North Carolina Central Law Review

Volume 36
Number 2 *Volume 36, Number 2*

Article 4

7-1-2014

Bill of Attainder: Old Wine in New Bottles

Jackson M. Nichols

Jackson S. Nichols

Matthew Buckner

BILL OF ATTAINDER: "OLD WINE IN NEW BOTTLES"

M. JACKSON NICHOLS*
JACKSON S. NICHOLS**
MATTHEW BUCKNER***

I. INTRODUCTION

Rose Kennedy famously said, "I'm like old wine. They don't bring me out very often, but I'm well preserved."[1] A little-known cause of action alleging Bill of Attainder is an old but exhilarating vintage found deep within the wine cellar of law which a judge may consider in determining the constitutionality of a challenged statute. With political polarization in the United States today, legislative abuse is on the rise. In the face of such abuse, federal and state courts are constantly considering challenges to legislative overreach on the basis of a violation of the Separation of Powers enunciated in the United States Constitution.

The Bill of Attainder has a lengthy history dating back to common-law England where Bills of Attainder were powerful tools used by nobility to quell political uprising. America's Founding Fathers were

* M. Jackson (Jack) Nichols is a shareholder and director of Allen, Pinnix & Nichols, P.A., Mr. Nichols has focused his legal career on administrative law and civil litigation. He worked in State Government from 1978 until 1985 and served as legal counsel to the Secretaries of Human Resources and Administration; he also served as Deputy Legislative Liaison to Governor James B. Hunt, Jr. Since entering private practice, he has represented clients before numerous regulatory bodies and has tried over 100 hearings in the Office of Administrative Hearings. In addition to representing twelve different occupational licensing boards, Mr. Nichols was elected as a Wake County Commissioner from 1990 to 1994 and also served as the first Vice-Chair of the Rules Review Commission. He is counsel of record in over 50 appellate cases, including writing *amicus* briefs on several constitutional issues. He is one of ten listed in Best Lawyers in American for North Carolina in Administrative Law for 2006 to the present. He has been listed as a "Super Lawyer" in *North Carolina Super Lawyer* from 2005 to the present. Mr. Nichols is AV rated by Martindale-Hubbell.

** Jackson S. Nichols is an attorney with the law firm of Thaler Liebeler LLP in Washington, D.C. His practice focuses on civil litigation and trial work in the D.C., Maryland and Virginia area.

*** Matthew Buckner is a 2014 graduate of North Carolina Central University School of Law and a 2009 graduate of East Carolina University with a degree in Political Science. Matthew would like to thank his loving fiancé and his parents for supporting him throughout law school.

1. *See* Karen Heller, *Celebrating Rose Kennedy in Honor of her 100th Birthday, 370 Family Members and Friends Gather for a Party Saluting "The Spirit of Us All,"* PHILADELPHIA INQUIRER, July 16, 1990, *available at http://articles.philly.com/1990-07-16/news/25898809_1_mental-retardation-joan-kennedy-rose-kennedy.*

undoubtedly aware of Bills of Attainder, and prohibited them in the United States Constitution. Over time, courts throughout the United States have considered various legislative enactments and fashioned tests to determine what is and is not considered a Bill of Attainder.

This article traces the history of the Bill of Attainder, dating from common-law England to present day. This article also discusses the development of Bill of Attainder jurisprudence in Federal as well as North Carolina courts over time, and its recent application of such jurisprudence to the North Carolina General Assembly's 2011-2012 and 2013-2014 budgets in *Planned Parenthood of Central North Carolina v. Cansler*. Finally, this article discusses potential uses of the Bill of Attainder in future causes of action.

II. History of Bill of Attainder in England

In common-law England, an act or Bill of Attainder was a legislative act "that impose[d] a punitive sanction upon either named individuals and groups or a sufficiently well-described but unnamed person or group of persons, without any of the procedural safeguards commonly associated with a complete judicial trial."[2] The purpose of a Bill of Attainder was to *attaint*[3] an individual "of treason, or felony, or to inflict pains and penalties beyond, or contrary to the common law."[4]

In common law England, Bills of Attainder were much more severe than bills of pain and punishment, which imposed "lesser, non-capital punishments, such as imprisonment, confiscation of property by the Crown, banishment from the realm, or disenfranchisement."[5] Bills of Attainder, on the contrary, prescribed a death sentence, and such pronouncements were carried out in a gruesome manner.[6] Adding insult to a slow and brutal death, the Bill of Attainder was accompanied by a "corruption of blood," the legal effect of which was "that the party attained lost all inheritable quality, and could neither receive nor

2. Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 Hastings Const. L.Q. 767, 768 (Summer 1978). *See also* Jay Wexler, The Odd Clauses: Understanding the Constitution Through Ten of Its Most Curious Provisions 162-63 (2011).

