憲法法庭言詞辯論意旨狀

案號：108 年度憲三字第 59 號

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為臺北高等行政法院第六庭就政黨及其附隨組織不當取得財產處理條例（下稱「黨產條例」）第 2 條、第 4 條第 1 款、第 2 款、第 8 條第 5 項前段及第 14 條規定聲請解釋案，謹提辯論意旨事：

一、黨產條例「附隨組織」之適用範圍擴及財團法人，使接受捐贈財產而設立、受政府監督之公益財團法人亦莫名成為規範對象，有違反立法目的原則、比例原則及明確性原則之違憲：

(一) 按立法目的依立法計畫落實於法律文字時，必須遵循一般立法之方法原則，不得違反明確性原則、平等原則、比例原則及體系一貫性，否則即有違憲之虞。[1]

[1] 蔡達智，從行政法學觀點論立法目的，行政法之一般法律原則(二)（城仲模主編，三民，初版），頁 77-82（1997）。

(二) 參照黨產條例第 1 條、第 4 條、第 5 條及第 6 條規定及其立法理由可知，黨產條例係為調查政黨利用威權體制，所實質控制之附隨組織，及調查政黨以違反政黨本質或其他悖於民主法治原則之方式，使自己或其附隨組織不當取得之財產。易言之，黨產條例之目的，在於追討政黨利用執政地位所不當取得之財產，然政黨為公益之目的，依法將其財產捐出並成立財團法人者，相關財產即已成為獨立於該政黨（捐助人）外之財產，由財團法人董事會在政府之監督下，依據公益目的而為使用。我國法院實務一再闡明財團法人為他律法人，並無意思決定機關，僅得依設立目的及捐助章程執行法人事務，其監督由法院或主管機關為之，不受捐助人之干預，即為此理。

(三) 準此，倘若黨產條例指稱之政黨或附隨組織，將其財產捐助成立財團法人者，該等**財團法人僅得依章程獨立運作，不可能受政黨或任何他人實質控制，亦絕非黨產條例所稱之附隨組織**，不當黨產處理委員會（下稱「黨產會」）猶依系爭黨產條例第 8 條第 5 項及第 14 條規定，**將財團法人列為調查對象，不啻自根本上否定財團法人之獨立性，實與財團法人之法理相悖**。且如針對黨產條例施行前業已依法捐助成立財團法人之財產，尚得予以追討，此範圍顯然過廣，而有違反比例原則及明確性原則之慮。

(四) 尤有甚者，**財團法人法第 2 條第 1 項、第 18 條及其立法理由載明，財團法人以從事公益為目的，則政黨或附隨組織基於公益目的就財團法人所為捐助或捐贈，如何得謂違反政黨本質或悖於民主法治原則？**財團法人基於公益目的而受捐助或取得之財產，如何得謂為不當取得？顯見**系爭黨產條例規範之客體，本質上即應排除財團法人及其財產**，遑論其條文復有違反平等原則、權力分

立、正當法律程序、法明確性原則及禁止溯及既往原則等情，系爭黨產條例違憲之情彰彰明甚。

二、系爭黨產條例第 4 條第 2 款前段及後段分別規定認定附隨組織之不同標準，然系爭黨產條例就前揭依不同標準認定之附隨組織，全然未為不同規範，顯然悖於平等原則及比例原則：

(一) 按「等者等之，不等者不等之，為憲法平等原則之基本意涵。是如對相同事物為差別待遇而無正當理由，或對於不同事物未為合理之差別待遇，均屬違反平等原則。」此有釋字第 593 號解釋及第 764 號解釋可資參照[23]。

(二) 查系爭黨產條例第 4 條第 2 款規定：「附隨組織：指獨立存在而由政黨實質控制其人事、財務或業務經營之法人、團體或機構；曾由政黨實質控制其人事、財務或業務經營，且非以相當對價轉讓而脫離政黨實質控制之法人、團體或機構。」另參照黨產條例第 4 條第 1 款及第 5 款立法理由：「考量 76 年 7 月 15 日解嚴前成立的政黨，其體制多未完備，且其在解嚴前的政治環境即得生存，其取得之財產有重新加以檢視之必要。另按動員戡亂時期人民團體法於 78 年修正公布後，增訂『政治團體』專章，開放政治性團體結社，始確立政黨之法律地位，依主管機關統計資料顯示，目前合法備案之政黨數目約三百個，為避免本條例規範政黨數目過多，造成不必要之申報、調查程序。爰於第一款明定本條例所稱政黨，指中華民國 76 年 7 月 15 日解除戒嚴前成立並於 78 年 1 月 27 日動員戡亂時期人民團體法修正公布後依該法第 65 條

