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Linking Educational Benefits with Draft Registration: An Unconstitutional Bill of Attainder

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COMMENT

LINKING EDUCATIONAL BENEFITS WITH DRAFT REGISTRATION: AN UNCONSTITUTIONAL BILL OF ATTAINDER?

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In *Doe v. Selective Service System*,[1] a federal district court judge enjoined the Selective Service Board from enforcing the Solomon Amendment,[2] the law that prohibits students who have not certified that they have registered for the draft from receiving federal financial aid for higher education.[3] The plaintiffs contended that the Solomon Amendment constituted an unconstitutional bill of attainder[4] and violated the students' Fifth Amendment privilege against compulsory self-incrimination.[5] Government attorneys filed an appeal,[6] and, on further review, the Supreme Court stayed the preliminary injunction pending appeal to and final resolution of the case by the Court.[7]

This Comment evaluates the bill of attainder attack on the Solomon Amendment. It begins by considering the history of the law and then summarizes the district court's opinion in *Doe*. Next, it considers the modes of analysis that courts have em-

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[1] 557 F. Supp. 937 (D. Minn. 1983), *cert. granted*, 51 U.S.L.W. 3932 (June 28, 1983) (No. 83-276). The district court found that the plaintiffs had a probability of success on the merits. *Id.* at 950.

[2] Department of Defense Authorization Act of 1983 (formally entitled Enforcement of the Military Selective Service Act), Pub. L. No. 97-252, § 1113, 96 Stat. 718, 748 (1982) (to be codified at 50 U.S.C. app. 453) [hereinafter referred to as the Solomon Amendment or the Amendment].

[3] The Solomon Amendment amended the Military Selective Service Act of 1948, 50 U.S.C. app. §§ 451–473 (1976). The Act created the system by which men register and are drafted. Although the draft ended in 1973, registration requirements continued until March 29, 1975. Proclamation No. 4360, 40 Fed. Reg. 14,567 (1975). President Carter reinstated mandatory registration on July 2, 1980. Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980).

[4] A bill of attainder is a legislative adjudication of guilt that exacts punishment on a specific person or group without the protections of a judicial trial. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4, at 484 (1978). *See* U.S. CONST. art. I, § 9, cl. 2 (prohibiting Congress from passing a bill of attainder); U.S. CONST. art. I, § 10, cl. 3 (placing similar restrictions on the states). *See also infra* text accompanying notes 49–56.

[5] U.S. CONST. amend. V (no person "shall be compelled in any criminal case to be a witness against himself").

[6] At the time this Comment went to press, the Supreme Court had not yet scheduled arguments.

[7] 51 U.S.L.W. 3932 (June 28, 1983) (No. A-1033).

ployed in deciding if a particular piece of legislation is a bill of attainder. Finally, this doctrine is appplied to examine the validity of the Solomon Amendment.

I. History of the Solomon Amendment

Representative Gerald B.H. Solomon (R-N.Y.) introduced the Amendment on July 28, 1982, during the House debate on Defense Department spending for 1983.[8] Senators Mack Mattingly (R-Ga.) and S.I. Hayakawa (R-Cal.) had introduced similar legislation in the Senate on May 12, 1982.[9] In its final form, the Solomon Amendment states that any person who is required to register for the draft and does not "shall be ineligible for any form of assistance or benefit provided under Title IV of the Higher Education Act of 1965."[10]

The Department of Education (DOE) issued its final regulations implementing the Amendment on April 11, 1983.[11] Under these regulations a student seeking financial aid is required to submit a statement of compliance with the registration law to the Secretary of Education. Any student who does not file such a statement cannot qualify for financial aid under the Higher Education Act.[12] Using the Department's model statement of registration compliance or a similar form,[13] a student must certify either that he has complied with the Selective Service Act or is exempted from registration for one of the reasons stated therein.[14] Starting in the 1985–1986 school year, students eligible for the first time for Title IV aid will be required to prove that they have complied with the Selective Service Act by submitting the appropriate documents.[15] The regulations also require notice to be sent to students whose aid is about to be denied for failure to file the compliance statement. A student who receives such

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[8] 128 Cong. Rec. H4756 (daily ed. July 28, 1982).

[9] *Id.* at S4943 (daily ed. May 12, 1982).

[10] *Id.*; *see* 20 U.S.C. §§ 1070–1089 (1976).

[11] Dep't of Educ., Student Assistance General Provisions, 48 Fed. Reg. 15,578 (1983) (to be codified at 34 C.F.R. § 668.24).

[12] *Id.* The protected aid programs include Pell Grants, Supplemental Educational Opportunity Grants, College Work Study, National Direct Student Loans, Guaranteed Student Loans, PLUS loans, and Student Incentive Grant Programs. *Id.*

[13] *See* 48 Fed. Reg. 15,582 (1983) (to be codified at 34 C.F.R. § 668.25).