3. A person who has been attained has been "maligned or tarnished reputationally." Black's Law Dictionary 146 (9th ed. 2009).

4. Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 St. Thomas L. Rev. 178, 182 (2005).

5. Lehmann, *supra*, note 2, at 768-70.

6. *See* Wexler, *supra*, note 2, at 162 (describing a typical traitor's punishment as being hanged, cut down alive, "privy members to be cut off," bowels taken out of the belly and burned while the person was alive, head cut off, body divided into four quarters, and the remains disposed of as the Crown saw fit).

transmit any property or other rights by inheritance."[7] This meant that the attainted individual's property passed to the state upon his death and not to his heirs.[8] Such a punishment insured that the attained individual's descendants paid for his crime.[9]

Bills of Attainder were used in England primarily between the sixteenth and eighteenth century.[10] One of the earliest recorded Bills of Attainder was issued against the Earl of Lancaster in 1322.[11] Hugh le Despenser, 1st Earl of Winchester, and his son Hugh Despenser the Younger, Earl of Gloucester, were both attainted—not for opposing the King, but for supporting him.[12]

At that time, Bills of Attainder were used by English nobility primarily as a means of repression of political uprising.[13] As Justice Story stated:

> [Bills of Attainder] have been most usually passed in England in times of rebellion, or of gross subserviency to the Crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.[14]

Bills of Attainder were further used for several unique purposes. Attainders were used frequently during the Wars of the Roses and continued to be used by the Tudors, particularly for punishing rebels.[15] King Henry VIII disencumbered himself of several wives by the use of Bills of Attainder.[16]

Famous persons who were executed as a result of a Bill of Attainder included Thomas Cromwell (1540), Catherine Howard (1542), and the Earl of Strafford, Thomas Wentworth (1641).[17] The Bill of Attainder issued against the Earl of Strafford is particularly notable. During the 1620s, Thomas Wentworth was a well-known member of the House of

---

7. Lehmann, *supra*, note 2, at 771 (quoting *Ex parte Garland*, 71 U.S. 333, 387 (1867)).
8. WEXLER, *supra*, note 2, at 162.
9. Lehmann, *supra*, note 2, at 771.
10. WEXLER, *supra*, note 2, at 162.
11. Reynolds, *supra*, note 4, at 187.
12. *See* COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME VOL. 1,, 24-38 (1809).
13. Lehmann, *supra*, note 2, at 772-73.
14. *Id.* at 773 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1344 (5th ed. M. Bigelow 1891); cited in Cummings v. Missouri, 71 U.S. 277, 323 (1866).
15. David Kairys, Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives,"* 67 COLUM. L. REV. 1490, 1491 (1967); Andrew Kim, Comment, *Falling From Legislative Grace: The Acorn Defunding and The Appropriations Power Through the Bill of Attainder Clause*, 60 AM. U. L. REV. 643, 647 (2010-2011); Walter G. Simon, Article, *Evolution of Treason*, 35 TUL. L. REV. 669, 691 (1960-1961).
16. Reynolds, *supra*, note 4, at 188.
17. Chris Trueman, *Bill of Attainder*, History Learning Site (Feb. 27, 2014, 4:58pm) http://www.historylearningsite.co.uk/Bill-of-Attainder.htm.

Commons and had a reputation for his "obstinacy towards the Crown."[18] Over the years, however, Wentworth's political power within the House of Commons eroded.[19] He resigned his post in Parliament and sided with the King.[20] He was later appointed as the Earl of Strafford.[21] In a quest for political reform, House of Commons leader John Pym, recognizing that Wentworth would be his "main obstacle," instituted an impeachment trial against him for the cause of treason.[22] At the trial, Wentworth and his lawyers "debunked all the allegations soundly."[23] At the close of the evidence, it was clear that the prosecution had failed.[24] Pym turned to the Bill of Attainder for recourse.[25] It passed the House of Commons by a final vote of 204-59 and in the House of Lords by a vote of 26-19.[26] The King signed the bill, and Wentworth was executed soon thereafter.[27]

Commentators agree that the attainder of John Fenwick in 1696 was the last instance of a Bill of Attainder in England.[28] Sir Fenwick was a devoted supporter of James II and participated in a conspiracy to overthrow William III.[29] A recently passed statute made it necessary for two witnesses to prove treason.[30] Over time, Fenwick learned one of his two co-conspirators had been bribed to disappear.[31] Therefore, he could not be convicted of treason at trial.[32] However, the House of Commons passed a Bill of Attainder by a "small majority," and the House of Lords passed it by a mere seven votes, sealing Fenwick's fate.[33]