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[2] 釋字第 593 號解釋理由書第 4 段。

[3] 釋字第 764 號解釋理由書第三點（第 14 段）。

但書備案者。」「本條例旨在調查及處理政黨於威權體制下所取得之財產」，可知76年7月15日解嚴時點，為區分政黨是否利用威權體制取得財產之重要判斷時點，可見黨產條例所稱附隨組織實有自76年7月15日解嚴前即受實質控制迄今者，與解嚴後甚或政黨輪替後始存在或受實質控制者；及過去曾受實質控制，惟解嚴前即脫離控制者，或解嚴後方脫離控制者之別。

(三) 此外，系爭**黨產條例第4條第2款前、後段分別規範「現仍受政黨實質控制者」，與「過去曾受實質控制而現已脫離控制者」，前者屬不真正溯及既往規範，後者屬真正溯及規定，二者間無論係受控制時點、期間或事證資料舉證難易度，皆全然相異，自應為合理差別待遇**，方符平等原則。

(四) 惟黨產條例無論第5條第1款推定不當取得財產規定、第8條第1項至第4項申報義務、第9條第1項禁止處分、同條第5項處分不生效力、第10條違反申報義務之效果、第26條違反申報義務之處罰及第27條違反禁止處分之處罰等，全然未區分前揭不同事實而規範不同法律效果，但**關係人係於多次政黨輪替後，始由第三人欣裕台股份有限公司捐助成立，與威權統治時期全然無關，根本不應成為黨產條例之規範對象**。退而言之，縱受黨產條例規範，所受規範強度理應合理減低，而與威權統治時期成立者有所區別，方符比例原則，然關係人依系爭黨產條例第4條第2款既有規定，竟**與成立於威權統治時期之附隨組織間，無論依法所負義務，或違反時之法律效果，毫無任何區別對待，顯然違反「不等者，不等之」之平等原則**，故系爭黨產條例第4條第2款規定已然違憲，要無疑義。

三、系爭黨產條例第 4 條第 2 款就認定附隨組織所為規定，具體意義難以明瞭，非為受規範者所得預見，更無從藉由審查確認，有違明確性原則：

(一) 釋字第 443 號理由書就層級化法律保留詳加闡述：「何種事項應以法律直接規範或得委由命令予以規定，與所謂規範密度有關，應視規範對象、內容或法益本身及其所受限制之輕重而容許合理之差異：諸如剝奪人民生命或限制人民身體自由者，必須遵守罪刑法定主義，以制定法律之方式為之；涉及人民其他自由權利之限制者，亦應由法律加以規定，如以法律授權主管機關發布命令為補充規定時，其授權應符合具體明確之原則。」[4]

(二) 釋字第 602 號解釋則闡明法律明確性原則之內涵：「法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，適當運用不確定法律概念而為相應之規定。在罪刑法定之原則下，處罰犯罪必須依據法律為之，犯罪之法定性與犯罪構成要件之明確性密不可分。有關受規範者之行為準則及處罰之立法使用抽象概念者，苟其意義非難以理解，且個案事實是否屬於法律所欲規範之對象，為一般受規範者所得預見，並可經由司法審查加以認定及判斷者，即無違反法律明確性原則（釋字第 432 號、第 521 號、第 594 號解釋參照）。」[5]

(三) 釋字第 432 號解釋亦明確指出，立法使用抽象概念者，其意義必須非難以理解，且為受規範者所得預見，並可經由司法審查加以

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[4] 大法官釋字第 443 號解釋理由書第 1 段。

[5] 釋字第 602 號解釋理由書第一點（第 2 段）。

確認，方符合明確性原則：「構成要件，法律雖以抽象概念表示，不論其為不確定概念或概括條款，均須無違明確性之要求。法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，從立法上適當運用不確定法律概念或概括條款而為相應之規定。有關專門職業人員行為準則及懲戒之立法使用抽象概念者，苟其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，即不得謂與前揭原則相違。」[6]此外，依釋字第 545 號解釋意旨，如以不確定之法律概念對違法行為進行規範，需得經由「適當組成之機構」依其「專業知識及社會通念」加以認定及判斷，並得藉由司法審查予以確認[7]；釋字第 594 號解釋進而補充，法律規定之意義，必須自「立法目的與法體系整體關聯性」觀察，「非難以理解」[8]。