[14] Exempted classes include women, persons in the armed services on active duty, persons not yet eighteen years old, and residents of the Trust Territories of the Pacific Islands. *Id.* The form does not contain an exemption for conscientious objectors. *Id.*

[15] 48 Fed. Reg. 15,582 (1983) (to be codified at 34 C.F.R. § 668.26).

notice will be given thirty additional days to file. A student who is denied benefits can request a hearing.[16]

The Solomon Amendment and the DOE regulations sparked a national debate. Representative Solomon hailed the regulations, stating: "If young men want the privilege of getting low-cost, taxpayer funded college loans, then they damn well ought to live up to their duty to obey the law."[17] The legislation also met with strong opposition. Financial aid administrators at colleges around the country resented the law for the administrative burden and governmental intrusion it imposed on them, if not for political reasons.[18] The Brethren, Mennonite, and Quaker Churches established funds to support students whose federal loan applications were denied as a result of nonregistration.[19]

II. *Doe v. Selective Service*

Plaintiffs in *Doe* are college students who were required to register under Section 453 of the Selective Service Act and who were unable to file truthful compliance statements. They claimed that they would be unable to remain in college without federal education aid. Plaintiffs sought a preliminary injunction against enforcement of the Solomon Amendment, challenging that law as an unconstitutional bill of attainder and alleging violations of their Fifth Amendment privilege against self-incrimination.

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[16] *Id.* at 15,583 (to be codified at 34 C.F.R. § 668.27).

[17] 129 CONG. REC. E315 (daily ed. Feb. 3, 1983) (extension of remarks of Rep. Solomon). Similar legislation has already been sucessfully introduced. On October 13, 1982, President Reagan signed into law the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1399 (1982) (to be codified at 20 U.S.C. § 1504). Under its terms, the Secretary of Labor is required to ensure that all people participating in any of the programs funded by the Act have registered for the draft.

[18] N.Y. Times, July 19, 1983, at C1, col. 1. In August, 1983, the newsletter of the Committee Against Registration for the Draft, *Rough Draft*, compiled a list of responses by various northeast colleges to the Amendment. According to their researchers, Boston College, Boston University, Brandeis University, Emmanuel College, and Northeastern University all planned to send compliance forms to students. Dartmouth College, Harvard University, and the Massachusetts Institute of Technology planned to send out the compliance forms and also to help their students obtain market rate, nonfederally financed loans. Yale University and Brown University planned to help affected students find campus jobs and commercial loans. Williams College did not intend to send compliance forms to its students and was attempting to secure employment and alumni/parent sponsored loans for students. Wellesley College planned not to send compliance forms to its students and hoped to be exempted from the regulations. Middlebury College did not mail forms to its students and has attempted to replace work-study funds lost by students by giving them jobs on the college payroll. Rough Draft, Aug., 1983, at 3–4.

[19] N.Y. Times, July 26, 1983, at B16, col. 1.

A. *Irreparable Harm*

Rejecting the Selective Service's claim that plaintiffs were not threatened with harm because they had not yet aplied for or been denied federal aid, Judge Alsop asserted a presumption that the Secretary of Education would comply with the regulations and that plaintiffs' aid would be denied. The court held that the inevitable denial of aid to the plaintiffs demonstrated a threat of irreparable harm because the plaintiffs would be unable to remain in college.[20] Judge Alsop stressed the great value that the Supreme Court has attached to a college education.[21]

The court also held that the Solomon Amendment threatened plaintiffs with irreparable harm to their Fifth Amendment privilege against self-incrimination.[22] Those who invoke the Fifth Amendment instead of filing a compliance form would lose financial aid benefits and could be providing the government with incriminating evidence.

B. *Balancing Injuries*

The court next weighed the threat of harm to the plaintiffs against the harm an injunction would impose on the Selective Service System. Judge Alsop found that the potential harm to the plaintiffs if an injunction were not granted, namely the loss of the opportunity to go to college, far outweighed the potential disruption in the administration of the draft registration system that the issuance of the injunction might cause.[23]

C. *Probability of Success on the Merits*

1. *Bill of Attainder.* The Constitution prohibits Congress from passing a bill of attainder.[24] Judge Alsop defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual or group without the protections of a judicial trial."[25] He applied a three-part test to

[20] Doe v. Selective Service, 557 F. Supp. 937, 939–40.
[21] *Id.* at 939, citing Plyler v. Doe, 457 U.S. 202, *reh. denied*, 103 S. Ct. 14 (1982), in which the Court described education as providing opportunities for individuals and assuring a high quality of community life. *Id.* at 221.
[22] 557 F. Supp. at 940.
[23] *Id.* at 941
[24] *See supra* note 4.
[25] 557 F. Supp. at 941.