III. HISTORY OF BILL OF ATTAINDER IN THE UNITED STATES

The American colonists, particularly those who were disloyal to the Crown such as wealthy landowners and colonial leaders who called for independence, were all too aware of Bills of Attainder.[34] With such a historical backdrop, it is surprising that several colonies passed Bills of

18. Reynolds, *supra*, note 4, at 189.
19. *Id.*
20. *Id.*
21. *Id.* at 190.
22. *Id.*
23. *Id.*
24. *Id.* at 192.
25. *Id.*
26. *Id.* at 192-93.
27. *Id.* at 193.
28. Lehmann, *supra*, note 2, at 774.
29. ZECHARIAH CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 134(1956).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 135.
34. *Special Legislation Discriminating Against Specified Individuals and Groups,* 51 YALE L.J. 1358, 1360 (1942), *see also* WEXLER, *supra*, note 2 at 163-64.

Attainder prior to the revolution.[35] Between 1776 and 1779, New York and Pennsylvania passed Bills of Attainder sentencing British supporters to death.[36] Thomas Jefferson even passed a Bill of Attainder during the summer of 1777 in the Virginia legislature against British sympathizer Josiah Phillips.[37]

The United States Constitution contains two provisions that prohibit Bills of Attainder: Article I, Sections 9 and 10.[38] Both clauses were likely "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply— trial by legislature."[39]

Article I, Section 9 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."[40] In *Federalist No. 84*, Alexander Hamilton addressed the importance of this provision.[41] In this article, he responded to the demand for a Bill of Rights.[42] He raised various prohibitions in the Constitution as rebuttal to the arguments for a Bill of Rights:

> The most considerable of these remaining objections is that the plan of the convention contains no bill of rights. . . .To the first I answer, that the Constitution proposed by the convention contains, as well as the constitution of this state, a number of such provisions.[43]

Hamilton then recited a series of provisions that had been inserted into the Constitution which protected individual rights.[44] He highlighted the provisions as to the strict requirements on proving impeachment and the writ of habeas corpus.[45] Then, he noted:

> Independent of those which relate to the structure of the government, we find the following: . . . Clause 3. "No bill of attainder or ex-post-facto law shall be passed."[46]

Later, in *Federalist No. 84*, Alexander Hamilton opined that "[t]he establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and of titles of nobility . . . are perhaps greater securities to

35. WEXLER, *supra*, note 2, at 163.

36. *Id.*

37. *Id.*

38. U.S. CONST. art. I § 9; U.S. CONST. art I. § 10.

39. United States v. Brown, 381 U.S. 437, 442 (1965). *See also* WEXLER, *supra*, note 2, at 165.

40. U.S. CONST. art. I § 9.

41. THE FEDERALIST No. 84 (Alexander Hamilton), *available at* http://thomas.loc.gov/home/histdox/fed_84.html.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

liberty and republicanism than any it contains."[47] Citing Blackstone, Hamilton emphasized that:

> To bereave a man of life, . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation. . . .[48]

In *Federalist No. 78*, in discussing the creation of the Judiciary, Hamilton emphasized limitations on the legislative branch, and the ability of the judiciary to invalidate such acts; he states:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. 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, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of 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.[49]

The Founders reasoned that legislative bodies are elected bodies and "lack procedural protections found in courts," which rendered them "wholly inadequate to determine individual guilt."[50]

The other provision, Article I, Section 10, is buried in the language of the Contracts Clause and forbids States from enacting Bills of Attainder; it provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law."[51] Obviously, the Framers felt that the matter was so important that they effectively enacted a wholesale ban on their use.

In *Federalist No. 44*, James Madison explains the limitation on States. His is the better explanation of the rationale for the prohibition; he essentially argued that they are self-evident when he wrote:

> Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully

47. *Id.*

48. *Id.*

49. THE FEDERALIST No. 78 (Alexander Hamilton), *available at* http://thomas.loc.gov/home/histdox/*fed_78.html*.

50. WEXLER, *supra*, note 2, at 165.

51. U.S. CONST. art. I § 10.

> consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. *They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.* They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.[52]

The obvious must be stated. If the States or their citizens were concerned about this prohibition, then limitations would have been enacted as part of the Bill of Rights. The fact that no such limitations were enacted only strengthens the argument that these constitutional prohibitions were seen as an important and significant restraint on the U.S. government and the States.