(四) 黨產條例第 4 條第 2 款規定違反明確性原則：

1. 系爭黨產條例第 4 條第 2 款規定「附隨組織：指獨立存在而由政黨實質控制其人事、財務或業務經營之法人、團體或機構；曾由政黨實質控制其人事、財務或業務經營，且非以相當對價轉讓而脫離政黨實質控制之法人、團體或機構。」及黨產條例施行細則第 2 條規定：「本條例第 4 條第 2 款所稱實質控制，指政黨得以直接或間接之方式，對特定法人、團體或機構之人事、財務或業務經營之重要事項為支配。」以得直接或間接方式支配組織之人事、財務、業務來定義「實質控制」之意義。

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[6] 釋字第 432 號解釋文第 1 段。

[7] 釋字第 545 號解釋文第 1 段。

[8] 釋字第 594 號解釋理由書第 2 段。

惟是否人事部份有所重疊即屬實質控制？所稱人事係僅評估經營管理階層抑或全體職員均一併考慮？財務控制係指政黨將附隨組織財產移轉至政黨者，或反之亦屬之？控制業務經營與通常營業行為間如何區辨？凡此均涉及得否判斷**有無構成實質控制要件之核心事項，但黨產條例就其規範意旨所指、所及範圍與界限為何均屬不明，其具體意義難以明瞭，非為受規範者所得預見**，更無從藉由審查確認，自有違明確性原則。

2. 所謂實質控制或施行細則所定義之支配重要事項，是否已符明確性原則，首應遵循釋字第 443 號理由書「視規範對象、內容或法益本身及其所受限制之輕重」以論。細繹黨產條例規定，被認定為「附隨組織」者，其財產即屬不當取得之財產（黨產條例第 5 條）、禁止附隨組織處分財產（同條例第 9 條）、命移轉財產（同條例第 6 條），並伴隨課予申報、說明、接受調查等不利義務（同條例第 8、10、11、12 條）。申言之，經認定為附隨組織後，其財產將因被禁止處分、移轉而被剝奪，所生影響包括營業活動止息、人力瓦解，擴大衍生對內（如勞工資遣）、對外（如組織運作相關契約之履行）法律糾紛，其結果危及組織生存，甚至終結其存續，剝奪其財產權及結社權。如以財團法人財產移轉國有為例，財團法人將可能因此受主管機關解散（民法第 65 條：「因情事變更，致財團之目的不能達到時，主管機關得斟酌捐助人之意思，變更其目的及其必要之組織，或解散之。」內政部審查內政業務財團法人設立許可及監督要點第 7 點：「財團法人僅得動支捐助財產孳息，不得動支本金。但本要點實施前已設立之政府捐助之財團法人，其捐助章程另有規定者，從其規定。」）；對外關係上，依黨產

條例第5條規定，財團法人自34年8月15日起，包含受認定為附隨組織後所取得財產，皆將被**推定為不當取得財產，除影響業已發生之捐贈關係外，更將影響潛在捐贈者之捐贈意願，致捐助人之捐助目的無從達成**，使原應尊重個人意思自由之私法自治關係，**將因附隨組織之認定，而產生質變，且違反當事人意思。**系爭黨產條例第4條第2款「附隨組織」所規範對象，文字上雖僅及於國民黨與其附隨組織，惟法律效力實質影響範圍尚擴及於組織員工、捐助人及受資助對象、潛在捐贈人等，實質上改變事務原來本質，損及組織及眾多受影響者之權益。系爭黨產條例實屬重大影響人民自由權利之規定，自應有嚴謹之規範密度。

