registering.[140] As such, the government continued, the Solomon Amendment constitutes deterrence rather than retribution, and therefore does not fall within the Supreme Court's historical definition of "legislative punishment."[141] The court rejected this argument, declaring that deterrence has always been one of the most important aspects of any type of punishment, including what historically has been defined as legislative punishment, as forbidden by the bill of attainder clause.[142]

Arguing under the second prong of the punishment test — the "non-punitive legislative purpose" inquiry — the government again contended that the escapable Solomon Amendment is meant to encourage draft registration rather than punish non-registration,[143] and therefore, it has a legitimate non-punitive purpose.[144] The district court rejected this recurring escapability argument, noting again that deterrence is an inherently punitive measure.[145] To subscribe to the argument that the statute should be upheld because it seeks to encourage certain conduct rather than punish the opposite behavior, the court reasoned, would be to render the bill of attainder clause meaningless.[146]

After rejecting the government's escapability argument, the court further found that the Solomon Amendment promotes both the aims of deterrence and retribution, and applies to conduct already a crime and already punishable.[147] In addition, the court found that the Amendment assumes the guilty intent of non-registrants and imposes a deprivation on them.[148] Notwithstanding the government's escapability contention, therefore, the district court held that this second prong of the punishment element test is met because a non-punitive legislative purpose could not be found.[149]

Moving to the third possible definition of punishment under the Supreme Court's three-prong punishment test, the *Doe* court looked to the legislative history of the Solomon Amendment to determine if such history "evinced an intent to punish" non-registrants.[150] The district court acknowledged the remarks of the bill's sponsors in the House and the Senate — Representative Solomon, after whom the law was named, and Senator Hayakawa.[151] The court observed that both men had expressed their outrage at the fact that young men who refused to live up to their responsibilities as citizens by not registering for the draft could enjoy the privilege of citizenship of receiving financial

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[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 944–45.
[143] *Id.* at 944.
[144] *Id.*
[145] *Id.* at 944–45.
[146] *Id.*
[147] *Id.* at 944.
[148] *Id.*
[149] *Id.* at 944–45.
[150] *Id.* at 945.
[151] *Id.*

aid for college.[152] In these remarks, as well as in those of other Congresspersons, the district court found a clear intent to punish non-registrants.[153]

Under all three inquiries of the three-prong punishment test, therefore, the district court found the deprivation of the Solomon Amendment to be the type of punishment prohibited by the bill of attainder clause.[154] Because the court also found that the Solomon Amendment legislatively, and without judicial process, determines the guilt of a specified identifiable group for that group's past conduct, the court held the Solomon Amendment an unconstitutional bill of attainder.[155]

B. *The Self-Incrimination Challenge*

After finding an unconstitutional bill of attainder, the district court in *Doe* turned to the compelled self-incrimination challenge to the Solomon Amendment's requirement that a financial aid applicant submit a form of compliance with the draft registration law in order to receive financial aid. Initially, the district court ruled that, in light of the historically liberal interpretation that the Supreme Court has given to this privilege, the fifth amendment applies to the financial aid application procedure whereby applicants must file draft registration compliance forms. The district court noted that, according to the Supreme Court, the privilege is applicable to all governmental proceedings, including those in which a person is required to submit written answers to incriminating questions.[156] The district court acknowledged that for the statute to violate the fifth amendment both the incrimination and compulsion components of the privilege would have to be found.[157] Although the district court was faced again with the government asserting that escapability defeats the components of the constitutional challenge, the court found both incrimination and compulsion, and therefore declared the statute unconstitutional on fifth amendment grounds.[158]

The district court first addressed the incrimination component of the fifth amendment privilege as it applies to the non-escapable Solomon Amendment, and as it would apply to what the government suggested is an escapable Solomon Amendment. Under its own interpretation of the statute as inflicting non-escapable punishment, the *Doe* court found that a financial aid applicant who has not registered for the draft on time is required to disclose to the government that he is in violation of the law.[159] Even if an applicant were allowed to refuse to file the compliance form, the district court reasoned, because the government's major problem in enforcing the draft registration law is identifying the 700,000 individual violators, the very act of claiming the fifth amendment privilege in refusing to file the form would bring attention to a person as a violator of the law, thereby providing the government with the identification link in the prosecution's case.[160] The court held, therefore, that whether a non-registered financial aid applicant

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[152] *Id.*
[153] *Id.*
[154] *Id.* at 945–46.
[155] *Id.* at 946.
[156] *Id.* at 946–47.
[157] *Id.*
[158] *Id.* at 950.
[159] *Id.* at 947.
[160] *Id.* at 948.

files the compliance form or conspicuously refuses to file the form, he has incriminated himself, or, at the very least, he has identified himself as a possible violator of the law.[161]

If it were to have accepted the government's escapability argument, the district court noted, the result would have been no different.[162] The district court pointed out that even if the Solomon Amendment is escapable — allowing late registration for the limited purpose of receiving financial aid — the draft registration law itself, which requires registration within thirty days of a man's eighteenth birthday, does not allow a person to escape felony conviction and punishment by registering late.[163] The court noted that the very act of late registration, which would be required to obtain financial aid under an escapable Solomon Amendment, demands that a registrant provide the Selective Service System with his birthdate and registration date — two of the facts needed to prosecute a violator of the draft registration law.[164] The court concluded, therefore, that no matter how the Solomon Amendment is construed, incriminating information would have to be disclosed to the government by all previously non-registered financial aid applicants.[165]

Having found incrimination in the Solomon Amendment's requirement that an applicant submit a draft registration compliance form, the district court moved to the compulsion component of the fifth amendment privilege. The district court noted that the Supreme Court has consistently provided a liberal interpretation of compulsion.[166] In *Doe*, the government argued that the necessary compulsion is absent because non-registrants are not compelled to seek financial aid for college from the federal government.[167] According to the government, non-registrants, therefore, are not compelled to incriminate themselves under the Solomon Amendment, which applies only to legitimate financial aid applicants.[168] The district court rejected this argument, reasoning that the issue is not a person's decision not to register and to apply for financial aid, but, once a person has so decided, whether the government constitutionally may require him to incriminate himself.[169] The court drew an analogy to cases where the Supreme Court decided that gamblers may not be convicted for failing to file tax returns where the tax forms inquired into the illegal sources of the gamblers' income.[170] In those cases, the district court noted, the Supreme Court rejected the government's argument that the defendants were not compelled to incriminate themselves because they were not compelled to gamble illegally in the first place.[171]

The district court further relied on the Supreme Court's holding that there is compulsion under the fifth amendment where the right to remain silent is made "costly."[172] The *Doe* court reasoned that the deprivation of a college education in modern America is as costly as many of the deprivations that the Supreme Court historically has

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[161] *Id.* at 947–48.
[162] *See id.*
[163] *See id.* at 942, 948; *see also infra* notes 254 & 259.
[164] *See Doe*, 557 F. Supp. at 942, 948.
[165] *Id.* at 948.
[166] *See id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*

held unconstitutional sanctions for the exercise of the fifth amendment privilege.[173] The Supreme Court has held, as the court pointed out, that the removal from one's job, and the denial of the opportunity to practice law are examples of unconstitutional penalties for the right to remain silent.[174] Because the denial of a college education can produce the same result, the *Doe* court concluded, it too is such an unconstitutional sanction.[175]

Although the district court specifically stated that the draft registration law itself is valid, and therefore should be followed and enforced, the court found itself obliged to strike down the additional method of enforcement chosen by Congress — namely, the Solomon Amendment — because the Amendment infringes on the fifth amendment privilege of the plaintiffs.[176] Having found that the information required to be disclosed under the scheme of the Amendment was both incriminating and compelled, the United States District Court for the District of Minnesota declared the Solomon Amendment an unconstitutional violation of the fifth amendment's prohibition against compelled self-incrimination.[177]

III. *Selective Service System v. MPIRG*

The Supreme Court in *MPIRG* reversed the decision of the district court in *Doe*. The first part of this section will focus on the Court's bill of attainder analysis and its holding that neither the punishment nor the specificity element of the bill of attainder clause is satisfied. The second part will focus on the Court's resolution of the fifth amendment claim and its finding that neither the incrimination nor the compulsion component of the privilege is met.