IV. FEDERAL LITIGATION INVOLVING BILL OF ATTAINDER FROM 1789 TO PRESENT

A. *Development of Federal Litigation Prior to 1984*

Although it was enacted in the U.S. Constitution in 1789, it was not until 1866 that the first Bill of Attainder claim was argued and decided in the Supreme Court of the United States.[53] Around this time, the Court struck down three laws as Bills of Attainder by finding the laws constituted a punishment based on the deprivation of life, liberty or property rights.[54] Not surprisingly, the first two cases related to aftermath of the Civil War.

In *Ex parte Garland*,[55] the Court struck down a federal law which required attorneys practicing in federal court to swear that they had not supported the rebellion.[56] The Court found that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."[57] It added that "[a]ll enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitu-

52. THE FEDERALIST No. 44 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_44.html (emphasis added).

53. *See* Cummings v. Missouri, 71 U.S. 277 (1866); Ex Parte Garland, 71 U.S. 333 (1866).

54. *See id.*; Pierce v. Carskadon, 83 U.S. 234 (1872).

55. 71 U.S. 333 (1866).

56. *Id.* at 381.

57. *Id.* at 377.

tional inhibition against the passage of bills of attainder, under which general designation they are included."[58]

On the same day, the Court released its decision in *Cummings v. Missouri*.[59] The Court considered a Missouri constitutional provision that required, among other persons, members of the clergy to swear a loyalty oath that they had not supported the government of the rebellion, lest they be forbidden from working.[60] Many citizens of Missouri had been loyal to the Confederacy; therefore, they could both perjure themselves and make the attestation or, if discovered, they could be subject to imprisonment for perjury.[61] If they refused, they would be denied work.[62] In *Cummings*, the Court provided perhaps the most widely cited definition in modern times of a Bill of Attainder:

> A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.[63]

The Court further indicated that "[t]hese bills are generally directed against individuals by name; but they may be directed against a whole class."[64] Here, the Court, speaking through Justice Field, noted that the oath mandated by the statute required clergy to purge themselves from prior acts that "have no possible relation to their fitness for those pursuits and professions,"[65] and thus was not constitutional because it effected a punishment "without the formality of a judicial trial and conviction."[66]

In *Pierce v. Carskadon*,[67] decided just a few years after *Cummings* and *Garland*, the Court struck down a West Virginia law requiring the out-of-state defendants challenging an attachment on their real property to swear an oath that they had not committed certain designated public offenses.[68] The Court appeared to consider the case similar enough to *Cummings* and *Garland* that it struck it down "on the authority" of those cases with minimal further explanation.[69]

58. *Id.*
59. 71 U.S. 277, 332 (1866).
60. *Id.* at 282-84.
61. *Id.* at 284.
62. *Id.* at 319
63. *Id.* at 323.
64. *Id.*
65. *Id.* at 319.
66. *Id.* at 329.
67. 83 U.S. 234 (1872).
68. *Id.* at 235
69. *Id.*

Since then, the Supreme Court has only heard two cases in which it struck down laws as Bills of Attainder.[70] In 1946, in *United States v. Lovett*,[71] the Court struck down a congressional law that specifically singled out three federal government employees based on the findings of a congressional investigation that named them as "subversives" and cited concern over them occupying influential positions in the U.S. government.[72] The law in question prohibited the employees from ever engaging in any government work, except as jurors or soldiers, unless reappointed by the president with the advice and consent of the Senate.[73] The law also prohibited any further payment of their wages after a certain date.[74] After a determination that the controversy was justiciable and did not present a political question, the Court struck down the law as unconstitutional under the Bill of Attainder clause because it inflicted punishment on the individuals named in the legislation without a judicial trial.[75]

In 1965, the Court faced the issue again, and for the first time provided a thorough historical treatment.[76] Justice Warren reviewed the English origin and the Parliamentary abuse.[77] In citing *Federalist Papers Nos. 47* and *48* on the issue of separation of powers, he wrote:

> [I]n a representative republic . . . where the legislative power is exercised by an assembly . . . yet not incapable of pursuing the objects of its passions . . ., barriers had to be erected to ensure that the legislature would not overstep [its] bounds. The Bill of Attainder Clause was regarded as such a barrier.[78]

Subsequent decisions reinforced this wholesale prohibition of such governmental behavior. *Nixon v. Administrator of General Services*[79] described a Bill of Attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[80] In *Selective Service System v. Minnesota Public Interest Research Group*, the Court said: "In forbidding bills of attainder, the draftsmen of the Constitution

70. *See* U.S. v. Lovett, 328 U.S. 303 (1946); Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984).

71. 328 U.S. 303 (1946).

72. *Id.* at 308.

73. *Id.* at 314.

74. *Id.* at 306-07

75. *Id.* at 316-17.

76. U.S. v. Brown, 381 U.S. 437, 441-46 (1965).

77. *See id.*

78. *Id.* at 443-44.