determine whether the Amendment was a bill of attainder. The court considered whether the Solomon Amendment is aimed at a specific person or group based on its past conduct, whether it is a leglslative determination of guilt, and whether it imposes a punishment.

a. *Application to a specific person or group.* Plaintiffs argued that the Amendment is aimed at a specific group of persons — young male students who require federal financial aid for education but who cannot file truthful statements of registration compliance.[26] In contrast, defendants claimed that the Amendment does not attach to a specific group because it does not punish persons for the past act of nonregistration. Rather, it attempts to regulate the present and future conduct of men who are required to register and desire federal education aid.[27] In rejecting defendants' argument, Judge Alsop relied on *Cummings v. Missouri*,[28] in which the Supreme Court rejected a similar argument applied to a statute requiring loyalty oaths as a condition of practicing certain professions.[29] Judge Alsop said that because males born after January 1, 1963, who failed to register within thirty days of their birthday cannot do so without being subject to prosecution for late registration, the statute does not encourage them to comply, but punishes them as members of a clearly ascertainable group whose members are identified by past conduct which they cannot eradicate.[30]

b. *Legislative determination of guilt.* Judge Alsop ruled that because the Solomon Amendment automatically denies federal aid to students who fail to file a compliance form, it "assumes that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements."[31] The students who fail to file a compliance form are denied financial aid whether the nonregistration is intentional or innocent.[32] The Amendment assumes that all students who fail to submit the required statement possess a guilty intent to avoid the registra-

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[26] *Id.* at 942.

[27] *Id.* A statute which applies to persons because of their past conduct is considered to be aimed at that specific group because those persons whose past behavior brings them under the statute cannot eradicate their past acts and escape the deprivations of the statute. *Id.*

[28] 71 U.S. (4 Wall.) 277 (1867).

[29] 557 F. Supp. at 942.

[30] *Id.*

[31] *Id.* at 943.

[32] Under the Selective Service Act, penal sanctions can be imposed only on persons who knowingly fail to obey their registration obligations. 50 U.S.C. app. § 453 (1981).

tion requirements, and is therefore a legislative adjudication of guilt.[33]

c. *Imposition of punishment.* The third element of the court's bill of attainder test was whether the statute imposed punishment. In determining this, the court followed *Nixon v. General Services Administration*,[34] in which the Supreme Court upheld against a bill of attainder challenge a statute which deprived former President Nixon of the right to dispose of his Presidential papers and tapes as he wished. The Court listed three areas that courts should examine in determining whether a statute which imposes a burden is actually imposing a punishment: whether the deprivation falls into an historical category of punishment, whether the burden was incidental to a valid governmental regulation, and whether the statute was passed with a punitive motive.[35]

Following *Nixon*, the district court first considered whether the denial of educational benefits falls into the category of historical punishments.[36] Defendant argued that this was not a punishment as that term has been interpreted by the courts. The defendants claimed that the Solomon Amendment was comparable to the statute in *Flemming v. Nestor*[37] that denied Social Security benefits to persons who had been deported because of past subversive activity. Judge Alsop disagreed,[38] stating that the sanctions provided by the Solomon Amendment fall into the class of punishment through which the legislature bars groups or individuals from employment or vocations. The Supreme Court has found these punishments to be unconstitutional.[39]

As required by the *Nixon* decision, the court next considered whether the statute and the deprivation it imposes furthers legitimate nonpunitive legislative purposes. Judge Alsop found that the statute failed this functional test. According to the court, the statute "imposes both a restraint and disability, assumes nonregistrants possess a guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime and is excessively broad in relation to its alternative purposes."[40] In rejecting the Selective Service's argument that

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[33] 557 F. Supp. at 943.
[34] 433 U.S. 425 (1977).
[35] *Id.* at 473–78.
[36] 557 F. Supp. at 944.
[37] 363 U.S. 603 (1960).
[38] 557 F. Supp. at 943–44.
[39] *Id.* at 943.
[40] *Id.* at 944.

the legitimate nonpunitive purposes of the statute were to encourage registration, to promote a just allocation of financial aid, and to assist the Selective Service in enforcing draft registration laws,[41] the court noted that "every 'punishment' could be renamed an 'encouragement' thereby escaping the Constitution's prescription on bills of attainder."[42]

Finally, the court considered whether the legislative record evinces a congressional intent to punish recalcitrant students. The court reviewed the legislative history and found such an intent. While Judge Alsop agreed with the defendants that the *Congressional Record* included statements that the Solomon Amendment's purpose was to encourage compliance, he found that "thorough examination of those statements . . . clearly reveal [sic] a punitive intent."[43]

Thus, plaintiffs met all of the requisite tests to establish a bill of attainder. The court concluded that plaintiffs had shown a probability of success on the merits of their claim that the Solomon Amendment was an unconstitutional bill of attainder.