A. *The Bill of Attainder Challenge*

On direct appeal the United States Supreme Court overturned, in *MPIRG*, the district court's holding in *Doe* that the Solomon Amendment is an unconstitutional bill of attainder.[178] The Supreme Court held that although Congress had inflicted deprivation on non-registrants without judicial process,[179] the challenged statute is not a bill of attainder because it does not single out an identifiable group for deprivation, and because the deprivation is not the type of punishment prohibited by the bill of attainder clause.[180] The Supreme Court's analysis consisted of two steps. First, the Court construed the Solomon Amendment to be escapable by late registration.[181] Second, the Court applied

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[173] *Id.* at 949.

[174] *Id.* at 948–49.

[175] *Id.* at 949.

[176] *Id.* at 950.

[177] *Id.*

[178] *MPIRG*, 104 S. Ct. at 3352.

[179] *Id.* at 3353 n.3.

[180] *Id.* at 3358. In *MPIRG*, the Supreme Court reaffirmed its definition of a bill of attainder as a law which legislatively, and without judicial process, determines guilt and inflicts punishment on an identifiable person or group. *Id.* at 3353; *see also supra* notes 45 & 67 and accompanying text. The Court rejected, without any discussion, the government's argument that the statute does not determine guilt without judicial process. *Id.* at 3353 n.3. The greater portion of the Court's opinion, therefore, concentrated on the specificity and punishment elements of the bill of attainder prohibition.

[181] *Id.* at 3354.

its historical bill of attainder analysis to the specificity and punishment elements and found that the *escapable*[182] Solomon Amendment violates neither.[183]

The Supreme Court construed the Solomon Amendment as escapable because subsection (f)(4) of the Amendment[184] states that an applicant, after being denied aid due to a finding that he has not registered for the draft, has thirty days to establish that he has registered before a final determination of ineligibility will be made.[185] The Court interpreted this provision as a thirty-day grace period during which financial aid applicants may register late, and thereby become eligible for Title IV federal assistance for college.[186] Having found that the Solomon Amendment is escapable by late registration, the Supreme Court proceeded to apply its traditional bill of attainder analysis to the escapable Solomon Amendment.

The plaintiffs had argued that the statute at issue singles them out as members of an identifiable group that has violated the draft registration law, thereby meeting the specificity element of unconstitutional bills of attainder.[187] The Supreme Court rejected this argument,[188] and held that because the Solomon Amendment is escapable, its purpose is to encourage the future conduct of registration, rather than to punish the past conduct of non-registration.[189] Since the group deprived of financial aid is the as yet unidentifiable group composed of those who will refuse to register in the future, the Court reasoned, it could not be said that members of an identifiable group are being denied anything as a sanction for past actions.[190] The Court concluded, therefore, that the Solomon Amendment is a legitimate law of general applicability intended to discourage future violation of the draft registration law, rather than to single out for punishment a specific group for its past illegal conduct.[191]

Although the specificity element is not met under the Supreme Court's construction of the Solomon Amendment, the Court went on to analyze the type of deprivation the law imposes in terms of the punishment element of the bill of attainder clause. Referring to the three-prong test of unconstitutional punishment laid down in *Nixon*, the Supreme Court noted that it would have to find that the punishment of the statute falls within the bill of attainder punishment prohibition if the deprivation imposed fits within the historical meaning of "legislative punishment," if the law reasonably cannot be said to "further non-punitive goals," or if the legislative history "evinced a congressional motive to punish."[192] The Court resolved all three inquiries in the negative, and thus found no prohibited punishment.[193]

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[182] *See supra* note 57. Compare *supra* note 58 and *infra* note 254.
[183] *MPIRG*, 104 S. Ct. at 3358.
[184] *See supra* note 2 and *infra* note 254.
[185] *MPIRG*, 104 S. Ct. at 3354.
[186] *Id.*
[187] *Doe*, 557 F. Supp. at 942.
[188] *MPIRG*, 104 S. Ct. at 3353–55.
[189] *Id.* at 3354–55.
[190] *Id.* at 3355.
[191] *Id.*
[192] *Id.* at 3355–56.
[193] *See id.* at 3356–58. Under the *Nixon* Court's three-prong punishment element test, an affirmative answer to any one of the three inquiries would connote prohibited punishment. *See supra* note 71 and accompanying text. The Court in *MPIRG* could have ended its discussion of the bill of attainder clause after finding that the specificity element was not met, but the Court continued,

Applying the first prong of the punishment element test, the Supreme Court noted that prohibited punishment historically has been limited to death, imprisonment or confiscation of property,[194] and that it has extended the bill of attainder clause's coverage to include the exclusion of people from certain occupations.[195] The Court concluded that the Solomon Amendment does not fall into any of these historically acknowledged forms of legislative punishment.[196] Instead, the Court held, the deprivation of federal financial aid for college is more like the denial of a mere non-contractual government benefit, which does not constitute, necessarily, bill of attainder punishment.[197] Finally, the Court invoked its escapability construction, and ruled that because the deprivation is only temporary, rather than permanent, it is too unlike the deprivations that have been declared unconstitutional in the past to warrant the extension of the bill of attainder protection to the Solomon Amendment.[198]

The escapability construction surfaced again when the Supreme Court next moved to its final two punishment element inquiries, as it determined whether the Solomon Amendment reasonably can be said to further non-punitive goals, and whether the legislative history evinced a congressional motive to punish. In examining the legislative history of the challenged statute, the Court found several non-punitive goals which persuaded it that Congress had not intended to punish.[199] The Court noted that several Congresspersons had expressed their concerns for the fair allocation of scarce federal resources to those who most deserve them, and found this a legitimate non-punitive goal of the statute.[200] Furthermore, the Court noted a number of remarks by Congresspersons expressing a genuine desire to encourage draft registration through the new provisions.[201] The Court ruled that this too is a valid non-punitive goal.[202] Finally, the Court noted that the Solomon Amendment deprives innocent, non-intentional violators[203] as well as knowing violators of the draft registration law.[204] The Court therefore concluded that Congress must have meant to encourage rather than punish because it could not have intended to punish innocent violators.[205]

Hence, the Court accepted the government's contention that the Solomon Amendment merely is meant to encourage draft registration, and not meant to punish non-registration. In light of this finding, and in light of its conclusion that the specificity element of singling out an identifiable group is not met, the United States Supreme Court reversed the decision of the United States District Court for the District of

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for some reason, to apply its escapability construction to all three punishment tests. For a possible explanation see *infra* note 286 and accompanying text.

[194] *Id.* at 3356.

[195] *Id.*

[196] *Id.*

[197] *Id. But see supra* note 77.

[198] *MPIRG*, 104 S. Ct. at 3356.

[199] *Id.* at 3356–57.

[200] *Id.* at 3357.

[201] *Id.*

[202] *Id.*

[203] By "innocent violators" the Court was referring to those non-registrants who did not knowingly violate the draft registration law by "willfully" not registering. The government must prove that a person has knowingly failed to register before it can get a conviction under the draft registration law. *Id.*

[204] *Id.*

[205] *Id.*

Minnesota, and declared that the Solomon Amendment is not an unconstitutional bill of attainder.[206]

B. *The Self-Incrimination Challenge*

The Supreme Court also reversed the holding of the district court in *Doe* that the Solomon Amendment violates the fifth amendment's prohibition against compelled self-incrimination.[207] The Supreme Court held that the information required by the Solomon Amendment for an applicant to receive financial aid for college is neither incriminating nor compelled.[208] The Court ruled, therefore, that the statute does not violate the fifth amendment.[209]

The Supreme Court found no compulsion in the Solomon Amendment[210] because one who does not register for the draft, and is thus ineligible for financial aid, is under no compulsion to seek financial aid in the first place.[211] Because a non-registrant is bound to know that he may not receive financial aid, and because he is not compelled to seek financial aid, the Court reasoned, non-registrants simply are not compelled to disclose any information to the government, whether or not the information required by the Solomon Amendment is incriminatory.[212]

Moreover, the Supreme Court found that the information required by the statute is not incriminatory.[213] The Court noted that the Solomon Amendment requires that a financial aid applicant submit a statement to his college insuring that he has complied with the draft registration law, and reasoned that because only draft registrants are eligible to apply, the statement of compliance can not furnish any incriminating information.[214] Even if late registration takes place by a previously non-registered applicant,[215] the Court reasoned, the statement of compliance does not provide any incriminating information: the statement merely declares that the registration law has been satisfied.[216] Absent incriminatory disclosure, the Court held, there is no violation of the fifth amendment privilege.[217]