79. 433 U.S. 425 (1977).

80. *Id.* at 468; *Nixon* is noteworthy in that it upheld a legislative enactment against what the court called "a legitimate class of one." There, the Court found that a law that directed an executive branch official to take custody of former President Nixon's presidential papers and tape recordings did not violate the Bill of Attainder clause because it did not "rests upon a congressional determination of his blameworthiness and a desire to punish him." *Id.* at 476.

sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.'"[81]

B. *Selective Service System v. Minnesota PIRG* & the Three-Part Test

In 1984, the Supreme Court of the United States heard a case involving a challenge to the Military Selective Service Act, which required men between the ages of 18-26 to register for the draft in order to receive financial assistance for higher education.[82]

In deciding the case, the Court formulated a three-part test for the elements to a Bill of Attainder claim.[83] Whether the challenged legislation imposing "punishment" involves "three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish."[84]

This test has been adopted by nine circuit courts of appeal.[85] In the Second Circuit, the Court of Appeals held: "[A] statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim."[86] The Fifth Circuit has observed that "the determination of each case depends on its own particular context," and since statutes must be presumed to be constitutional, courts must not "lightly . . . choose that reading of the statute's setting which will invalidate it over that which will save it."[87]

The Fourth Circuit Court of Appeals held that "[a] legislative act is an unconstitutional bill of attainder if it singles out an individual or

81. 468 U.S. 841, 847 (1984) (quoting *Brown*, 381 U.S. at 447).

82. *Id.* at 847

83. *Id.* at 852. .

84. *Id.*

85. *See* Elgin v. U.S. Dep't of the Treasury, 641 F.3d 6, 21 (1st Cir. 2011); Consol. Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002); Garner v. U.S. Dep't of Labor, 221 F.3d 822, 826 (5th Cir. 2000); Brookpark Entm't, Inc. v. Taft, 951 F.2d 710, 717 (6th Cir. 1991); Dehainaut v. Pena, 32 F.3d 1066, 1070 (7th Cir. 1994); Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 461 (8th Cir. 1999); Seariver Mar. Fin. Holdings v. Mineta, 309 F.3d 662, 668-69 (9th Cir. 2002); Taylor v. Sebelius, 189 Fed. Appx. 752, 758 (10th Cir. 2006); Little v. City of N. Miami, 805 F.2d 962, 966 (11th Cir. 1986); Emory v. United Air Lines, Inc., 720 F.3d 915, 923 (D.C. Cir. 2013). .

86. *Consol. Edison Co.*, 292 F.3d at 350. *See also* United States v. Dorlouis, 107 F.3d 248, 257 (4th Cir. 1997) ("A Bill of Attainder is a legislative determination of guilt which metes out punishment to named individuals" and such determination must "single out" an individual). Not all Circuits have clearly stated whether the test is a factor test or if they require all three elements to be met.

87. Garner v. U.S. Dept. of Labor, 221 F.3d at 826 (quoting Fleming v. Nestor, 363 U.S. 603, 616-17 (1960)).

narrow class of persons for punishment without a judicial proceeding."[88] However, the Fourth Circuit did not reach the Bill of Attainder issue in that case but addressed the issue concerning a North Carolina tax on illegal drugs on separate grounds.[89]

More generally, courts have condemned statutes as Bills of Attainder when the burdens associated with the legislation are entirely disproportionate to any supposed non-punitive benefit—especially where the legislative intent to punish is evident.[90] For example, in *Foretich v. United States*,[91] the District of Columbia Circuit Court of Appeals held that the Elizabeth Morgan Act was unconstitutional because it embodied a legislative opinion that Elizabeth's father was a criminal child abuser and singled him out for punishment.[92] Also, a statute prohibiting a state agency from contracting with a specifically named organization has been held to be "very much akin to the enactments that prompted the framers to include in the Constitution a prohibition on bills of attainder."[93]

V. BILL OF ATTAINDER IN N.C. CONSTITUTION & N.C. CASES

As noted, the U.S. Constitution prohibits States from enacting a Bill of Attainder. Independent of the U.S. Constitutional prohibition, the North Carolina Constitution prohibits the General Assembly from enacting Bills of Attainder.[94] The Supreme Court of North Carolina has also recognized a claim for Bill of Attainder under North Carolina law."[95]

North Carolina courts have followed the federal test for determining whether a statute is an unconstitutional Bill of Attainder: "(1) it must specify the affected persons; (2) it must be punitive; and (3) it must fail to provide for the protections of a judicial trial."[96]

Several North Carolina state cases have also addressed the Bill of Attainder issue. In *CitiCorp v. Currie*,[97] the North Carolina Court of Appeals held that the state statute prohibiting the acquisition or control of an industrial bank by any company was not an unlawful Bill of