2. *The Fifth Amendment.* The court also found that plaintiffs had established a likelihood of success on their claim that the Solomon Amendment violated the Fifth Amendment privilege against compulsory self-incrimination.[44] It held that the information required is incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute them.[45] Moreover, the statute penalizes those students who exercise the privilege by denying them access to federal financial aid for college.[46]

D. *The Public Interest*

Judge Alsop concluded that because plaintiffs had demonstrated a likelihood of success on their claim that the Amendment is unconstitutional, the public interest favored an injunction. The court granted the plaintiffs a preliminary injunction and ended its decision with a disclaimer: this decision should not be "construed as condoning noncompliance with the valid draft registration laws of this nation . . . . The issue here before

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[41] *Id.*
[42] *Id.* at 944–45.
[43] *Id.* at 945.
[44] *Id.* at 947.
[45] *Id.*
[46] *Id.*

this court turns not on whether the registration law should be enforced, but in what manner."[47]

Justice Department officials appealed the injunction to Justice Blackmun, Circuit Justice for the Eighth Circuit. He stayed the injunction, and the rest of the Supreme Court affirmed his decision.[48]

III. An Analysis of the Bill of Attainder Claim

A. *Overview*

A bill of attainder is a legislative act which adjudicates guilt and imposes punishment on a person or an easily ascertainable group without the protections guaranteed in criminal trials.[49] Bills of attainder were valid exercises of legislative power in England and most of the colonies during the pre-Constitutional period,[50] but were banned by the United States Constitution.[51]

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[47] *Id.* at 950.

[48] 51 U.S.L.W. 3938. According to the *New York Times*, government lawyers convinced the Court that concern for national security and the wide deference given to Congress when it legislates for reasons of national security required a stay of the injunction. N.Y. Times, July 19, 1983, at C1, col. 1. To have accepted this argument, the Court must have begun with the presumption that the Solomon Amendment was an attempt to enforce the Selective Service Act. The Court's traditional deference to Congress when it legislates about issues of national security was reaffirmed in Rostker v. Goldberg, 453 U.S. 57 (1981). The Court in *Rostker* accepted a gender-based classification which excluded women from military registration requirements instead of subjecting the classification to stricter scrutiny. Justice Rehnquist wrote for the majority that "[t]he case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." 453 U.S. at 64–65 The Court also doubted its own competence to adjudicate questions of national security: "Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Id.* at 65. For other cases in which the Court has accepted other suspect classifications as legitimate incidents of regulating national security, see Korematsu v. U.S., 319 U.S. 432 (1942) (racially based discrimination); United States v. O'Brien, 391 U.S. 367 (1967) (speech); Parker v. Levy, 417 U.S. 733 (1973) (overbreadth doctrine).

[49] *See, e.g.*, Garner v. Board of Public Works, 341 U.S. 716 (1951); United States v. Lovett, 328 U.S. 303 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

[50] Bills of attainder most often appeared in England and the United States during periods of political unrest and distrust. Garner v. Board of Public Workers, 341 U.S. at 745. They played an integral role in British succession struggles and religious persecutions and were passed by colonial legislatures during the Revolutionary War. For examples of statutes which persecuted Loyalists, see Reppe, *The Spectre of Attainder in New York*, 23 St. John's L. Rev. 1 (1948). For examples of British bills of attainder, see U.S. v. Brown, 381 U.S. 437, 445–46, n.19 (1965); Communist Party v. Subsersive Activities Control Board, 367 U.S. 1, 149–54 (1960) (appendix to Black, J., concurring); Barenblatt v. U.S. , 360 U.S. 109, 160–62 (1959) (Black, J., dissenting); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 146–50 (1951) (Black, J., dissenting); Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 Hastings Const. L.Q. 767 (1978); and Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330 (1962).

[51] *See supra* note 4.

Despite the constitutional prohibition, Congress and the states passed laws which later were found to be bills of attainder during the post-Civil War period[52] and the Communist scare of the 1940's and 1950's.[53]

The Supreme Court, in analyzing challenged legislation, requires four elements to find that a statute is a bill of attainder: a legislative act, an imposition of punishment, application of the punishment to a specific person or group, and absence of judicial safeguards.[54] Any statute deemed by the Court to contain these four elements will be struck down.

The Court's most recent formulation of the bill of attainder test came in *Nixon v. Administrator of General Services*.[55] Speaking of the relationship between punishment and the specification of an individual, Justice Brennan stated that the bill of attainder prohibition is applicable only to cases in which the individual or group is punished by a statute. He specified that such a statutory punishment exists if: a) the statute inflicts a traditional form of punishment such as death or imprisonment; b) it imposes a deprivation of a government benefit without serving a legitimate governmental purpose; or c) Congress passed the statute with punitive motives.[56]

As reflected in *Nixon*, the Court's bill of attainder analysis focuses on whether the act in question inflicts punishment. The Court, however, approaches this question from two different perspectives. The Court first undertakes a quasi-equal protection analysis which examines whether the deprivation caused by the statute is actually an incident of rational regulation of a legitimate governmental concern. If it is, the deprivation is not

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[52] *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866).

