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Constitutional Law—Bill of Attainder—Section 504 of the Landrum-Griffin Act Held: Unconstitutional—*United States v. Brown*, 381 U.S. 437 (1965)

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CONSTITUTIONAL LAW—BILL OF ATTAINDER—SECTION 504 OF THE LANDRUM-GRIFFIN ACT HELD: UNCONSTITUTIONAL—*United States v. Brown*, 381 U.S. 437 (1965).

Respondent, an open member of the Communist Party, was elected to the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union in 1959, 1960, and 1961. During his third term of office he was indicted, tried, and convicted for violation of section 504 of the Landrum-Griffin Act.[1] Congress had enacted section 504, which replaced section 9(h) of the Taft-Hartley Act,[2] to prevent political strikes and disruptions in the economy.[3] Section 9(h) had proved ineffective in removing Communists from union office.[4]

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[1] "(a) No person who is or has been a member of the Communist Party . . . shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body . . . of any labor organization . . . .

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during or for five years after the termination of his membership in the Communist Party. . . .

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both." Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 504, 73 Stat. 536 (1959), 29 U.S.C. § 504 (1964).

[2] Ch. 120, 61 Stat. 146 (1947), *repealed*, 73 Stat. 525 (1959). Section 9(h), upheld in American Communications Workers v. Douds, 339 U.S. 382 (1950), provided that the use of the NLRB facilities would be denied to any union whose officers did not file affidavits stating that they were not members of the Communist Party and did not believe in or belong to any organization that advocated the illegal overthrow of the government.

But see Communist Control Act § 6, 68 Stat. 777 (1954), 50 U.S.C. § 784(a)1(E) (1958). Section 6 provides, *inter alia*, that once a communist organization is registered it shall be unlawful for any member to hold office with a union. It would seem likely that this provision is unconstitutional as a bill of attainder following the present case.

[3] In American Communication Workers v. Douds, 339 U.S. 382, 388-89 (1950), the Court found that the purpose of § 9(h) of the Taft-Hartley Act was to prevent political strikes. Section 504 was adopted as a more effective means of accomplishing the same result. H. R. Rep. No. 741, 86th Cong., 1st Sess. 33.

[4] S. Rep. No. 187, 86th Cong., 1st Sess. 35 (1959), 2 U.S. CODE CONG. & AD. NEWS, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 2351-52 (1959). The Justice Department testified at the Senate hearings that Communists were filing false affidavits under the Taft-Hartley Act while they secretly remained Party members, even while non-Communist unions were being denied certificates of compliance through mere inadvertence on the part of their officers to file affidavits.

The district court upheld the constitutionality of section 504, refusing to give respondent's requested instructions requiring a finding of specific intent for conviction.[5] The Ninth Circuit Court of Appeals in *Brown v. United States*[6] reversed, holding that section 504 placed an impermissible restraint on the respondent's right of association and further that there was not a sufficient relationship between respondent's status as a Communist holding union office and the evil Congress sought to eliminate to meet due process of law requirements. Without reaching the constitutional issues decided in the circuit court, five justices, in an opinion written by the Chief Justice, affirmed, holding that section 504 is a bill of attainder and therefore violates Article I, section 9 of the Constitution.[7] The statute is the first struck down by the Court as a bill of attainder since *United States v. Lovett*[8] was decided in 1946.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial upon named individuals or those of an easily ascertainable class.[9] The present case applies this definition to a legislative act which specifically designates Communists as individuals unfit to hold union office and punishes them by forcing them to choose between loss of their union position and criminal sanctions.

Section 504 is a bill of attainder because it regulates a designated political organization instead of setting forth:

> a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts or characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics.[10]

The Court emphasized that "the Communist Party" is not a "shorthand phrase" which designates the characteristics which Congress is seeking to bar from labor unions.[11] Therefore, section 504

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[5] Brown v. United States, 334 F.2d 488, 492 (9th Cir. 1964).

[6] 334 F.2d 488 (9th Cir. 1964).

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

[8] 328 U.S. 303 (1946).

[9] *Id.* at 315. A bill of attainder inflicts its punishment ". . . without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.'" *Id.* at 316-17. The only function a court would perform in invoking a bill of attainder would be to ascertain if the accused is the one the legislature attainted, which is of course not a judicial trial at all. The conviction has already been effected and the punishment pronounced by the legislature.

[10] United States v. Brown, 381 U.S. 437, 450 (1965).

[11] *Id.* at 456. See Scales v. United States, 367 U.S. 203 (1961) (mere

cannot be rationalized by using the designation "Communist Party" to denote "those characteristics which render likely the incitement of political strikes."[12]

A bill of attainder necessarily denies the victim due process of law. But the bill of attainder clause is in the Constitution for the specific purpose of insuring that no one is tried and convicted by the legislature. The importance of the guarantee would seem to require more than a foundation on vague concepts of due process; the protection should be based on the more specific clause. This is the apparent reason that the Court chose to avoid the due process issue relied on by the circuit court, as well as other constitutional

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membership in the Communist Party not equivalent to advocating forcible overthrow of the government). Legislative findings to this effect are not sufficient since the Party would have been tried by the legislature, which is what the bill of attainder clause proscribes.