88. Lynn v. West, 134 F.3d 582, 594 n.11 (4th Cir. 1998).
89. *Id.*
90. *Id.* at 593.
91. 351 F.3d 1198, 1226 (D.C. Cir. 2003).
92. *Id.*
93. Fla. Youth Conservation Corp. v. Stutler, No. 4:06CV275, 2006 WL 1835967, at *2 (N.D. Fla. June 30, 2006).
94. N.C. CONST. art. I, §16 ("no ex post facto law shall be enacted"). .
95. *See* State v. Whitaker, 364 N.C. 404, 411-12 (2010).
96. *See* Price v. Town of Atl. Beach, 2010 U.S. Dist. LEXIS 34752, at *16-17 (D.S.C. Apr. 7, 2010); *see also* Scinto v. Preston, 2005 U.S. Dist. LEXIS 41902, *6-7 (E.D.N.C. May 25, 2005).
97. 75 N.C. App. 312, 330 S.E.2d 635 (1985), *review denied*, 314 N.C. 538, 335 S.E.2d 15 (1985).

Attainder because it did not inflict punishment on the bank's stockholders without trial; rather, it simply prevented them from selling their stocks to CitiCorp.[98]

In *Misenheimer v. Misenheimer*,[99] the Supreme Court of North Carolina considered whether a state statute, which bars one who "willfully and unlawfully" kills another as principal or accessory from sharing in the other's estate, would affect distribution of an estate to the murderer's children.[100] Specifically, the decedent's son, John, actually murdered the decedent; the decedent's will devised his estate to his eight surviving children, including John.[101] In a footnote, the court found that construing the statute to prevent the murderer's children from inheritance would be an unconstitutional Bill of Attainder.[102]

> A bill of attainder is a legislative Act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. . . . It is not necessary that all of the children's rights in their grandfather's estate be destroyed. "*The deprivation of any rights, civil or political, previously enjoyed, may be punishment* . . . ."[103]

The North Carolina Court of Appeals explicitly recognized that Article I, Section 16 of the N.C. Constitution served as a basis for assertion of a Bill of Attainder claim in *State v. Johnson*.[104]

In *State v. Whitaker*, the North Carolina Supreme Court affirmed the Court of Appeals' finding that the statute prohibiting convicted felons from possessing any firearms in any location was not an unconstitutional Bill of Attainder.[105] The court based its holding on the finding that the statute does not operate as punishment.[106] Furthermore, even if the statute did operate as a punishment, the court held that it is unlikely that felons would be considered a group protected under the Bill of Attainder Clause as "laws regulating the conduct of convicted felons have long been upheld as valid exercises of the legislative function."[107]

98. *Id.* at 316-17
99. 312 N.C. 692, 325 S.E.2d 195 (1985).
100. *Id.* at 693.
101. *Id.* at 692-93, 325 S.E.2d at 196.
102. *Id.* at 698 n.2, 325 S.E.2d at 198 n.2.
103. *Id.* (citing *Cummings*, 71 U.S. at 323)(emphasis added)(citation omitted).
104. State v. Johnson, 169 N.C. App. 301, 310, 610 S.E.2d 739, 745 (2005).
105. *Id.* at, 405, 700 S.E.2d 215, 216 (2010).
106. *Id.* at 412, 700 S.E.2d at 220.
107. *Id.* (internal citation omitted).

VI. PLANNED PARENTHOOD OF CENTRAL NORTH CAROLINA V. CANSLER

Recently, Judge James Beaty, Jr. of the U.S. District Court for the Middle District of North Carolina issued an opinion involving Planned Parenthood's assertion of a Bill of Attainder against the State of North Carolina.[108] Judge Beaty found that Planned Parenthood was likely to prevail on a number of its constitutional claims, including the Bill of Attainder claim.[109]

The history of the case is revealing. On June 15, 2011, the North Carolina General Assembly enacted, over Governor Perdue's veto, a budget for fiscal years 2011-2012 and 2013-2013.[110] Contained within that voluminous document was a special provision that prohibited the State's "Department of Health and Human Services [from] provid[ing] State funds or other funds administered by the Department for contracts or grants to Planned Parenthood, and affiliated organizations."[111] The legislation was effective July 1, 2011.[112]

On July 7, 2011, Planned Parenthood filed a lawsuit in the Middle District for the U.S. District Court of North Carolina and challenged the constitutionality of the legislation on five grounds under the U.S. Constitution.[113]

> PPCNC seeks declaratory and injunctive relief because Section 10.19 violates the Supremacy, Due Process, Equal Protection, and Bill of Attainder Clauses of the United States Constitution, and the First Amendment.[114]

Contemporaneously with the Complaint, Plaintiff moved for a Preliminary Injunction.[115] Plaintiff cited the *Nixon* test and contended that "[a]ll of these elements are met here. Because it specifically "single[s] out'" Planned Parenthood by name, there can be no serious question that § 10.19 meets the specificity requirement."[116]

---

108. Planned Parenthood of Cent. N.C. v. Cansler, 877 F.Supp.2d 310, 321-25 (M.D.N.C. 2012).

109. *Id.* at 332-33.