[53] *See, e.g.*, United States v. Brown, 381 U.S. 437 (1965); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (opinion of Burton, J.); United States v. Lovett, 328 U.S. 303 (1946). Many statutes drafted during this period, however, survived challenges brought on bill of attainder grounds. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1960); Flemming v. Nestor, 363 U.S. 603 (1960); Garner v. Board of Public Works, 341 U.S. 716 (1951); American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

[54] Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 HASTINGS CONST. L.Q. 767 (1978). The punishment can be the deprivation of any right or privilege and is not limited to traditional forms of punishment which accompanied attainders. *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 475 (1977); Cummings v. Missouri, 71 U.S. 277, 320 (1866). In addition, the legislation does not have to specify the person or group by name. If it applies to past acts committed by a certain group which Congress has deemed worthy of punishment, a court will find that the act applies to that group. *See, e.g.*, *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866).

[55] 433 U.S. 425 (1977).

[56] *Id.* at 470–78.

found to be a punishment.[57] The second approach assumes that the purpose of the Bill of Attainder Clause is to implement the notion of the separation of powers, specifically legislative and judicial powers. If the Court finds that, in enacting a statutory deprivation, the legislature was acting as a court — deeming certain persons guilty of punishable behavior and exacting a punishment — the statute will be found to be a bill of attainder.[58]

Both analyses involve the question of whether Congress, in enacting a deprivation, intended to punish a particular class. There is, however, a crucial difference in the analyses. The quasi-equal protection/regulatory analysis is sympathetic to the existence of a valid governmental regulatory motive. If there is such a valid motive and the statute regulates the activity in question by passing standards of behavior related to the activity, the statute is acceptable.

Even if a statute is regulatory on its face, however, it is is a bill of attainder if it imposes a deprivation on a group of people as a result of past conduct which they cannot undo by changing present behavior.[59] The second analysis is concerned with whether the legislature, in imposing a burden on a class of persons, has done so because it deems them guilty of certain behavior. It is this legislative adjudication of guilt which violates the Bill of Attainder Clause.[60] Unlike the first, this form of analysis is not concerned with a valid regulatory motive or with whether the deprivation is a legitimate regulatory burden as opposed to punishment.

B. *Regulatory Analysis*

The roots of the regulatory analysis applied in bill of attainder cases can be traced to *Cummings v. Missouri*.[61] In that case, the Supreme Court rejected Missouri's argument that a provision of the state's antebellum constitution requiring priests and

[57] *See, e.g.*, Garner v. Board of Public Works, 341 U.S. 716 (1951); American Communications Ass'n. v. Douds, 339 U.S. 382 (1949).

[58] *See, e.g.*, U.S. v. Brown, 381 U.S. 437 (1965).

[59] *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1960); Flemming v. Nestor, 363 U.S. 603 (1960); Garner v. Board of Public Works, 341 U.S. 716 (1951); American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

[60] *See* United States v. Brown, 381 U.S. 437 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866). *See also* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 356 (1965).

[61] 71 U.S. (4 Wall.) 277 (1866).

clergymen to take a loyalty oath that they had been loyal to the South during the Civil War was a valid regulation of the clergy. The Court found that because there was no relation between previous disloyalty and the ability to be a priest, the statute was not a regulation of the clergy, but a punishment for past conduct.[62] The Court held that a statute which disqualifies persons from certain professions on the basis of past conduct will be upheld against a bill of attainder challenge only if there is some relation between the past conduct and the ability to practice the profession.[63]

Regulatory analysis has been refined to allow a statute which regulates a profession or activity by disqualifying persons from that activity based on their past conduct if those persons may renounce their past conduct by changing their present behavior. In *American Communications Association v. Douds*,[64] plaintiffs challenged as a bill of attainder a law that denied labor unions access to the National Labor Relations Board if officials of those unions failed to file affidavits affirming that they were not Communists. The Court held that this was a legitimate nonpunitive exercise of congressional power to regulate interstate commerce[65] because the law did not punish union leaders based on past membership in the Communist Party. The law allowed them to avoid sanctions by renouncing their membership and conforming their behavior to acceptable standards.[66] Thus, when a regulation is based not on past, ineradicable acts, but on "continuing contemporaneous"[67] behavior, it is not punitive, and not a bill of attainder. Legislation which imposes sanctions on individuals only if they fail to change their present behavior does not fall under the bill of attainder prohibition.