3. 系爭黨產條例第4條第2款規定所欲相繩者，包括「法人、團體、機構」，從組織型態來看，或為具法人性質之社團、財團，及不具法人格之合夥團體、非法人團體等，復不限於營利性質或公益性質者，然每一種團體之集體意思形成方式不同，所謂實質控制或重要事項之支配，本係抽象語彙，又一體適用於不同組織之團體，實無法區別類型，而難以預見其要件內涵。參之時任立法委員之國安會顧立雄秘書長於105年7月22日立法院第9屆第1會期黨團協商會議之發言雖稱「實質控制的概念是在公司法上有明文，並不是我們發明的條文」，意指系爭黨產條例第4條第2款所謂實質控制等同公司法上實質控制之意義。惟所謂「公司法上有明文」，參照公司法第8條第3項前段：「公開發行股票之公司之非董事，而實質上執行董事業務或實質控制公司之人事、財務或業務經營而實質指揮董事執行業務者，與本法董事同負民事、刑事及行政罰之責任。」

及第六章之一「關係企業」章，規範控制公司與從屬公司間之關係，及控制公司就從屬公司之責任應如何分擔、承擔等規定可知，**關於實質控制各該規定旨在使隱身於後之控制者承擔責任，相襯於其所享受之利益，以消除國內長期漠視之人頭文化**。惟此係適用於課責事項，乃針對違章事實或不利益經營之具體個案發生時，判斷有無其他實質控制者，而形成時間及環境之限縮。**此與針對已長期存在運作之組織，是否為社團法人中國國民黨（下稱「國民黨」）所實質控制，所應觀察之面相具備多元特徵，顯然有別**。況公司法第 369-2 條、第 369-3 條分別明文規定控制公司之判準，明文以持股情形或股東、董事、出資者相同之比例為標準。反觀黨產條例於涉及公司體制之規範對象上，既未將公司法類似規定明定於系爭黨產條例第 4 條第 2 項定義內，則於不同法律體系，就所規範不同領域之事項，法律解釋上，也不得逾越準用；遑論，就涉及非屬人治性質之組織或團體之規範對象，更是無所適從。詳言之，**我國法院實務一再闡明財團法人為他律法人，並無意思決定機關，僅得依設立目的及捐助章程執行法人事務，其監督由法院或主管機關為之，不受捐助人之干預，亦非捐助人之附隨組織**[9]**，則黨產條例所稱實質控制，顯然悖於財團法人之本質**，其意義更難為財團法人所得預見。由此**可見立法者對於運用「實質控制」一詞之立法疏漏**。準此，關係人實無從知悉、預見黨產會認定國民黨實質控制該基金會人事、財務或業務經營之判斷標準為何？究係依據國民黨在何階段對關係人有所支配且認定有實質控

[9] 最高行政法院 92 年判字第 729 號、100 年判字第 1173 號、100 年判字第 1173 號、99 年度判字第 1108 號判決及臺北高等行政法院 92 年訴更一字第 69 號判決。

制能力？又如何認定支配能力強弱、支配事項重要與否、支配目的等，以具體化其判斷標準。

4. 是以，有關附隨組織之認定，系爭**黨產條例第 4 條第 2 款規定以政黨實質控制其人事、財務或業務經營，或施行細則規定以支配其中重要事項，為判斷標準**，乃影響廣泛且損害權益重大之規範，**惟其要件過於疏漏，給予行政權濫用及恣意空間**，且法律規範意義無從預知而難以供遵循，未符依法行政之法律明確性原則。

5. 復由　鈞院大法官受理 107 年度憲三字第 15 號、108 年度憲三字第 9 號、108 年度憲三字第 59 號聲請解釋案之原因案件當事人中，中央投資股份有限公司、欣裕台股份有限公司、中華民國婦女聯合會及關係人等，均遭黨產會依系爭黨產條例第 4 條第 2 款規定認定為國民黨之附隨組織，然前揭**原因案件當事人，其組織型態橫跨股份有限公司、人民團體、財團法人，組織型態各有不同，遭黨產會認定為附隨組織之理由亦不相同**，惟其規範依據竟俱為系爭黨產條例第 4 條第 2 款規定，**顯見黨產會依系爭黨產條例第 4 條第 2 款規定所為處分毫無標準可言**，足證系爭黨產條例第 4 條第 2 款規定抽象、空洞、不明確而難以預見，確有違明確性原則。

6. 黨產條例第 5 條規定將政黨及附隨組織取得之財產，一概推定為不當取得，僅明示排除性質上除政黨外，任何團體皆無從取得之黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息，實質上使與政黨組織型態及性質扞格之附隨組織所有財產無限上綱為不當取得財產，高度限制人民自由管理處分財產之權利，然系爭黨產條例第 4 條第 2 款規定卻使用高度不確定