110. *Id.* at 315.

111. Current Operations and Capital Improvements Appropriations Act of 2011, § 10.19, 2011 N.C. SESS. LAWS 145.

112. *Cansler*, 877 F. Supp. 2d at 315

113. Complaint for Injunctive and Declaratory Relief, Planned Parenthood of Cent. N.C. v. Cansler at 1-2, 804 F.Supp. 482 (M.D.N.C. July 7, 2011) (No. 1:11CV531).

114. *Id.* at 2

115. 877 F. Supp. 2d at 315

116. Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 18, (M.D.N.C. July 7, 2011 (No. 1:11CV531)) (citing United States v. Dorlouis, 107 F.3d 248, 257 (4th Cir. 1997) (alterations in original)).

In their Brief in Opposition to the Preliminary Injunction Motion, the State argued that § 10.19 is not a Bill of Attainder because it "imposes none of the burdens historically associated with punishment."[117]

On August 19, 2011, Judge Beaty issued an Order and held the statute passed by the North Carolina legislature that specifically disallowed federal funding for Planned Parenthood's North Carolina branches would likely be considered unconstitutional on several grounds, including a Bill of Attainder claim.[118] The court issued a preliminary injunction barring the Secretary of the North Carolina Department of Health and Human Services from withholding such funds from the organization.[119]

Because the statute specifically targeted Planned Parenthood without a judicial proceeding, it likely met the first and third prong of the Bill of Attainder test.[120] "Therefore, the singling out of Planned Parenthood and its affiliates for the denial of funding would likely be deemed punishment."[121]

Judge Beaty also found that the statute singled out Planned Parenthood for punishment based on statements made by many legislator proponents of the statute complaining about Planned Parenthood's abortion activities.[122] The Order cited comments by Representative Paul Stam, the Majority Leader of the N.C. House of Representatives, and Senator Warren Daniel.[123] Judge Beaty also observed that Plaintiff noted that the legislators' statements were inaccurate and the statements were

> motivated by an intent to punish Planned Parenthood for an alleged historical connection to the eugenics movement and to punish Planned Parenthood for the alleged number of abortions that it had performed, unrelated to any state-funded programs. . . . [B]ased upon the evidence before the Court, it appears that Section 10.19 was adopted specifically to penalize Planned Parenthood for its separate abortion-related activities. . . . Therefore, the Court concludes that Plaintiff has established a likelihood of success as to its contention that Section 10.19 is an unconstitutional bill of attainder.[124]

Judge Beaty also noted that proponents of the statute were aware that it could be considered a Bill of Attainder because opponents of

117. Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction at 20, Planned Parenthood of Cent. N.C. v. Cansler, 804 F.Supp. 482 (M.D.N.C. Aug. 1, 2011) (No. 1:11CV531).

118. Planned Parenthood of Cent. N.C. v. Cansler, 804 F. Supp. 2d 482, 498 (M.D.N.C. 2011).

119. *Id.* at 501.

120. Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 17-20, 804 F. Supp. 2d 482 (No. 1:11CV531).

121. *Cansler*, 804 F.Supp.2d at 496.

122. *Cansler*, 877 F.Supp. 2d. at 325.

123. *Id.*

124. 804 F.Supp. 2d at 496-97.

the measure had voiced such concerns in debates on the House floor.[125] Plaintiff had presented transcripts of the floor debate that noted that Representative Glazier had so informed the N.C. House of Representatives.[126]

The following year, Judge Beaty issued his final Order granting judgment for Plaintiff Planned Parenthood.[127] The State did not appeal and repaid the funds to Planned Parenthood.

VII. Potential Use Of Bill Of Attainder In Future Causes of Action

Unfortunately, given the current political propensity to punish certain classes of citizens, or to condition the receipt of governmental benefits, the use of this constitutional challenge may expand. Like all significant constitutional issues, the difficult cases are those that involve the collision of constitutional rights. The federal government clearly has the power to impose conditions on the financial grants that it provides, but there are limits.[128]

Clearly, the easiest challenges for the courts to resolve are those that seek to punish an organization whose actions are contrary to some majority political party or coalition. The recent attempts to defund Planned Parenthood health education efforts because of political opposition to its contraceptive and abortion activities should result in the same outcome as the *Cansler* case.