C. *Separation of Powers Analysis*

The Supreme Court most completely formulated the separation of powers analysis in bill of attainder cases in *United States*

[62] *Id.*

[63] Thus, in Hawker v. State of New York, 170 U.S. 189 (1897), the Court upheld a state statute which made it illegal for persons previously convicted of a felony to practice medicine, agreeing with the state's argument that protecting its citizens from physicians of bad moral character is a legitimate interest of the state. *Id.* at 196.

[64] 339 U.S. 382 (1950).

[65] 339 U.S. at 387–88. The Court also considered First Amendment issues.

[66] *Id.* at 413–14.

[67] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86–87 (1960) (registration requirement imposed on the Communist Party is not a bill of attainder).

v. Brown.[68] In *Brown*, the Court struck down Section 504 of the Labor Management Act which made it a crime for a person who at that time was or had been in the previous five years a member of the Communist Party to occupy executive positions in labor unions. Chief Justice Warren found that the potential for conforming behavior to acceptable standards was irrelevant.[69] The crucial factor for the Court was that the legislature usurped the judicial function by finding that all Communists were dangerous.[70] The Court held that Congress may set forth rules of general applicability, defining who is qualified to serve on a union exectuive board, but it "cannot specify the people upon whom the sanctions it prescribes are to be levied."[71] This task belongs to the courts.[72] Thus, the crucial element in this analysis is not whether a person is suffering a legislative sanction, but whether that sanction was imposed after a legislative finding of guilt.

D. *The Solomon Amendment: Regulatory and Separation of Powers Analysis*

1. *The regulatory analysis*. Using the regulatory analysis, the Court would view the Solomon Amendment as an attempt to enforce the draft registration law. If prohibiting persons who fail to file a compliance form is found to be a valid incident of this regulation, the Act will stand. If, however, the Court finds that Congress had a punitive motive in depriving non-registrants of their governmental benefits, it will strike down the statute.[73]

The Court might view the Solomon Amendment in its most favorable light, as granting federal financial aid only to those who affirm that they have registered by filing a compliance form. Under this formulation, the Amendment does not reach the past act of nonregistration and thus would not be considered punishment.[74]

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[68] 381 U.S. 437 (1965).
[69] 381 U.S. at 458–59.
[70] *Id.* at 450.
[71] *Id.* at 461.
[72] *Id.*
[73] While this mode of analysis is similar to the analysis used in the separation of powers mode, there is an important difference. Here, the Court considers whether the legislature either was inflicting a punishment or was creating a deprivation incidental to regulating. In the separation of powers mode, the Court only looks at whether the legislature was acting like a court. Congress can legislate punishments for certain types of conduct. Only the courts, however, may apply these punishments.
[74] *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1877).

The compliance form is not a means of ascertaining or punishing persons who failed to register. It merely encourages men to register by denying them federal aid if they do not. The Court might decide that persons who do not file the form are not deemed by Congress to be guilty of breaking the Selective Service law; these persons simply failed to file the form. They may have done so for a number of reasons — because, for example, they no longer need aid, or they plan to leave college.

The Court would look to the statute itself, and the Congressional debates about its passage, to determine if the legislature intended to enforce the Selective Service Act through the Amendment. In the Senate, one of the sponsors of the legislation, Senator Hayakawa, stated that "[t]his Amendment seeks not only to increase compliance with the registration requirement but also to insure the most fair and just usage of Federal education benefits . . . . The Selective Service System was established for a very important purpose. The success of this system is crucial to the security of this country."[75] Senator Roger W. Jepsen (R-Iowa) stated that "the chief purpose of the amendment is to encourage greater compliance with the registration requirement. Registration is the law of the land. And this amendment is not meant to punish as many nonregistrants as possible."[76]

If the Court identifies the Amendment as having such a regulatory purpose, it next would determine whether Congress implements this purpose in a way which imposes legitimate burdens on noncomplying individuals or illegitimate burdens meant to punish them. Under the Amendment, Congress dangles the benefit of educational loans before the students, but requires them to register if they want to receive the reward. The provision most likely will aid in the enforcement of registration. The analysis, however, does not end here. The Court must consider Justice Field's pronouncement in *Cummings* that "it by no means follows that under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act . . . ."[77]

With this in mind, the Court would have to evaluate the impact of the Amendment on the respective categories of men affected by the action. The issue is whether they are suffering a burden incidental to congressional regulation of the Selective

[75] 128 CONG. REC. S4943–44 (daily ed. May 12,1982) (statement of Sen. Hayakawa).
[76] *Id.* at S4945 (statement of Sen. Jepsen).
[77] 71 U.S. (4 Wall.) 277, 325 (1877).

Service Act, or whether they are being intentionally punished for their alleged past act of nonregistration.[78] The first category to be considered consists of those men who have not yet turned eighteen or who have turned eighteen less than thirty days previously and can still register in compliance with the Selective Service Act. These men can escape from the deprivations of the bill, and thus, like the parties in *Douds*,[79] *Garner*,[80] and *Communist Party*,[81] are not being punished for past conduct.