Finally, the Supreme Court addressed the plaintiffs' contention that, if the Solomon Amendment is construed as escapable, a previously non-registered financial aid applicant has to register late for the draft in order to comply with the Amendment and, therefore, he must disclose incriminating information to the Selective Service System.[218] The Court accepted the plaintiffs' assertion that late registration itself is incriminatory because the disclosure of one's birthdate and registration date are required to complete draft registration, and because these same facts prove violation of the draft registration law if the

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[206] *Id.* at 3358.
[207] *Id.* at 3359.
[208] *Id.* at 3358–59.
[209] *Id.*
[210] *Id.* at 3358.
[211] *Id.*
[212] *Id.*
[213] *Id.* at 3358–59.
[214] *Id.* at 3358.
[215] *See supra* text accompanying notes 184–86.
[216] *MPIRG*, 104 S. Ct. at 3358. *But see infra* notes 248–59 and accompanying text.
[217] *MPIRG*, 104 S. Ct. at 3358.
[218] *Id.* at 3358–59.

government also can prove that the failure to register on time was intentional.[219] Nevertheless, the Court concluded that it did not need to decide this issue because the plaintiffs in *MPIRG* have not registered, and therefore have no occasion even to raise the fifth amendment privilege as it potentially applies to late registration.[220] Not having been confronted with the incriminating questions of the draft registration form, the Court held, the plaintiffs cannot raise a cognizable fifth amendment claim.[221]

Having thus found neither incrimination nor compulsion in the statute's requirement that financial aid applicants submit a statement of compliance with the draft registration law, the Supreme Court upheld the constitutionality of the Solomon Amendment.[222] Having further found that even if the Amendment requires non-registrants to register late, thereby incriminating themselves, in order to receive financial aid, the Court ruled that since the plaintiffs in *MPIRG* had not registered late, they cannot raise the fifth amendment claim as it relates to the act of late registration.[223] The Court therefore reversed the holding of the district court.

Justice Marshall, joined by Justice Brennan,[224] dissented from the majority's opinion on the fifth amendment issue.[225] In criticizing the Court's handling of the privilege against compelled self-incrimination, Justice Marshall assumed arguendo the accuracy of the escapability construction of the Solomon Amendment which the Court invoked to save the statute under the bill of attainder challenge.[226] Justice Marshall thus focused on the fifth amendment issue which was shaped by the Court's escapability construction.[227]

Due to Marshall's assumption that the Solomon Amendment is escapable, he did not take issue with the Court's holding on the merits that late registrants do not have to file incriminating statements of compliance with their schools under the Solomon Amendment.[228] Justice Marshall argued, however, that the act of late registration, which is compelled by the Court's escapability construction of the statute, requires the disclosure of incriminating information to the Selective Service System.[229] Justice Marshall concluded, therefore, that the Court's refusal, apparently on ripeness grounds, to address the non-registrants' self-incrimination claim based on the danger of registering late, is unsupportable.[230]

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[219] *Id.* at 3358.

[220] *Id.* at 3359.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 3361 (Brennan, J., dissenting).

[225] *Id.* (Marshall, J., joined in part by Brennan, J., dissenting). Justice Marshall also dissented from the Court's cursory rejection of the plaintiffs' equal protection claim. *See id.* at 3368–71 (Marshall, J., dissenting); *see also supra* note 24.

[226] *See id.* at 3363 (Marshall, J., joined in part by Brennan, J., dissenting).

[227] *Id.* Justice Marshall stated that he did not have to disagree with the Court's bill of attainder holding because it was based wholly on the Court's construction of the Solomon Amendment as escapable by late registration. *Id.*; *see also supra* notes 181–83 and accompanying text and *infra* note 245 and accompanying text. Justice Marshall noted, however, that this act of late registration, required under the Court's statutory construction to defeat the bill of attainder challenge, causes fifth amendment problems because it involves the disclosure of incriminating information. *See MPIRG*, 104 S. Ct. at 3363 (Marshall, J., dissenting).

[228] *MPIRG*, 104 S. Ct. at 3363 (Marshall, J., dissenting).

[229] *Id.* at 3364 (Marshall, J., dissenting).

[230] *See id.* at 3364–68 (Marshall, J., dissenting).

Justice Marshall vehemently disagreed with the Court's holding that the plaintiffs' fifth amendment challenge is not ripe for review.[231] He noted that the Court's late registration requirement is incriminating in two ways. First, it requires the late registrant to furnish the government with his birthdate and registration date, two of the three facts necessary for him to be prosecuted for failure to register within thirty days of his eighteenth birthday.[232] Second, if the late registrant noticeably refuses to answer the incriminating questions before a cognizable fifth amendment claim may be made, as the Court requires,[233] such late registrant furnishes the government with the identification link in the prosecutor's potential case by calling attention to himself as one of the almost 700,000 individual violators.[234] Justice Marshall concluded, therefore, that *MPIRG* should be controlled by the rule that where vocal assertion of the fifth amendment privilege itself is incriminating, the only meaningful way to claim the privilege is by silence.[235]

Moving to the issue of compulsion — here, created by the Court's escapability by late registration construction — Justice Marshall argued that the denial of eligibility for financial aid for college is similar to other forms of economic coercion which have been struck down in the past, under the self-incrimination clause.[236] Surely, he argued, denial of financial aid to a person who otherwise cannot afford to attend college is no different a sanction against the right to remain silent than a sanction struck down in a case where the plaintiff is removed from his job for refusing to answer incriminating questions.[237] Justice Marshall concluded, therefore, that the Court deprived the plaintiffs in *MPIRG* of their constitutional right not to be compelled to incriminate themselves.[238] The plaintiffs are left with the choice, he found, between losing the opportunity to attend college for remaining "silent" by not registering for the draft, and incriminating themselves of a felony by registering late.[239] According to Justice Marshall, this is an unwarranted and indefensible denial of the plaintiffs' fifth amendment right.[240]

IV. *MPIRG*: A Third Act of Political Expediency?

This note now turns to a critical analysis of the Supreme Court's opinion in *MPIRG*, which reversed the district court's opinion in *Doe*. Part A will analyze the Court's bill of attainder decision, first focusing on its escapability construction of the Solomon Amendment, and then dealing with the Court's application of its precedent to the *escapable* Solomon Amendment. Section B will evaluate the Court's resolution of the fifth amendment issue, the focus being on the Court's resolution of the compulsion and incrimination components of the privilege, and on its resolution of the self-incrimination issue raised by its escapability construction of the Solomon Amendment. Part C will link the findings made in Parts A and B that the Court erroneously construed the Solomon Amendment

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[231] *Id.* at 3366 (Marshall, J., dissenting).
[232] *Id.* at 3364 (Marshall, J., dissenting).
[233] *Id.*
[234] *Id.*
[235] *Id.* at 3366–68 (Marshall, J., dissenting).
[236] *Id.* at 3365 (Marshall, J., dissenting).
[237] *Id.*
[238] *Id.* at 3367–68 (Marshall, J., dissenting).
[239] *Id.*
[240] *Id.* at 3367 (Marshall, J., dissenting).

and then spuriously applied its bill of attainder and self-incrimination precedent to the *escapable* statute. Ultimately, this note will conclude that the Court, exclusively concerned with the "correct" result in this case, evaded rather than confronted the constitutional issues presented, and therefore was misguided in its reversal of the district court's opinion in *Doe*.

A. *The Bill of Attainder Challenge*

Although the Supreme Court in *MPIRG* reversed the district court's holding in *Doe* on the bill of attainder challenge, it reaffirmed the validity of the cases on which the district court had relied in striking the Solomon Amendment as an unconstitutional bill of attainder.[241] The Supreme Court's opinion in *MPIRG* diverged from the district court's opinion in *Doe* in two major ways. First, the Supreme Court ruled that the Solomon Amendment is escapable,[242] whereas the district court found that it clearly is not.[243] Second, the Supreme Court sanctioned escapability as a defense to the bill of attainder challenge, notwithstanding the precedent to the contrary which it, as well as the district court in *Doe*, cited approvingly.[244] As will be exemplified below, the Court employed a faulty statutory construction and invoked a strained application of precedent to reach the result it apparently desired to reach, in spite of the valid constitutional challenges raised.