Similarly, efforts to condition the receipt of governmental benefits upon other independent conditions are subject to challenge. As shown by the *Selective Service System v. Minnesota PIRG* case, the government cannot require registration for the draft in order to receive governmental loans.[129] If so, can the government prevent undocumented immigrants or underage children of undocumented parents from receiving a driver's license or governmental benefits? While our research found no cases that used a Bill of Attainder as a basis for challenging limitations on education benefits to such persons,

125. *Id.* at 496.

126. Reply Memorandum of Law of Plaintiff Planned Parenthood of Central N.C. in Further Support of Plaintiff's Motion for a Preliminary Injunction at Ex. G, pp. 8-9 & Ex. J, pp. 6-8, Planned Parenthood of Cent. N.C. v. Cansler, (M.D.N.C. Aug. 5, 2011) (No. 1:11CV531).

127. 877 F. Supp. 2d 310 (M.D.N.C. 2012).

128. *See* Allison Quick, Harvard Law School, Federal Budget Policy Seminar, Legal Limits on Conditional Spending Including Recent Challenges to No Child Left Behind (May 2, 2006) (quoting *South Dakota v. Dole*, 483 U.S. 203 (1987), *available at* http://www.law.harvard.edu/faculty/hjackson/NoChild_19.pdf. ("The use of the spending power must be in pursuit of the general welfare, the conditions must be unambiguous, the conditions must be related to the federal interest in particular projects, the conditions cannot force the state to do something unconstitutional, and the conditions cannot be coercive"))

129. 468 U.S. 841, 850-51 (1984).

it would seem that such cases would be able to meet the three-part test discussed earlier.

Equally vulnerable to challenge are recent governmental efforts to condition the receipt of welfare benefits on requirements such as limiting the number of children in a family that might receive benefits.[130] Linking benefits to work and time limitations have been upheld.[131] But now "[m]ore states are enacting or considering laws that prohibit people who get welfare cash from spending it on liquor, cigarettes, strip clubs, gambling and guns — laws that even supporters say are difficult to enforce."[132] What about drug testing for welfare recipients? In analyzing such challenges, a court's focus clearly will be on the punitive nature of the limitation.

In the area of occupational licensure, efforts to deny licensure because of the commission of an unrelated crime may invite such challenges. For example, a DUI might serve as a basis for denying a license to a paramedic, but should that conviction alone require an occupational licensing board to deny a license to a licensed learned profession that does not involve driving? On the other hand, if the blood alcohol level is extremely high and indicative of alcoholism, should the same result apply?

In litigating constitutional challenges, plaintiff's counsel has to be creative and also use a shotgun approach by asserting a variety of constitutional challenges. As discussed, claiming that the government's action constitutes a Bill of Attainder presents another option in such litigation. Accordingly, anyone considering such a claim should consult experienced counsel about how to match the best option to their needs.

VIII. CONCLUSION

In this era of polarized politics, legislative abuse is on the rise. Justice Story's Commentary has become true – that in times ". . . of violent political excitements . . . nations are most liable. . . to forget their

130. C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d 171, 194-95 (3d Cir. 1996) (one federal court of appeals has held that a state's AFDC "family cap" policy does not violate the due process or equal protection rights of AFDC parents who give birth to a child after they begin receiving public assistance.).

131. *See, e.g.*, United States v. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 178 n.11 (1980) ("Congress may condition eligibility for benefits such as these on the character as well as the duration of an employee's ties to an industry."); Batterton v. Francis, 432 U.S. 416, 428-29 (1977) (regulation which used the term "unemployment" in connection with AFDC payments to children with unemployed fathers and defined the time frame for eligibility was reasonable and valid).

132. Marisol Bello, *States Restrict Welfare Purchases*, USA TODAY July 8, 2012, , *available at* http://usatoday30.usatoday.com/news/nation/story/2012-07-08/welfare-purchase-restrictions/56100508/1.

duties, and. . . trample upon the rights and liberties of others."[133] Under the wisdom of the Separation of Powers of the U.S. Constitution, the federal courts and state courts are being faced with challenges of legislative overreaching. For those litigants seeking to challenge the legislative branch, a cause of action alleging a Bill of Attainder is another arrow in the quiver with which to attack. Or, to use the analogy of the title of this article, it is another bottle of wine to set before the judge for his or her sampling of its contents and determination as to whether it meets the tasting test of constitutionality. Like any older wine, this option has only gotten more complex with age.

133. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 211 (Boston, Hilliard, Gray, & Co. 1833).