The Court, however, would face considerable criticism if it invoked the escapability proviso. Critics of the notion claim that inescapability and the inevitability of punishment are not essential elements of a bill of attainder. Punishment in a bill of attainder can be preventive and is not limited to retribution. In *Brown*, the Court held that inescapability is not a prerequisite of a bill of attainder.[82] Chief Justice Warren stated that punishment need not be merely retributive, as it would be if the person could not escape from the deprivation imposed by the statute. "Punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive."[83] Warren explicitly noted that bills of attainder were often passed to inflict deprivation "upon that person or group in order to keep it from bringing about the feared event."[84] Under the Court's reasoning, punishment within the meaning of a bill of attainder does not necessarily have to apply to the ineradicable past conduct of a person or group. Congress can also be found to be punishing individuals when it restricts them from engaging in certain behavior by legislating specific disqualifications applicable to those presently engaging in that behavior.

The Court also must examine the effect of the legislation on the persons who can no longer register in compliance with the law. The conduct of these persons with regard to registration is ineradicable. They cannot escape the deprivations imposed by the Solomon Amendment unless they turn themselves in or perjure themselves by filing false forms. As the court in *Doe*

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[78] Justice Harlan, writing for the majority in Flemming v. Nestor, 363 U.S. 603, 614 (1960), characterized this distinction by stating that "[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly on the one affected."

[79] 339 U.S. 382 (1950).

[80] 341 U.S. 716 (1951).

[81] 367 U.S. 1 (1960).

[82] 381 U.S. 437, 458–59 (1965).

[83] *Id.* at 458.

[84] *Id.* at 459.

pointed out, men who fail to register within thirty days of their eighteenth birthday are subject to prosecution for late registration.[85] Thus, Congress has isolated past conduct, specified the group which has committed it, and punished the members of this group for their ineradicable past conduct. This legislation seems to fulfill all of the requirements of a bill of attainder.[86] The government could not claim that the statute is a means of enforcing the Selective Service Act as applied to this particular group. The law does not encourage these people to register; it is already too late for that. In this context, it merely attempts to impose civil sanctions on persons who do not file compliance forms. The legislation reaches the person, not the conduct,[87] and violates the prohibition against legislative punishment.

The Government may argue that because Congress has the right to set reasonable terms for the benefits that it bestows on the public, denying aid to those who refuse to comply with the registration law cannot be considered punishment.[88] Further, students do not have a right to education unless it is granted by statute. The Higher Education Act does not guarantee an education.[89] While the right of students in higher education to financial aid might not rise to the level of a property right for the purposes of due process protection,[90] its denial might be deemed a punishment for the purposes of bill of attainder analysis. In *Cummings*, the Court held 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."[91]

Thus, when Congress intends a deprivation,[92] and its intention deprives a person of some benefit, its action may be deemed a

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[85] 557 F. Supp. 937 (D. Minn. 1983). *See* 50 U.S.C. app. § 462 (1976).

[86] *See supra* text accompanying notes 26–46.

[87] *See* Flemming v. Nestor, 363 U.S. 603, 614 (1960).

[88] *See, e.g., id.*

[89] In Goss v. Lopez. 419 U.S. 565 (1975), the Court considered a challenge by grade school students to their suspension on the basis that it was ordered without any procedural protections. The Court ruled that students had no right to an education outside of that granted by state statute. Because the state did guarantee a public education, it was required to provide procedural protections before it deprived students of that right. In Arnett v. Kennedy, 416 U.S. 134 (1974), however, Justice Rehnquist stated in a plurality opinion that when the state chooses to create a benefit, it also may define the procedural protections which accompany the benefit where the two are inextricably intertwined.

[90] Despite this argument, Department of Education regulations provide for protection against loss of benefits. *See supra* text accompanying note 16.

[91] 71 U.S. (4 Wall.) 277, at 320 (1866).

[92] *See, e.g.*, Nixon v. General Services Admin., 433 U.S. 425 (1977); Flemming v. Nestor, 363 U.S. 603 (1960).

punishment. Denying a person education benefits clearly is a deprivation. In *Plyler v. Doe*,[93] Justice Brennan wrote for the majority that ". . . education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[94] Thus, Congress's denial of financial aid for education seems to be the kind of deprivation that was deemed a punishment in *Cummings*. Under the analysis of the regulatory model, the Solomon Amendment is a bill of attainder.

2. *The separation of powers analysis — legislative adjudication.* If the Court uses a separation of powers analysis in evaluating the Solomon Amendment, as it did in *Brown*, its primary concern will be determining whether Congress has adjudged guilt and meted out punishment. If Congress has deemed persons who have failed to file a compliance form guilty of registration evasion, the statute is a bill of attainder.[95] Because the Court must decide whether Congress has acted as a court or as a legislative body, the notion of escapability and the distinction between past and future nonregistrants is irrelevant here. The sole question is whether Congress has adjudged people who fail to file the compliance form guilty of nonregistration.