性之文字及法律概念，意義上無從使人預見或理解，實有違法律明確性原則，應屬違憲。

四、系爭黨產條例第 2 條、第 8 條第 5 項及第 14 條規定由黨產會經聽證程序即得將人民團體、公司或財團法人認定為政黨之附隨組織，且賦予黨產會得推翻司法機關終局判斷之權限，嚴重破壞法安定性，侵犯司法權保障基本人權之核心，**違反權力分立及正當法律程序：**

(一) 我國憲政體制下之治權分為五權，彼此關係由早期「五權分治彼此相維」[10]，迄今轉為重視其間之「權力分立與制衡」，強調功能分工與彼此制衡，以避免人民權利遭受國家公權力之侵害，此見釋字第 419 號解釋理由書即明：「自從 1787 年美國聯邦憲法採嚴格之三權分立為其制憲之基本原則，以及法國 1789 年人權宣言第 16 條揭櫫：『任何社會中，未貫徹權利保障，亦無明確之權力分立者，即無憲法。』以還，立憲民主國家，莫不奉權力分立為圭臬……判斷憲法上行為之瑕疵是否已達違憲程度，在欠缺憲法明文規定可為依據之情形時，亦有上述瑕疵標準之適用（參照釋字第 342 號解釋）。所謂重大係指違背憲法之基本原則，諸如國民主權、權力分立、地方自治團體之制度保障……。」[11]

(二) 釋字第 585 號解釋，針對「三一九槍擊事件真相調查特別委員會」即指出：「**立法院為有效行使憲法所賦予之立法職權**，本其固有之權能自得享有一定之調查權，主動獲取行使職權所需之相關資訊，俾能充分思辯，審慎決定，以善盡民意機關之職責，**發揮權力分立與制衡之機能**。立法院調查權乃立法院行使其憲法職權所

[10] 釋字第 175 號解釋。

[11] 釋字第 419 號解釋理由書第 7 段及第 13 段。

必要之輔助性權力，基於權力分立與制衡原則，立法院調查權所得調查之對象或事項，並非毫無限制。除所欲調查之事項必須與其行使憲法所賦予之職權有重大關聯者外，凡國家機關獨立行使職權受憲法之保障者，即非立法院所得調查之事物範圍。」[12]

(三) 對於五權分立之事務歸屬，解釋實務上則提出「功能最適原則」為其指標，釋字第 613 號解釋指明：「作為憲法基本原則之一之**權力分立原則，其意義不僅在於權力之區分**，將所有國家事務分配由組織、制度與功能等各方面均較適當之國家機關擔當履行，以使國家決定更能有效達到正確之境地。要**亦在於權力之制衡，即權力之相互牽制與抑制，以免權力因無限制之濫用而致侵害人民自由權利。**權力之相互制衡仍有其界限，除不能牴觸憲法明文規定外，亦**不能侵犯各該憲法機關之權力核心領域，或對其他憲法機關權力之行使造成實質妨礙**（釋字第 585 號解釋參照）或導致責任政治遭受破壞（釋字第 391 號解釋參照），例如剝奪其他憲法機關為履行憲法賦予之任務所必要之基礎人事與預算；**或剝奪憲法所賦予其他國家機關之核心任務；或逕行取而代之，而使機關彼此間權力關係失衡**等等情形是。」[13]

(四) 此外，釋字第 709 號解釋更表明功能最適與否屬於正當法律程序之內涵：「憲法上正當法律程序原則之內涵，應視所涉基本權之種類、限制之強度及範圍、所欲追求之公共利益、決定機關之功能合適性、有無替代程序或各項可能程序之成本等因素綜合考量，由立法者制定相應之法定程序」[14]。

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[12] 釋字第 585 號解釋文第 1 段。

[13] 釋字第 613 號解釋理由書第 5 段。

[14] 釋字第 709 號解釋理由書第 4 段。

(五) 黨產條例達致目的所採行之方法，係以具剝奪、限制效力之公權力處分，變動財產權之歸屬及運用，**惟得以判斷「不當」之法律意義者，不外乎本諸民事、刑事、行政所規範不法事項。就此等不法事項之判斷，本屬司法權核心權力**，今我國各法院置獨立、專業法官，設公平、公正、公開、對等、嚴謹、審級及合致事件本質之訴訟程序，足供以定分止爭。況，憲法第 77 條業將民事、刑事、行政審判及公務員懲戒等權力分配予司法權，無論自組織、制度與功能等方面以觀，此類事務權責機關，皆應由司法機關擔當，方屬功能最適之機關。