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[241] The Supreme Court cited approvingly the following cases upon which the district court in *Doe*, 557 F. Supp. at 941–46, heavily relied in striking the Solomon Amendment on bill of attainder grounds: Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); United States v. Brown, 381 U.S. 437 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867). *MPIRG*, 104 S. Ct. at 3353.

[242] *MPIRG*, 104 S. Ct. at 3354.

[243] *Doe*, 557 F. Supp. at 942.

[244] For example, the *MPIRG* Court repeatedly cited *Cummings*, despite the fact that the *Cummings* Court soundly rejected the very escapability argument that the *MPIRG* Court accepted. For instance, the Court in *Cummings* declared:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
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> . . . .
>
> The theory upon which our political institutions rests is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. *Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.*

Cummings, 71 U.S. at 320–22 (emphasis added). The *Cummings* Court went on to explain that the laws under bill of attainder scrutiny were:

> aimed at past acts, and not future acts. They were intended especially to operate upon parties who . . . had aided or countenanced the Rebellion . . . and they were intended to operate by depriving such persons the right to hold certain offices and trusts, and to pursue their . . . avocations. *This deprivation is punishment; nor is it any less so because a way is opened for escape from it* . . . .

Id. at 327 (emphasis added). In addition, the *MPIRG* Court approvingly cited *Brown*, yet ignored the *Brown* Court's admonition that the bill of attainder clause be given a liberal interpretation so that it would implement the separation of powers doctrine, as it was intended to do. *Brown*, 381 U.S. at 442. Ironically, Chief Justice Burger, who wrote the majority opinion in *MPIRG*, giving a narrow interpretation to the bill of attainder protection, wrote a dissent in *Nixon*, arguing there that the protection was supposed to be construed and applied liberally. *Nixon*, 433 U.S. at 537–38 (Burger, C.J., dissenting).

The Supreme Court began its bill of attainder analysis in *MPIRG* by agreeing with the district court's opinion in *Doe* that a non-escapable Solomon Amendment would be an unconstitutional bill of attainder.[245] The Court proceeded, however, to construe the Solomon Amendment as escapable.[246] The Court then used this escapability construction to defeat the specificity element of its bill of attainder definition, as well as to defeat the punishment element under all three inquiries of its three-prong punishment test.[247] Therefore, without the escapability construction, the Supreme Court presumably would have stricken the statute. Hence, the soundness of the Supreme Court's decision in *MPIRG* rests on the validity of the Court's construction of the Solomon Amendment as escapable.[248]

Close scrutiny of the language of the Solomon Amendment will illustrate a patent inaccuracy in the Supreme Court's escapability construction. The Court held that the Solomon Amendment is escapable by late registration notwithstanding that subsection (f)(1) of the statute states that all persons in violation of the draft registration law are ineligible for financial aid,[249] and notwithstanding that the draft registration law states that each male who does not register within thirty days of his eighteenth birthday is in violation of the law.[250] As the district court noted, late registration, subsequent to this thirty-day period, is just as illegal as non-registration.[251] Therefore, an applicant who registers for the draft over thirty days after his eighteenth birthday is ineligible for financial aid under the actual terms of subsection (f)(1) of the Solomon Amendment, despite his registering late.

Nevertheless, to substantiate its contrary finding that the Solomon Amendment is escapable by late registration,[252] the Supreme Court relied on subsection (f)(4) of the Solomon Amendment, which states that an applicant notified of impending denial of financial aid has thirty days during which to prove that he has registered in compliance with the draft registration law.[253] Subsection (f)(4), however, merely gives an applicant whose registration is disputed the opportunity to prove that he has registered in compliance with the draft registration law, which, in turn, requires registration within thirty days of his eighteenth birthday.[254] The Solomon Amendment says nothing about a thirty-

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[245] *See MPIRG*, 104 S. Ct. at 3352. This is so because without the Court's escapability construction both the specificity and punishment elements of the bill of attainder challenge are met by the plaintiffs. *Compare supra* text accompanying notes 187–91 *and supra* text accompanying notes 198–206 *with supra* text accompanying notes 128–32 *and supra* text accompanying notes 140–53.

[246] *MPIRG*, 104 S. Ct. at 3354.

[247] *Id.* at 3354–58.

[248] *Id.* at 3363 (Marshall, J., dissenting).

[249] *See supra* note 2 and accompanying text.

[250] *See supra* text accompanying notes 6–7.

[251] *Doe*, 557 F. Supp. at 942.

[252] *See MPIRG*, 104 S. Ct. at 3354.

[253] *See supra* note 2 and *infra* note 254.

[254] Solomon Amendment, 50 U.S.C. app. § 462(f)(4) (1982). In pertinent part, the Amendment states:

> [A]ny person to whom the Secretary of Education proposes to deny assistance or benefits under title IV for failure to meet the registration requirements of section 3 [the draft registration law] . . . shall be given notice of the proposed denial and shall have a suitable period (of not less than thirty days) after such notice to provide the Secretary with information and materials establishing that he *has complied with the*

day grace period for late registration.[255] On the contrary, subsection (f)(1) of the statute excludes, on its face, late registrants from the financial aid programs[256] because late registration is not valid compliance with the draft registration law.[257]

The Court inappropriately read into the statute a thirty-day grace period[258] for the limited purpose of defeating the bill of attainder challenge. In so doing, the Court created the absurd situation where late registration, while not constituting valid compliance with the draft registration law, constitutes compliance with the Solomon Amendment, which requires valid compliance with the draft registration law.[259] Because the Supreme Court stated that its reversal of the district court's opinion in *Doe* was based on the escapability of the Solomon Amendment,[260] the Court's opinion in *MPIRG* is founded on this erroneous construction of the law. The Court's use of escapability to defeat both the specificity and punishment elements of its bill of attainder analysis further evades logic because the Court not only failed to overturn or narrow the contrary holdings of *Cummings* or *Brown*, but reaffirmed them as controlling law.[261]

In addition to its fallacious construction of the Solomon Amendment, the Supreme Court seems to have cut back on the scope of the bill of attainder protection, as set down in *Cummings* and *Brown*, by ruling that escapability does defeat a bill of attainder challenge.[262] In so doing, the Court appears stubbornly result oriented because the very authority it purports to rely upon stands for the proposition that escapability defeats neither the punishment nor the specificity elements of an otherwise successful bill of

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> *registration requirement under section 3*. . . . [T]he Secretary may afford such person an opportunity for a hearing to establish his compliance . . . .

Id. (emphasis added). In construing the statute, the Supreme Court erroneously left out the key words in the Amendment which are emphasized above. *See MPIRG*, 104 S. Ct. at 3354. Thus, the Court declared that the Solomon Amendment gave a non-registrant thirty days in which to register late, rather than thirty days to prove that he had complied with section 3 of the Military Selective Service Act, which is the draft registration law. *Id.* Such a reading of the statute does not merely strain the meaning of the words used by Congress in the Solomon Amendment, it transforms the words used.

[255] The thirty-day grace period that the Court "found," during which non-registered financial aid applicants might register late and thereby receive financial aid, is clearly not in the language of subsection (f)(4) of the Solomon Amendment. *See supra* note 254. Moreover, such language is nowhere to be found in the draft registration law itself. *See* Proclamation No. 4771, 3 C.F.R. § 82 (1980), *reprinted in* 50 U.S.C. app. § 453, at 233–34 (1982); *see also infra* note 259. Rather than find a way to construe the draft registration law so as to avoid an anomalous result, the Court simply ignored the inconsistency. *See infra* text accompanying note 259.

[256] *See* Solomon Amendment, 50 U.S.C. app. § 462(f)(4) (1982), *supra* notes 2 & 254.

[257] *See* Proclamation No. 4771, 3 C.F.R. § 82 (1980), *reprinted in* 50 U.S.C. app. § 453, at 233–34 (1982); *see also* text accompanying notes 6–7. Ironically, the Court admitted this fact in its fifth amendment analysis, *MPIRG*, 104 S. Ct. at 3358, yet misleadingly ignored it in construing the Solomon Amendment so as to defeat the bill of attainder challenge.