An examination of the congressional debates makes it clear that supporters of the Amendment believed that persons who did not comply with the form were in fact guilty of nonregistration. Many senators who supported the Amendment stated that young men who did not register (that is, did not file a form certifying that they had registered) should not receive governmental benefits.[96] The House debates were similar. Representative Solomon's first words were: "Mr. Chairman, this amendment prohibits young men who are in violation of the Draft

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[93] 457 U.S. 202 (1982).

[94] 457 U.S. at 221.

[95] 71 U.S. (4 Wall.) 333 (1866).

[96] The debates in the Senate on the Solomon Amendment show that supporters of the Amendment believed that men who did not file the form would be guilty of nonregistration. Senator Mattingly, one of the Amendment's sponsors in the Senate, said, ". . . as long as we have the law, all men reaching the age of 18 should and must register for it. If a young man decides he will ignore this law, he should not be eligible for financial assistance from the Federal Government." 128 CONG. REC. S4947 (daily ed. May 12, 1982) (statement of Sen. Mattingly). Senator Hayakawa, another sponsor, stated, "the responsibilities of registering with the Selective Service System should be gladly accepted. If it [sic] is not, then America has every right to deny those who are unwilling to do so financial assistance to advance their education." *Id.* at S4944 (statement of Sen. Hayakawa). Senator Tower (R.-Tex.) expressed similar sentiments: "I do not know why anyone should be permitted to claim the benefits of that which are financed out of the pockets of the taxpayers of this country if they are not prepared simply to register for a draft . . . ." *Id.* at S4945 (statement of Sen. Tower).

Registration Act from receiving any financial assistance under title IV of the Higher Education Act."[97] The Solomon Amendment, however, is not a criminal statute that provides civil penalties for draft evaders once a court has pronounced them guilty. The Amendment instead uses the nonfiling of the registration compliance form to establish an irrebuttable presumption that a person is guilty of violating the registration provisions of the Selective Service Act. Representatives seemed to presume that anyone who failed to file the compliance form was guilty. For example, Representative Stratton (D-N.Y.) said that "[t]he Amendment . . . is designed to prevent anybody who is violating the registration law [from receiving educational aid]."[98]

It is evident that Congress intended that those men who do not file the compliance forms should be deemed not to have registered and therefore should not share in the benefits of federal financial aid. The separation of powers analysis prohibits the legislative behavior involved here: adjudication of guilt followed by punishment. Congress has determined who is guilty of registration evasion. It does not matter that nonregistration is punishable as a crime, and that Congress merely is adding to the penalties for nonregistrants. What does matter is the means through which Congress has chosen to enforce these penalties. Congress could legislate that nonregistrants cannot receive financial aid for education, but it must let the courts determine whether a person has registered.

Thus, it is apparent from the existence of the compliance form and the attitude of many of the supporters of the Amendment that the Solomon Amendment is an act of legislative adjudication. The creation of such Congressional presumptions of guilt clearly is prohibited by the Bill of Attainder Clause.

IV. Conclusion

Plaintiffs in *Doe* do not challenge Congress's power to add civil sanctions, in the form of denial of federal financial aid, to the criminal sanctions already imposed for failure to comply with draft registration laws. They challenge the means Congress has chosen to determine who will suffer deprivations: the requirement students who desire aid must file a compliance form

[97] 128 Cong. Rec. H4757 (daily ed., July 28, 1982) (statement of Rep. Solomon).
[98] *Id.* at H4759 (statement of Rep. Stratton).

and the denial of aid to students who do not file forms. The heart of plaintiffs' bill of attainder claim is that this process of law enforcement, by which Congress determines the guilt of and inflicts punishment on a specific group of persons without a trial, is constitutionally forbidden.

The Supreme Court's decision in *Doe* should send a signal to Congress about the limits of its power to legislate. If the Court accepts the Solomon Amendment as a regulation, it must construe the deprivation of aid as nonpunitive. This would require a narrow definition of punishment and a holding that the Amendment does not punish nonregistrants, but rewards registrants. The Court, however, would be ignoring those men who cannot register without facing prosecution. To this group, the statute presents the option of losing aid or registering late and facing prosecution.

If the Supreme Court accepts the Solomon Amemdment, it will indicate that it will allow Congress a broad range of powers to impose civil penalties on persons who fail to affirm their own law-abiding behavior. If the Court rejects the Amendment as a regulation, this power will be denied. Similarly, if the Court rejects the Amendment from a separation of powers perspective, it will signal Congress that it may punish persons for illegal conduct only by passing laws applicable to the population at large, leaving to the judiciary the task of applying them to specific individuals.