However, if there is a certainty that the legislative findings are correct, a constitutional statute which applies to a specific group or specific individuals may be framed. For example, a legislature may deny a driver's license to all who are in a class possessing a susceptibility to uncontrollable seizures. See United States v. Brown, 381 U.S. 437, 454 n.29 (1965). If all Communist Party members do in fact possess characteristics which are dangerous if coupled with union power (at least to the extent that no court may prospectively separate one member from another in this respect), there is no adjudicating to be done. The majority of course does not believe this to be the case.

Another type of specification was held constitutional in Hawker v. New York, 170 U.S. 189 (1898), in which a convicted abortionist was tried under a statute which barred felons from practicing medicine. The statute was held constitutional since the abortionist had been tried and convicted—a sufficient judicial determination on which the legislature may act to preserve the integrity of the medical profession. Section 504 does not fit under this classification since the Communist Party has not received a conviction applicable here. The dissent argues that the administrative finding that the Communist Party is an organization advocating the forceful overthrow of the government by the Subversive Activities Control Board approved in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961), should serve in the present case as an adequate basis on which Congress may act. United States v. Brown, 381 U.S. 437, 471 (1965). But in the majority's view the Court in the *Communist Party* case was acting only in regard to a broad definition, the "communist-action organization" of § 3 of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. § 781-826 (1964). The definition in § 3 permits the Party to escape the punishment prescribed in the event its character changes, but § 504 does not. United States v. Brown, 381 U.S. 437, 452 n.26 (1965).

[12] *Id.* at 456 n.31. The circuit court used the same argument to justify its conclusion that respondent was denied due process of law. Brown v. United States, 334 F.2d 448 (9th Cir. 1964).

grounds such as freedom of association.[13]

But in invoking the bill of attainder clause the Court is confronted with a parallel to section 504 in a conflict-of-interest statute, section 32 of the Banking Act of 1933,[14] which provides that no employee of an organization dealing in securities may concurrently serve as an employee of a member bank of the Federal Reserve system. The dissent argued that since section 32 is not a bill of attainder, section 504 should be upheld.[15] Section 32 is closely analogous to section 504, but is distinguished by the Court on three grounds.[16] The first is that section 504 pertains to a political group and section 32 does not. This is significant since political groups were the targets of the majority of the early English and American bills of attainder.[17] The second is that "§ 32 incorporates no judgment censuring or condemning any man or group of men."[18] However, as stated by the dissent, both provisions deal with a "specifically described group, officers and employees of underwriting firms in the one case and members of the Communist Party in the other."[19] The third distinction made is that section 32 is a general rule while section 504 is a specification. But both statutes ban the retention of two types of positions concurrently and both name the specific group banned—Communists in one case and those in underwriting houses in the other. The distinction is not convincing. Since the political—non-political dichotomy appears to be the most persuasive distinction given by the Court, future bill of attainder cases may well turn on whether the accused is a member of a political group.

Infliction of punishment is a necessary element of a bill of attainder. The present case substantially broadens the meaning of "punishment" and thereby the scope of the bill of attainder clause.

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[13] There is every implication that the Court approves of the circuit court's holding. The Court uses the lower court's reasoning to buttress their own bill of attainder argument ("overbroadness" is discussed in the opinion to strengthen the argument that "Communist Party" is not a shorthand phrase used to designate certain characteristics to be kept out of the labor movement). United States v. Brown, 381 U.S. 437, 456 n.31 (1965).

[14] 48 Stat. 194 (1933), as amended, 12 U.S.C. § 78 (1964).

[15] United States v. Brown, 381 U.S. 437, 466-67 (1965) (dissenting opinion).

[16] *Id.* at 453-55.

[17] *Id.* at 453. Compare United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). (Section 9A of the Hatch Act, prohibiting federal employees from engaging in political activity, held not a bill of attainder).

[18] United States v. Brown, 381 U.S. 437, 453-54 (1965).

[19] *Id.* at 466 (dissenting opinion).

The view that only limited forms of punishment are proscribed by the bill of attainder clause has restricted its application in several cases in spite of *Cummings v. Missouri*[20] which held that a deprivation of the right to follow one's profession constitutes punishment. In a narrow interpretation of the present case loss of one's job constitutes punishment, but under a broader reading, the case may mean that any form of retribution, rehabilitation, deterrence, or prevention is punishment under the bill of attainder clause.

The present case destroys a limitation on the meaning of punishment stated in *American Communication Workers v. Douds*[22]— that a statute which only punishes for future actions is not a bill of attainder. The provision at issue in *Douds*, section 9(h) of the Taft-Hartley Act, escaped the bill of attainder proscription since it operated preventively and prospectively by punishing only when non-Communist affidavits were not filed. *Douds* was distinguished from *Cummings, Ex parte Garland*,[23] and *Lovett* on this basis since the bill of attainder in those cases punished for past acts or beliefs. The present case actually affirms the doctrine of early English cases which held that the punishment imposed by a bill of attainder may be for prospective as well as past conduct.[24]

Since a statute is a bill of attainder if punishment is inflicted on a specific group of individuals for prospective as well as past acts, the constitutionality of many types of loyalty oaths is in doubt. Several cases have not applied the bill of attainder proscription to loyalty oaths as conditions of government employment because the oath referred only to future and prospective qualifications.[25]

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[20] 71 U.S. (4 Wall.) 277 (1866).