(六) 參諸民事審判實務，後述諸多判決即為國家經由公平、公正、公開之司法判決回復財產狀態，終局定分止爭，彰顯正義之適例：

1. 財政部國有財產署基於無權占有之法律關係，向救國團請求返還台北市松江路上房地（臺灣高等法院 103 年度重上字第 38 號判決，經最高法院 106 年度台上字第 326 號判決駁回救國團上訴）；

2. 國有財產局向中華日報，請求確認臺南市土地所有權存在並塗銷移轉登記（臺南地方法院 96 年度重訴字第 319 號判決、臺灣高等法院臺南分院 102 年度重上更（二）字第 2 號判決駁回中華日報上訴）；

3. 交通部基於移轉土地所有權之法律關係，向中國廣播股份有限公司（下稱中廣公司）請求塗銷臺北縣八里鄉等土地所有權登記（臺灣高等法院 97 年度重上更（一）字第 111 號判決，經最高法院 99 年度台上字第 2345 號裁定駁回中廣公司上訴）；

4. 交通部基於確認土地所有權存在之法律關係，向中廣公司請求塗銷新北市板橋區民族段等土地所有權登記，並回復所有權登記為中華民國所有（臺灣高等法院101年度重上更（三）字第42號判決，經最高法院103年度台上字第1675號判決駁回中廣公司上訴）；

5. 交通部基於確認土地所有權存在之法律關係，向中廣公司請求塗銷花蓮市民勤段等土地所有權登記，並回復所有權登記為中華民國所有（臺灣高等法院花蓮分院103年度重上更（三）字第4號判決廢棄原一審中廣公司勝訴判決）；

6. 交通部基於終止信託之法律關係，向中廣公司請求移轉彰化縣芬園鄉土地登記予中華民國，管理機關為交通部（臺灣高等法院95年度上字第313號判決，經最高法院96年度台上字第1094號判決駁回中廣公司上訴）。

7. 交通部基於終止信託等法律關係，向中廣公司請求將嘉義縣民雄鄉土地移轉登記予交通部（臺灣高等法院93年度重上字第388號判決，經最高法院94年度台上字第818號裁定駁回交通部上訴）。

(七) 準此，系爭黨產條例第2條第1項：「行政院設不當黨產處理委員會（以下簡稱本會）為本條例之主管機關，不受中央行政機關組織基準法規定之限制。」第2項：「本會依法進行政黨、附隨組織及其受託管理人不當取得財產之調查、返還、追徵、權利回復及本條例所定之其他事項。」第8條第5項前段：「本會得主動調查認定政黨之附隨組織及其受託管理人」、第14條：「本會依第6條規定所為之處分，或第8條第5項就政黨之附隨組織及

其受託管理人認定之處分，應經公開之聽證程序。」等規定，就系爭黨產條例所定標的，由黨產會主動進行調查、返還、追徵、權利回復，惟該等標的倘因不法情事登記於國民黨或任何組織名下，如前揭裁判所示，原權利人或其繼承人本得藉由訴訟程序，針對原因事實請求回復權利，系爭黨產條例主動調查、處分之舉措，等同剝奪原權利人自主決定是否依司法程序請求救濟之訴訟權，甚至**就司法審查三審定讞之事件，不顧**原權利人依司法程序請求救濟後，**司法業已終局判斷之法律關係及權利歸屬，仍得逕予重新調查，自行認定，已侵害司法權核心領域**。

(八)詳言之，**黨產條例並未排除黨產會重行調查前揭司法機關業已作出終局判斷之標的，實有嚴重破壞法安定性之憂疑**，蓋司法權之核心即係保障基本人權，根據現代實質憲法論觀點，具實質現代意義之憲法，無不以立憲主義作為其核心價值，透過成文憲法將此核心價值實定化，並透過憲法之形式優位性，確保此憲法之實質優位性，其目的即在臻至立憲主義所追求之終極目標－保障基本人權，其中諸如分權制衡、法治主義、民主主義等皆為達致此目標所不可或缺之制度。憲法創設司法權，即在使其擔任捍衛人權之最後防線。除循傳統象徵性法律功能進行權利救濟與仲裁爭議外，更透過權力性政治功能對政府部門進行合憲控制，以免政府部門非法侵犯人民權利。