[258] *MPIRG*, 104 S. Ct. at 3354.

[259] The Solomon Amendment requires compliance with the draft registration law for eligibility for financial aid. 50 U.S.C. app. § 462(f) (1982). To comply with the draft registration law, young men must register within thirty days of their eighteenth birthdays. Proclamation No. 4771, 3 C.F.R. § 82 (1980), *reprinted in* 50 U.S.C. app. § 453, at 233–34 (1982). Therefore, the Court's ruling that the Solomon Amendment allows for late registration simply does not make sense.

[260] *MPIRG*, 104 S. Ct. at 3352.

[261] *Id.* at 3353–56; *see also infra* notes 264–71 and accompanying text.

[262] *See MPIRG*, 104 S. Ct. at 3354–58.

attainder challenge.[263] For example, the Court approvingly cited *Cummings* as the foundation of modern bill of attainder law.[264] In *Cummings*, however, the Supreme Court unequivocally declared that escapability does not save a statute from bill of attainder danger.[265]

The *MPIRG* Court also relied on *Nestor v. Flemming*,[266] where the deprivation of a non-contractual government benefit was upheld against a bill of attainder punishment attack.[267] The Court's reliance on *Nestor*'s finding that a non-contractual governmental benefit does not constitute punishment is misplaced, however, because the holding in *Nestor* was based on a different aspect of the case: namely, under the principles set down in *Cummings*, the *Nestor* Court could find no congressional intent to punish.[268] Therefore, although the *MPIRG* Court tried to buttress its holding by analogizing financial aid for college to the non-contractual benefit involved in *Nestor*, the Court in fact was relying on its escapability construction in order to find no congressional motive to *punish* a *specific* group. Furthermore, the *MPIRG* Court approvingly cited *Brown*,[269] which not only staunchly reaffirmed the *Cummings* principle that escapability does not make a difference in bill of attainder analysis, but also dispelled the notion that *Nestor*, or any other case, held that escapability alone can defeat the punishment or specificity elements of a bill of attainder challenge.[270] Nevertheless, the *MPIRG* Court used its escapability construction of the Solomon Amendment as its sole basis for defeating the bill of attainder clause's specificity requirement, as well as defeating the punishment requirement under all three prongs of the legislative punishment test.[271]

Specifically, the Supreme Court held that the Solomon Amendment does not fulfill the *specificity* element of the bill of attainder clause because, the punishment being escapable, the statute regulates future conduct rather than punishing past conduct.[272] This holding flies in the face of the *Cummings* and *Brown* decisions, which both held that escapability does not defeat the specificity requirement.[273]

Furthermore, the Court's own reasoning that the Solomon Amendment serves the legitimate legislative purpose of allocating scarce federal resources to those who most deserve them contradicts its holding that the specific group of non-registrants are not singled out for punishment by the Solomon Amendment. As the Court itself noted, the

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[263] *See infra* text accompanying notes 264–73.

[264] *MPIRG*, 104 S. Ct. at 3353.

[265] *Cummings*, 71 U.S. at 324–25; *see also supra* notes 57–58, & 244.

[266] 363 U.S. 603 (1960).

[267] *MPIRG*, 104 S. Ct. at 3356.

[268] *See supra* note 77.

[269] *MPIRG*, 104 S. Ct. at 3353.

[270] *See supra* note 77. In criticizing the notion that escapability defeats the punishment element because it promotes deterrence rather than retribution, the *Brown* Court declared:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.
>
> Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution.

Brown, 381 U.S. at 458.

[271] *See infra* text accompanying notes 272–77.

[272] *MPIRG*, 104 S. Ct. at 3355.

[273] *See supra* note 244.

Cummings Court correctly found the requisite specificity where a statute was designed to "reach the person, not the calling."[274] Whereas in *Cummings* the Court invalidated the attempt to persecute the "disloyal" citizens singled out by a law which had no legitimate relevance to the calling it was regulating, the *MPIRG* Court ignored the absence of authentic financial or academic provisions in the congressional regulation of financial aid programs, and found it appropriate for Congress to "reach the person[s]" — the "disloyal" non-registrants — who were deemed unworthy of enjoying the rights of citizenship. Consequently, the Court's endorsement of escapability to defeat the specificity element contradicts its own affirmation of controlling precedent.

The Court's analysis of the *punishment* element of the bill of attainder clause suffers from the same weaknesses as its specificity analysis. The Court used escapability to answer in the negative all three of the inquiries in the three-prong punishment test, again relying on its reading of the Amendment as encouragement to register, rather than punishment for failure to register.[275] Because the Solomon Amendment — due to its escapability — is not a permanent deprivation, the Court held, such deprivation does not fall within the historical definition of legislative punishment.[276] Also as a result of its escapability construction, the Court found that the Solomon Amendment's encouragement to register is a legitimate non-punitive legislative purpose, and consequently, it could not be said that Congress possessed a motive to punish.[277] Under all three punishment inquiries, therefore, escapability led the Court to find that no legislative punishment, within the bill of attainder prohibition, is present in the Solomon Amendment. Even if the escapability construction were defensible, however, its use by the Court to defeat the punishment requirement can not be reconciled with *Cummings* and *Brown*, both of which held that escapability does not negate the existence of the punishment prohibited by the bill of attainder clause.[278]

If, despite the Court's apparent reliance on authority to the contrary, the rule established in *MPIRG* is that a person's ability to avoid the conduct prohibited by a statute is sufficient to defeat a constitutional challenge to such statute, the Court severely cut away at the efficacy of the bill of attainder clause, as the district court had warned.[279]

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[274] *MPIRG*, 104 S. Ct. at 3353. The Court quoted in part the *Cummings* Court which had found a punitive intent because the law in question was designed

> in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

Cummings, 71 U.S. at 320. This quote, from which the *MPIRG* Court extracted some of its punishment element reasoning, cuts against the Court's specificity element reasoning. It should also be noted that because identifying the approximately 700,000 individual violators of the draft registration law is so difficult, the quote from *Cummings* also cuts against the *MPIRG* Court's finding that the Solomon Amendment is not punitive, in light of the congressional attempt to enforce the draft registration law through this additional measure.

[275] *MPIRG*, 104 S. Ct. at 3356–57.

[276] *Id.* at 3356.

[277] *Id.* at 3356–58.

[278] *See supra* note 244.

[279] In addition to destroying the underpinnings of *Cummings*, the *Doe* court reasoned, upholding a law because the plaintiffs may be able to avoid its punishment would render the bill of attainder clause meaningless. *Doe*, 557 F. Supp. at 944–45.

Because *MPIRG* is founded on a groundless statutory construction and an erroneous application of precedent, however, it is not clear whether the Supreme Court indeed narrowed the bill of attainder protection. What is clear, on the other hand, is that the Court yielded to the legislature the unrestrained power to make the political decision to deprive those it deems disloyal of the right to seek federal financial aid for college.

Whereas the district court took great pains to separate political considerations from the constitutional issues presented,[280] by explaining that the procedural safeguards of the bill of attainder clause were at issue rather than the political wisdom of excluding people who refuse to register for the draft from financial aid eligibility,[281] the Supreme Court chose to ignore[282] this judicial obligation.[283] Instead, the Supreme Court interjected policy concerns and political sympathies into the case by declaring that the Solomon Amendment "furthers a *fair* allocation of scarce federal resources by limiting Title IV aid to *those who are willing to meet their responsibilities to the United States* by registering."[284] The Court went on to cite approvingly the legislative history, in which Congresspersons advocated the government's political obligation to insure that federal dollars are spent fairly and prudently on the loyal, rather than on the disloyal.[285] In order to uphold what it considered a politically desirable statute, the Court first went out of its way to construe the Solomon Amendment as escapable, although such a construction is not warranted by the language of the statute, and then misapplied the very cases upon which it purportedly relied, so as to find the Solomon Amendment constitutional.[286]

In deferring to Congress on an issue such as the bill of attainder clause, the Court abandoned its role as guardian and interpreter of the constitutional protection by neglecting to recognize that the proscription's very purpose is to limit the power of the legislature through judicial review.[287] Disregarding the history of the Supreme Court's application of the bill of attainder clause as the vehicle for enforcement by the courts of the Framers' desire to protect the unpopular from the power of the representative, majoritarian branch of government, the *MPIRG* Court surrendered the fate of modern "disloyals" to the political whim of Congress.[288] The Court even went so far as to agree with Congress that these "disloyal" young men who failed to register for the draft do

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[280] *See id.* at 938–39, 950.