[21] United States v. Brown, 381 U.S. 437, 458 (1965).

[22] 339 U.S. 382 (1950). The same principle was stated in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86-87 (1961).

[23] 71 U.S. (4 Wall.) 333 (1866). In *Garland* an act requiring attorneys to swear that they had not taken part in the rebellion against the Union before they could practice in the federal courts was held unconstitutional as a bill of attainder.

[24] United States v. Brown, 381 U.S. 437, 458 (1965); 72 YALE L.J. 330, 337 (1962).

[25] Garner v. Board of Los Angeles, 341 U.S. 716, 722-23 (1951). The non-Communist oath in this case set prospective standards of qualification for city employees according to the majority. They reasoned that no punishment was involved since only general and prospective qualifications were imposed whereas in *Lovett* the determining qualifications were for past beliefs. The same bar to bill of attainder was used in Nostrand v. Balmer, 53 Wash.2d 460, 335 P.2d 10 (1959) and Thorp v. Trustees of Schools for Industrial Educ., 6 N.J. 498, 79 A.2d 462 (1951). The majority in *Garner* also seems to say that the oath was "reasonable" as a qualification for employment, but this is not a

With this distinction disappearing, loyalty oaths could increasingly be held to be bills of attainder.

Douds also maintained that section 9(h) was not a bill of attainder since there was an avenue of escape from the punishment through a change in political loyalty. The present case rejects this doctrine as historically inaccurate and contrary to precedent.[26] Forcing an individual to change his political beliefs under the threat of loss of office is obviously a punishment which only an unjustifiably narrow interpretation of the term could exclude.

Besides the changes in the interpretation of what constitutes punishment under the bill of attainder clause, the emphasis in the present case upon the nature of the class designated is a departure from previous bill of attainder cases.[27] Previously the central inquiry in these cases had been whether the punishment was imposed by the legislature to reach the person or class with an intent to punish or whether the punishment was merely incidental to what otherwise would be valid legislation.[28] The presence of an intent to punish was ascertained either by determining the motives of Congress in passing the act, as was done in *United States v. Lovett*,[29] or by a finding that "the characteristic causing persons to be dis-

valid test of bill of attainder since the clause bans all punishment of specific persons without judicial trial regardless of the reasonableness involved.

[26] United States v. Brown, 381 U.S. 437, 457 n.32 (1965). Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), is cited as supporting this proposition as well as several ante-constitution bills of attainder which ". . . inflicted their deprivations upon named or described persons or groups, but offered them the option of avoiding the deprivations, *e.g.*, by swearing allegiance to the existing government."

[27] United States v. Brown, 381 U.S. 437, 462 (1965) (dissenting opinion).

[28] DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (plurality opinion); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866). And in Flemming v. Nestor, 363 U.S. 603 (1960), a bill of attainder challenge was not sustained because the statute did not punish but rather regulated an activity, the Social Security system, and punitive intent was not shown. The statute terminated Social Security payments when the alien defendants were deported for being members of the Communist Party. Even though the defendants had paid into the fund the Court reasoned that ". . . no affirmative disability or restraint is imposed, and certainly nothing approaching the 'infamous punishment' of imprisonment . . . ." is present. *Id.* at 617. *Brown* discredits this aspect of *Flemming* since the presence of congressional punitive intent is not controlling—the only requirement to establish punishment within the meaning of bill of attainder is that the effect of the act is to punish.

[29] United States v. Lovett, 328 U.S. 303, 315 (1946). (An act which manifested congressional intent to punish named individuals, thought by a House committee to be subversive, held unconstitutional as a bill of attainder).

qualified was irrelevant to the activity from which they were excluded."[30] In the present case the Court implies that imposition of punishment on specific individuals constitutes a bill of attainder without regard to any alleged legislative intent to punish.

Disregard of this legislative intent together with the broadened interpretation of punishment has been termed a "functional test" since the effect of the statute determines whether the act is a bill of attainder.[31] The effect and function of section 504 is to punish specific individuals by depriving them of their union positions; it is therefore unconstitutional. It is apparent that statutes restricting allegedly subversive individuals and organizations will have to be carefully framed to avoid a bill of attainder challenge under the *Brown* interpretation.

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30 64 YALE L.J. 712, 723 (1955). This test was used in Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), in which a provision of the Missouri Constitution of 1865 provided that no one could engage in the ministry unless he took an expurgatory oath saying he had not taken part in the rebellion against the Union. Since no relevancy could be found between fitness for the profession and the oath taken, penal intent was inferred and the provision was declared a bill of attainder.

31 See 72 YALE L.J. 330, 331 (1962).