

# WebMemo



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## Can Congress Punish People? Why the Constitution Prohibits Bills of Attainder

*An excerpt from The Heritage Guide to the Constitution*

*No Bill of Attainder... shall be passed.*

—U.S. Constitution, Article I,  
Section 9, Clause 3

The Constitution prohibits both the federal government (in this clause) and the states (in Article I, Section 10, Clause 1) from passing either bills of attainder or *ex post facto* laws. The Framers considered freedom from bills of attainder and *ex post facto* laws so important that these are the only two individual liberties that the original Constitution protects from both federal and state intrusion. As James Madison said in *The Federalist* No. 44, “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.”

In common law, bills of attainder were legislative acts that, without trial, condemned specifically designated persons or groups to death. Bills of attainder also required the “corruption of blood”; that is, they denied to the condemned’s heirs the right to inherit his estate. Bills of pains and penalties, in contrast, singled out designated persons or groups for punishment less than death, such as banishment or disenfranchisement. Many states had enacted both kinds of statutes after the Revolution.

The Framers forbade bills of attainder as part of their strategy of undoing the English law of treason and to contend with what they regarded as the most serious historical instances of legislative tyranny by state or national legislatures. Professor Raoul Berger argues that the bill of attainder clauses (see also

Article I, Section 10, Clause 1) protect only against legislative actions that affect the *life* of the individual, not his property, which was the province of bills of pains and penalties. Beginning with Chief Justice John Marshall, however, the Supreme Court has insisted that “a Bill of Attainder may affect the life of an individual, or may confiscate his property, or may do both.”<sup>1</sup>

Marshall and his successors saw the Bill of Attainder Clause as an element of the separation of powers. As the decisions of the Court in *Marbury v. Madison* (1803) and *United States v. Klein* (1871) made clear, only a court can hold a trial, evaluate the evidence, and determine the merits of the claim or accusation. The Constitution forbade the Congress from “exercis[ing] the power and office of judge.”<sup>2</sup> In *United States v. Brown* (1965), the Court specifically rejected a “narrow historical approach” to the clauses and characterized the Framers’ purpose as to prohibit “legislative punishment, of any form or severity, of specifically designated persons or groups.”

Even with an expansive definition, the Bill of Attainder Clause provides only limited protection against retroactive civil legislation. The modern Court rarely invokes the clause’s protection; it has not

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invalidated legislation on bill-of-attainder grounds since 1965. Moreover, the only laws that the Court has invalidated as bills of attainder have been bars on the employment of specific individuals or groups of individuals.

The Court devised a three-part test to determine when a piece of legislation violates the Bill of Attainder Clause: Such legislation specifies the affected persons (even if not done in terms within the statute), includes punishment, and lacks a judicial trial. Because of the Court's relatively narrow definition of punishment, however, it rarely, if ever, invalidates legislation on this basis. For example, the Court has held that the denial of noncontractual government benefits such as financial aid was not punishment,<sup>3</sup> nor did an act requisitioning the recordings and material of President Richard M. Nixon and several of his aides constitute punishment.<sup>4</sup> Exclusion from employment, however, is a form of punishment.<sup>5</sup>

**See Also:**

- Article I, Section 9, Clause 3 (Ex Post Facto)
- Article I, Section 10, Clause 1 (State Bill of Attainder)
- Article I, Section 10, Clause 1 (State Ex Post Facto)

**Suggestions for Further Research:**

- Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355 (1978)
- Daniel E. Troy, *RETROACTIVE LEGISLATION* (1998)

**Significant Cases:**

- *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)
- *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)
- *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867)
- *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)
- *United States v. Lovett*, 328 U.S. 303 (1946)
- *United States v. Brown*, 381 U.S. 437 (1965)
- *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)
- *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984)

*This essay is excerpted from The Heritage Guide to the Constitution, a line-by-line analysis of the original meaning of each clause of the United States Constitution, edited by David Forte and Matthew Spalding.*

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1. *Fletcher v. Peck* (1810).
  2. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).
  3. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984).
  4. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).
  5. *United States v. Brown*, 381 U.S. 437 (1965).