[281] *Id.*

[282] *See MPIRG*, 104 S. Ct. at 3363 (Marshall, J., dissenting); *see also infra* note 286.

[283] *See infra* notes 340–45 and accompanying text.

[284] *MPIRG*, 104 S. Ct. at 3357 (emphasis added).

[285] *Id.*

[286] *See supra* text accompanying notes 261–73. Again, it should be remembered that the author of the *MPIRG* majority, Chief Justice Burger, wrote in dissent in *Nixon*, arguing that the majority in *Nixon* had improperly refused to apply liberally the bill of attainder protection to former President Nixon. *Nixon*, 433 U.S. at 537–38 (Burger, C.J., dissenting). Thus, it seems clear that the Chief Justice was more concerned with the political outcome of these cases than with the consistent and accurate application of the bill of attainder protection. In other words, Chief Justice Burger was apparently bothered by Congress' singling out of former President Nixon for specialized treatment, but not by Congress' singling out of men who refused to register for the draft. Such personal preferences, however, should have no place in constitutional jurisprudence.

[287] *See Brown*, 381 U.S. at 442–47.

[288] *Compare MPIRG*, 104 S. Ct. at 3357 (Chief Justice Burger narrowly construing the bill of attainder prohibition), *with Nixon*, 433 U.S. at 469 (the majority, not including Chief Justice Burger, broadly interpreting the bill of attainder proscription) *and id.* at 538 (Burger, C.J., dissenting) (Chief Justice Burger advocating an even broader reading of the Constitution's ban against bill of attainders than the majority in *Nixon* was willing to accept).

not *deserve* the privileges of citizenship.[289] In so doing, the Court refused to enforce some of the checks and balances that the Framers included in the Constitution to separate the powers of the federal branches of government.[290] Consequently, the Court necessarily weakened the protection of individual rights against potential governmental abuse.[291]

B. *The Self-Incrimination Challenge*

In *MPIRG*, the Supreme Court reversed the district court's holding in *Doe* that the Solomon Amendment violates the fifth amendment's prohibition against compelled self-incrimination. The Supreme Court found neither compulsion nor incrimination in the challenged statute's requirement that financial aid applicants submit statements of compliance with the draft registration law.[292] Further, the Court held not ripe for review the plaintiffs' assertion that the escapability of the Solomon Amendment produces its own fifth amendment problems because late registration itself, required under the escapability construction, is incriminatory.[293] The appropriateness of the Supreme Court's ruling is cast in doubt, however, by comparing it to the *Doe* court's holding, which found compulsion and incrimination in an accurately construed non-escapable Solomon Amendment, and to the *MPIRG* dissent's criticism of the Court's application of the fifth amendment to the *escapable* Solomon Amendment.

The Court's initial reason for denying the plaintiffs' fifth amendment claim was its conclusion that, because non-registrants are not compelled to seek financial aid in the first place, they are not compelled to disclose any information at all under the Solomon Amendment.[294] In cases cited by the Court, however, this type of rationalization was rebuked.[295] For example, in *Marchetti v. United States*[296] and *Grosso v. United States*[297] the government had argued that gamblers are not compelled to disclose the illegal source of their income on their tax returns because they are not compelled to gamble illegally in the first place.[298] The Supreme Court rejected this view, stating that the issue is not

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[289] *MPIRG*, 104 S. Ct. at 3357.

[290] The bill of attainder clause is the Constitution's procedural enforcement of the separation of powers axiom that trial by the judiciary rather than by the legislature is proper under the American system of government. *See Brown*, 381 U.S at 442–47.

[291] *See id.* Alexander Hamilton described the importance of the bill of attainder clause in the scheme of the separation of powers doctrine, as follows:

> By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder . . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST No. 78, at 576–77 (A. Hamilton) (Hamilton ed. 1880), *quoted in Brown*, 381 U.S. at 462.

[292] *MPIRG*, 104 S. Ct. at 3358–59.

[293] *Id.* at 3359.

[294] *Id.* at 3358.

[295] *See supra* text accompanying notes 100–102.

[296] 390 U.S. 39 (1968).

[297] 390 U.S. 62 (1968).

[298] *See Marchetti*, 390 U.S. at 51; *see also Grosso*, 390 U.S. at 62–72 *passim* (the Court incorporated in full the reasoning and holding in the companion case of *Marchetti*); *see also supra* text accompanying notes 100–102.

whether the plaintiffs could choose not to gamble, but whether, once they have chosen to gamble, they may be compelled to incriminate themselves.[299] Similarly, the district court in *Doe* properly held that the issue is not whether the plaintiffs are compelled to seek financial aid, but whether, once they have chosen to seek such aid, they may be compelled to incriminate themselves.[300] The Supreme Court in *MPIRG*, therefore, sidestepped the issue of compulsion. The real issue of compulsion, as pointed out by the dissent in *MPIRG* and the district court in *Doe*, is whether the deprivation of the opportunity to attend college is "costly" under the Supreme Court's historical treatment of sanctions against the right to remain silent.[301]

The Supreme Court traditionally has held that economic as well as physical coercion creates a costly choice in terms of fifth amendment compulsion.[302] Accordingly, the denial of government contracts and the exclusion from certain occupations as sanctions against an individual's choice to remain silent have been deemed compulsion because they make claiming the fifth amendment privilege costly.[303] As the *Doe* court noted, and the *MPIRG* dissent reaffirmed, the withholding of a person's financial means of receiving a college education, especially where, as here, the plaintiffs have no other means with which to attend college, is certainly a costly sanction in modern society, in terms of the Supreme Court's historical protection of the right to remain silent.[304] Furthermore, as the *Doe* court and the *MPIRG* dissent found, the denial of a college education is commensurate to denying access to certain occupations, a sanction that the Court repeatedly has deemed costly under fifth amendment principles.[305] Because the Supreme Court consistently has held that compulsion occurs where the right to remain silent is made costly, and because the denial of a college education unquestionably is costly, the Court was misguided in its logic in *MPIRG* that the plaintiffs are not compelled to incriminate themselves, however literally correct the Court was in its declaration that the plaintiffs are not coerced into seeking financial aid.

The Supreme Court also denied in *MPIRG* that incriminating disclosures are required of non-registrants by the Solomon Amendment.[306] The Court ruled that because non-registrants are ineligible for financial aid, they may not enter the application process, and therefore, they have no occasion to file the statement of compliance which would incriminate them.[307] The Court's holding begs the question, however, in light of the *Doe*

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[299] *Marchetti*, 390 U.S. at 51.

[300] *Doe*, 557 F. Supp. at 948; *cf. Marchetti*, 390 U.S. at 51.

[301] *See MPIRG*, 104 S. Ct. at 3365–68 (Marshall, J., dissenting) (citing Spevack v. Klein, 385 U.S. 511, 514–15 (1967)); *see also Doe*, 557 F. Supp. at 948, (citing *Spevack*, 385 U.S. at 514–15).

[302] *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (divesting political office holder of his office deemed costly in terms of fifth amendment compulsion analysis); Lefkowitz v. Turley, 414 U.S. 70 (1973) (denial of public contracts to private businessperson deemed costly in terms of fifth amendment compulsion); Garrity v. New Jersey, 385 U.S. 493 (1967) (removal from one's job deemed costly in terms of fifth amendment compulsion analysis); Spevack v. Klein, 385 U.S. 511 (1967) (disbarment deemed a costly sanction under the fifth amendment compulsion component).

[303] *See supra* note 301.

[304] *MPIRG*, 104 S. Ct. at 3365 (Marshall, J., dissenting); *Doe*, 557 F. Supp. at 949.

[305] *See Doe*, 557 F. Supp. at 947–49 (discussing Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Garrity v. New Jersey, 385 U.S. 493 (1967); and Spevack v. Klein, 385 U.S. 511 (1967); *see also MPIRG*, 104 S. Ct. at 3365 (Marshall, J., dissenting) (discussing *Turley*, 414 U.S. at 70; *Garrity*, 385 U.S. at 493; and *Spevack*, 385 U.S. at 511).