(九)**然參諸黨產條例之推定，恐造成經司法權認定財產權最終歸屬之判決，遭黨產會重新做出與司法機關不同之認定結果，此種結果無疑架空司法權對於「具體個案」實質認事用法之權限，反由黨產會以抽象、空泛主觀之「附隨組織」、「不當取得財產」等不確定法律概念進而直接達成重大侵害受處分人財產權之禁止處**

分效果，破壞受處分人對司法判決之信賴，司法權之威信蕩然無存，在在足證其已侵犯司法權之權力核心功能。尤有甚者，黨產條例係透過立法行為，不經司法審判程序，直接剝奪規範對象之財產權，如黨產條例第 3 條特別排除時效制度之適用（「本會對於政黨、附隨組織及其受託管理人不當取得財產之處理，除本條例另有規定外，不適用其他法律有關權利行使期間之規定」），第 5 條透過倒置舉證責任，將規範對象除黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息外之財產，一律推定為不當黨產，進而依同條例第 9 條規定，無庸經法院裁定或判決，即得無限期凍結政黨或其附隨組織相關資產，又任何資產被認定為不當取得者，依同條例第 6 條規定，更得不經司法審判直接移轉為國有、地方自治團體或原所有權人所有，凡此皆係明確以立法方式授權行政機關行使司法權力，直接侵奪人民財產權，而侵害司法權之核心功能，至為灼然。

(十) 綜上，黨產條例規定以定義難以理解之不確定法律概念為構成要件，並賦予黨產會以聽證程序，取代法院以司法程序判斷決定財產權變動之權，不僅違反法律明確性原則，且非功能適當之機關，更已侵犯司法權核心，有違權力分立原則及正當法律程序原則。

五、政黨政治係憲法第 1 條、第 2 條所揭示民主憲政國家之重要內涵，對於政黨存續保障，應屬憲法保留；關於政黨財產移轉、禁止等事項，重大影響政黨存續，由僅具法律位階之黨產條例予以規範，顯然違反憲法保留：

(一) 按釋字第 499 號解釋明白揭示，自由民主憲政秩序為憲法賴以存立之基礎：「憲法條文中，諸如：第一條民主共和國原則、第二條國民主權原則、第二章保障人民權利、以及有關權力分立與制

衡之原則，具有本質之重要性，亦為憲法整體基本原則之所在。基於前述規定所形成之自由民主憲政秩序，乃現行憲法賴以存立之基礎，凡憲法設置之機關均有遵守之義務。」[15]同號解釋亦敘明憲法中具有本質重要性，而為規範秩序存立基礎者，如聽任修改條文予以變更，則憲法整體規範秩序將形同破毀（亦稱憲法破棄）[16]；另，釋字第 721 號理由闡述憲法增修條文第 4 條第 1 項及第 2 項所採單一選區制與比例代表制混合之兩票制（並立制），旨在強化政黨政治，展現國民意志，符合國民主權原則：「系爭憲法增修規定一、二有關立法院立法委員選舉方式之調整，採並立制及設定政黨比例代表席次為三十四人，反映我國人民對民主政治之選擇，有意兼顧選區代表性與政黨多元性，其以政黨選舉票所得票數分配政黨代表席次，乃藉由政黨比例代表，以強化政黨政治之運作，俾與區域代表相輔，此一混合設計及其席次分配，乃國民意志之展現，並未牴觸民主共和國與國民主權原則」[17]。以上解釋，及憲法增修條文第 4 條關於立法委員選舉方式、名額及憲法第 62 條、第 63 條立法委員職權規定，皆係體現我國依憲法第 1 條、第 2 條規定，乃以政黨政治實現主權在民之民主國家。而臺灣經過多次總統、副總統、各級民意代表直接選舉結果，亦深化並確立政黨政治於臺灣之重要性。

(二) 查政黨係以凝聚國民政治意志，取得政權為目的，經由提名、推薦候選人而參與選舉[18]。在憲政民主體制下，相同政治理念之人

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[15] 釋字第 499 號解釋文第 2 段後段。

[16] 釋字第 499 號解釋文第 2 段前段。

[17] 釋字第 721 號解釋理由書第 3 段。

[18] 政黨法第 3 條：「本法所稱政黨，指由中華民國國民組成，以共同政治理念，維護自由民主憲政秩序，協助形成國民政治意志，推薦候選人參加公職人員選舉之團體。」