[306] *MPIRG*, 104 S. Ct. at 3358–59.

[307] *Id.* at 3358.

court's and *MPIRG* dissent's demonstration that the real issue is whether the plaintiffs may be compelled to incriminate themselves once they have chosen to apply for financial aid.[308]

Finally, the Court was faced with the plaintiffs' claim that if the escapability construction were adopted, they would be forced to register late, thereby incriminating themselves.[309] The plaintiffs argued that in registering late they would have to disclose their birthdates and registration dates, two of the three facts needed to prosecute them for the felony of not registering within thirty days of their eighteenth birthdays.[310] The Court disposed of this problem in two steps. The Court first found that, although late registration is incriminating, the statement of compliance form is not, because, rather than asking for the registrant's birthdate and registration date, it merely asks whether the person has complied with the registration requirement.[311] Secondly, the Court stated that even though its escapability construction of the Solomon Amendment requires non-registrants to register late, thereby furnishing the Selective Service System with incriminating information, the plaintiffs in *MPIRG*, being non-registrants, have not registered late.[312] The Court held, therefore, that the plaintiffs' fifth amendment claim against this late registration requirement is not ripe for review.[313] As will become apparent, both of these justifications are not logically supportable.

First of all, the Court correctly stated that a late registrant does not have to furnish his registration date and birthdate on the statement of compliance submitted to the school.[314] The Court failed to explain, however, how it is that a person who cannot possibly comply with the draft registration law's requirement of registration within thirty days of his eighteenth birthday once the thirty days have expired can legitimately file a statement with his school, as required by the Solomon Amendment, that states that he is in compliance with the draft registration law.[315]

Furthermore, although obviously correct in stating the tautology that the non-registrants have not registered,[316] the Court failed to work logically through its ripeness holding. That is, if the plaintiffs in *MPIRG* had registered late, the Court presumably would have had to strike down the Solomon Amendment under the fifth amendment.[317] One is forced to conclude therefore that the Supreme Court held that the Solomon Amendment is constitutional *because* the specific plaintiffs who challenged the law had not registered for the draft.

Moreover, in registering late, as required by the Supreme Court's own construction of the statute, the plaintiffs would have to incriminate themselves, unless a person somehow can register for the draft without answering the questions on the registration form which ask a previously non-registered person his birthdate and registration date.[318]

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[308] *See supra* text accompanying notes 299–301.

[309] *MPIRG*, 104 S. Ct. at 3358–59; *see also supra* text accompanying notes 218–19.

[310] *MPIRG*, 104 S. Ct. at 3358–59; *see also supra* text accompanying notes 218–19.

[311] *MPIRG*, 104 S. Ct. at 3358.

[312] *Id.* at 3359.

[313] *Id.*

[314] *See id.* at 3352 n.2.

[315] *See supra* notes 249–57 and accompanying text.

[316] *MPIRG*, 104 S. Ct. at 3359.

[317] This is so because the Court admitted that late registration is incriminatory and that the opportunity for late registration is what saves the Solomon Amendment from constitutional attack. *Id.* at 3358–59.

[318] *See id.* at 3366 (Marshall, J., dissenting).

Through the very act of submitting a registration form without answering all of the form's questions, however, as required by the Court's ruling in order to claim the fifth amendment privilege, the plaintiffs would incriminate themselves by identifying themselves as some of the 700,000 individual violators of the draft registration law. It should be remembered at this point that one of the government's major problems in enforcing the draft registration law is the individual identification of the massive number of violators.[319] In other words, for late registrants, the very act of claiming the fifth amendment privilege would be incriminating.

Paradoxically, in *Minnesota v. Murphy*,[320] decided just seven days prior to *MPIRG*, the Supreme Court ruled that the only appropriate means of claiming the fifth amendment privilege in cases where the very act of claiming it is incriminating is by silence.[321] That is, under *Murphy*, the *MPIRG* plaintiffs could only preserve their fifth amendment privilege by silently refusing to register.[322] This is exactly what they did.[323] Nevertheless, in *MPIRG*, the Court held that their fifth amendment claim is not ripe for review.[324] As a result, the Court created a trap from which the plaintiffs cannot escape.[325] Even if the plaintiffs somehow register late without answering the incriminating questions, as the Court implied that they must do in order to receive financial aid, *Murphy* precludes them from claiming the fifth amendment privilege as it relates to identifying themselves as law breakers.[326] As the *MPIRG* dissent pointed out, the plaintiffs are left with the choice of not registering late and as a result losing the opportunity to go to college, or registering late, thereby incriminating themselves of a crime for which the penalty is up to five years in jail and up to $10,000 in fines.[327]

Again, rather than choosing to affirm the district court's holding striking down the statute, the Supreme Court chose to defer to the political will of Congress.[328] Unlike the district court,[329] the Supreme Court declined to separate its constitutional duties from its political inclinations.[330] As politically or even morally unacceptable as a person's decision not to register for the draft may be, the Supreme Court is obliged by the Constitution to protect that decision from unconstitutional infringement by Congress.[331] Here, Congress sought to enforce the legitimate draft registration law in an illegitimate way.[332] In the Solomon Amendment, it created a scheme of enforcement whereby violators of the law are compelled to incriminate themselves.[333] The Supreme Court simply chose not to be there to protect from compelled self-incrimination the individuals in the group singled out for punishment by Congress who have no other means of receiving a college education.

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[319] *See id.*
[320] 104 S. Ct. 1136 (1984).
[321] *See id.* at 1149 n.8.
[322] *See id.*
[323] *MPIRG*, 104 S. Ct. at 3359.
[324] *Id.*
[325] *See id.* at 3367–68 (Marshall, J., dissenting).
[326] *Id.* at 3368 (Marshall, J., dissenting).
[327] *Id.* at 3365 n.15, 3367–68 (Marshall, J., dissenting).
[328] *See id.* at 3357.
[329] *Doe*, 557 F. Supp. at 938–39, 950.
[330] *See MPIRG*, 104 S. Ct. at 3357.
[331] *Id.* at 3361 (Marshall, J., dissenting).
[332] *Id.*
[333] *Id.*

C. *A Retreat from Judicial Enforcement of Constitutional Protections of Individual Rights*

The Supreme Court in *MPIRG* held that the Solomon Amendment is neither a violation of the bill of attainder clause nor of the self-incrimination clause despite citing with approval the same cases on which the district court relied in reaching the opposite result.[334] In light of the controlling authority, which it declined to distinguish, narrow or overrule overtly, and in light of the explicit terms of the Solomon Amendment itself, constitutionally, the Supreme Court's reversal of the district court was misguided.

With its faulty construction of the statute, the Supreme Court achieved its desired result[335] of upholding Congress' denial of financial aid for college to those who do not register for the draft, while apparently not upsetting the controlling precedent in bill of attainder and self-incrimination constitutional jurisprudence. However comfortable the Court was with the proposition that young men should share in the responsibilities as well as the privileges of citizenship, the Court should not have upheld the Solomon Amendment. It is the judiciary's unique function in American government, as the only non-elected branch, to ignore political considerations and enforce the Constitution.[336] In *MPIRG* the Supreme Court seemed unwilling to do this. Instead, the Court chose to take a hands-off attitude towards a politically difficult, but constitutionally clear, controversy.

The plaintiffs in *MPIRG* did not question Congress' power to enforce draft registration or to punish non-registration. Rather, they asked the Court to see to it that, in enforcing the law, Congress not overstep the procedural bounds of the Constitution. Like the Supreme Court, the district court found the *substance* of the Solomon Amendment non-offensive.[337] The *procedure*, however, whereby the legislature determined guilt and inflicted punishment on a specific group without the protections of a judicial trial, with the help of coerced written confessions, was deemed constitutionally offensive by the district court,[338] as it should have been by the Supreme Court. The bill of attainder and self-incrimination clauses are, after all, two of the most significant protections of the fundamental liberties of the individual against the ever more present and ever more powerful federal government. The Supreme Court, however, refused to separate the political acceptability of the substance of the law from constitutionally mandated procedural standards.[339] Unfortunately, the Court's value-laden, constitutionally-blind approach has implications far beyond the issue of whether young men, who made moral decisions which may prove unpopular, constitutionally may be deprived of an opportunity to attend college with the help of financial aid from the federal government.

In separating the powers among the three co-equal branches of government, the Framers sought to protect individual liberties.[340] By specifically mandating that the

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[334] *See supra* notes 241, 244, 274 & 286.

[335] *See supra* text accompanying notes 280–86.

[336] *See supra* notes 287–91 and accompanying text.

[337] *Doe*, 557 F. Supp. at 938–39, 950.

[338] *See supra* text accompanying notes 280–81.

[339] *See MPIRG*, 104 S. Ct. at 3363 (Marshall, J., dissenting).

[340] In discussing the importance of the bill of attainder clause, the Supreme Court has declared:

> The proper scope of the bill of attainder clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best

legislature is to pass laws of general applicability, that the executive is to prosecute violators of those laws within stringent procedural guidelines, and that the judiciary is to adjudicate individual cases through impartial tribunals, the Framers sought to protect the rights of the individual, however unpopular, from encroachment by the legislature and the executive, each of which is purposely accountable to the political process.[341] The two political acts which created the Solomon Amendment, the President's reactivation of draft registration and the Congress' tying of draft registration to federal financial aid funds, seem potentially justifiable political judgments for the two political branches to be persuaded to make. The judiciary, however, is supposed to be insulated from such political pressures.

Upholding the Solomon Amendment in the face of valid constitutional attacks seems to be the third of three politically expedient acts of government which now present men presumed disloyal by Congress with the deprivation of the right to attend college if they cannot afford to attend on their own. It was the fear of this very notion of political expediency, nonetheless, which led the Framers to create the federal judiciary as a check on legislative and executive powers. At the Supreme Court's worst moments, such as when it endorsed the slavery of black Americans in *Dred Scott v. Sanford*,[342] and when it upheld the internment of Japanese Americans in *Korematsu v. United States*,[343] the Court capitulated to the pressure from which the Framers, with their extensive system of checks and balances, sought to shelter the rights of the individual. The Framers consciously made the choice to protect procedurally the guilty as well as the innocent, and the unpopular as well as the popular.[344] In its greatest moments, the Supreme Court has accepted this unparallelled challenge of American jurisprudence by refusing to succumb to political pressures. The Court has declared many times that even the slightest deviation from a strict interpretation and application of the procedural protections of the Constitution necessarily begins the gradual but sure deterioration of the fundamental rights of the individual.[345] Unfortunately, the Court rejected this tradition in *MPIRG*. Although this case surely will not draw as much criticism as the *Dred Scott* and *Korematsu* cases have

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

Brown, 381 U.S. at 442.

[341] *See id.* at 443; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–5, at 491–92 (1978).

[342] 60 U.S. (19 How.) 393 (1857).

[343] 323 U.S. 214 (1944).

[344] *See* Ullmann v. United States, 350 U.S. 422, 427 (1956).

[345] Spevack v. Klein, 385 U.S. 511, 515 (1967). In discussing the importance of the fifth amendment's protection of the individual against compelled self-incrimination, the Court stated:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Id. (quoting United States v. Boyd, 116 U.S. 616, 635 (1886)).

drawn, it does signal a disturbing direction of deference to the political will of Congress by the Supreme Court. The constitutional attacks on the Solomon Amendment under the bill of attainder and self-incrimination clauses may have been highly technical procedural attacks against a statute whose substance is otherwise non-offensive. Nevertheless, it is the duty of the Supreme Court of the United States to adhere to the Constitution's procedural protections of liberty, especially when asserted by a seemingly unpopular person, for a seemingly unpopular cause.

Conclusion

The constitutionality of the Solomon Amendment, which conditions federal financial aid for college on registration for the draft and which requires financial aid applicants to submit to their schools draft registration compliance forms, was upheld by the Supreme Court in *MPIRG*. Reversing the decision in *Doe* of the United States District Court for the District of Minnesota, the Supreme Court held in *MPIRG* that the Solomon Amendment violates neither the bill of attainder clause nor the self-incrimination clause of the United States Constitution.

In its bill of attainder analysis, the Supreme Court reaffirmed its precedent which defines a bill of attainder as a law which legislatively, and without judicial process, determines the guilt of and levies punishment on an identifiable person or group. Turning to the facts in *MPIRG*, the Court acknowledged that, in passing the Solomon Amendment, Congress legislatively, and without judicial process, determined the guilt of non-registrants, thereby meeting the first element of prohibited bills of attainder. The Court found, however, that the Amendment's deprivation — the denial of financial aid to non-registrants — is escapable by late registration. Consequently, the Court concluded that the second and third elements of the bill of attainder proscription — punishment and specificity — are not met because the escapable statute properly regulates the future conduct of a presently unidentifiable group, rather than impermissibly *punishes* the *specific*, identifiable group of present non-registrants for their past conduct. That is, since it found that Congress passed a law of general applicability, which encourages future legal conduct yet which does not punish past illegal conduct, the Court reversed the district court in *Doe* and declared that the Solomon Amendment is not a bill of attainder.

Similarly, the Supreme Court in *MPIRG* reaffirmed its fifth amendment precedent, ruling that the privilege against compelled self-incrimination is applicable to situations, like that potentially created by the Solomon Amendment, in which individuals are compelled to disclose to the government, in writing, facts which could incriminate them. Applying this precedent to the facts of *MPIRG*, however, the Court found neither the requisite compulsion nor the requisite incrimination that the district court found in *Doe*. The Supreme Court first found that the compulsion component is lacking in the scheme of the Amendment because Congress did not compel non-registrants to invoke the provisions of the statute by applying for financial aid. The Court reasoned that since non-registrants, therefore, are not compelled to do anything by the statute, they could not have been compelled to incriminate themselves. The Court went on to find that the information required by the Solomon Amendment is not even incriminatory. Because the statute only applies to eligible financial aid applicants — that is, those who have complied with the draft registration law — the Court continued, the statute's compliance form could not possibly incriminate the applicants. Finally, the Court rejected the notion that its escapability by late registration construction produced a cognizable self-incrimi-

nation issue. Although it recognized that late registration is incriminating, the Court ruled that this claim is not ripe for review because the plaintiffs in *MPIRG* have not registered and thus have no occasion to raise the fifth amendment as it relates to the act of late registration. Accordingly, the *MPIRG* Court reversed the district court in *Doe* and held that the Solomon Amendment is not violative of the privilege against compelled self-incrimination.

Despite reaching a *result* which may seem palatable to many observers who believe that young men should register for the draft, and should not receive federal aid for college if they do not so register, the *MPIRG* Court abused its judicial role in reversing the *Doe* court and countenancing the Solomon Amendment based on its own contempt for draft registration resisters. Though it clearly articulated its sympathy for the political decision reached by Congress in passing the legislation, the Supreme Court failed to explain lucidly its seeming misapplication of precedent and its manifestly errant statutory construction. That the Court firmly endorsed its *Cummings-Brown* precedent as controlling, while ruling that the Amendment is not a bill of attainder because it is escapable, is perplexing in light of the fact that *Cummings* and *Brown* both staunchly held that escapability does not save a statute from bill of attainder attack. Likewise, one is hard pressed to discern the Court's unexplained rationale for "interpreting" a statute which states that a man is ineligible for financial aid if he fails to register by a certain date as escapable, where that man registers after that certain date.

The Court's fifth amendment analysis is troubling as well. By ruling that the plaintiffs are not compelled to incriminate themselves, the Court in effect held that the denial of the opportunity to attend college is not costly, in terms of government sanctions against an individual's exercise of her constitutional rights. Finally, its attempt to save the statute from bill of attainder attack by "construing" the deprivation as escapable led the Court to reason circularly, for fifth amendment purposes, that although late registration is required of non-registrants, the plaintiffs, being non-registrants, have no fifth amendment privilege to challenge the future incriminatory act of late registration.

Because the Court's holding is based in its entirety on a strained construction of the statute, as well as on a tenuous application of law, the precedential value of *MPIRG* in terms of the bill of attainder clause and the self-incrimination clause is difficult to discern. Nevertheless, the Court's willingness to abdicate its judicial function by deferring to the Congress and to the President its role as guardian of constitutional protections against legislative and executive abuse, unfortunately, sets an ominous "precedent."

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