組成政黨，整合及歸納人民意見後，提出政策方針或價值立場，進而推舉候選人供人民選擇，具整合社會不同利益之效果，使選舉制度反映民意之功能有效發揮，現代民主須依靠政黨作為聯結人民意志與國家意志之橋樑，政黨乃影響民主得否正常運作之關鍵角色，對於民主體制運作實具不可替代之特殊地位。[19]質言之，間接民主所需要之代議士[20]，幾乎由政黨推舉而來，是故對於政黨之組織、活動，及其賴以運作維繫之財產權予以保障，等同對於國民主權之保障，且有憲法上重要意義。

(三) 從比較法觀察，德國早期曾將政黨定位為「憲政機關」，容許政黨提起機關權限爭議訴訟，雖 1966 年一則憲法法院判決改變見解，惟仍以「憲法上的制度」待之[21]，可見政黨地位具特殊重要性。我國於 81 年 5 月修正憲法增修條文，全盤移植德國制度，將政黨違憲解散事件，由大法官以司法審查之裁判為之，於第 13 條第 2 項、第 3 項規定：「司法院大法官，除依憲法第七十八條之規定外，並組成憲法法庭審理政黨違憲之解散事項。」「政黨之目的或其行為，危害中華民國之存在或自由民主之憲政秩序者為違憲。」（嗣經修正為現行第 5 條第 4 項、第 5 項規定）[22]亦即彼時對於組織政黨無須事前許可[23]，須俟政黨成立後發生其目

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[19] 蕭文生，國家法(I)國家組織篇，頁 59~60（2008）。

[20] 釋字第 520 號解釋理由書指出，我國乃間接民主之代議政治，係由立法委員展現國民意志（「在代議民主之憲政制度下，立法機關所具有審議預算權限，不僅係以民意代表之立場監督財政支出、減輕國民賦稅負擔，抑且經由預算之審議，實現參與國家政策及施政計畫之形成，學理上稱為國會之參與決策權。」）。

[21] 參見法治斌、董保城，憲法新論（元照，五版）頁 35（2012）。

[22] 吳庚、陳淳文，憲法理論與政府體制（自行出版，五版）頁 786（2017）。

[23] 106 年 12 月 6 日公布施行之政黨法，其第 7 條對於政黨之設立，亦採報備制。

的或行為危害中華民國存在或自由民主憲政秩序時，始由憲法法庭啟動「憲法的自我防衛機制」[24]，作成解散判決，始得禁止其活動。

(四) 綜上，政黨政治實為民主國原則及國民主權原則存立之基礎，具有憲法本質上之重要性，就財產等涉及政黨立足根本，而關乎政黨存續事項，應屬憲法保留事項，惟黨產條例徒具法律位階，逕為規範政黨財產之移轉、禁止事項，顯然違反憲法保留。

六、系爭黨產條例第 4 條第 1 款、第 5 條第 1 項及第 2 項規定，以 76 年 7 月 15 日前成立，而於 34 年 8 月 15 日起擁有財產之特定政黨為規範對象，乃**無正當理由之個別立法**，違反平等原則及不溯及既往原則：

(一) 釋字第 666 號解釋理由書揭示：「憲法第七條所揭示之平等原則非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇。法律為貫徹立法目的，而設行政罰之規定時，如因處罰對象之取捨，而形成差別待遇者，須與立法目的間具有實質關聯，始與平等原則無違。」[25]釋字第 405 號解釋理由書亦指出：「立法院行使立法權時，雖有相當廣泛之自由形成空間，但不得逾越憲法規定及司法院所為之憲法解釋，自不待言。」[26]故憲法上原則，不僅適用於基本權保障，對於立法權作用，亦同受規範。

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[24] 吳庚、陳淳文，前揭註 22，頁 787。

[25] 釋字第 666 號解釋理由書第 1 段。

[26] 釋字第 666 號解釋理由書第 1 段。

(二) 過往君權至上時代，行政、立法及司法權均出於君王，故王室得以頒行「剝奪權利之個案法律（bill of attainder）」，於未經審判之情下，逕行剝奪臣民之性命及財產。然現代民主憲政國家，國家權力由不同機關分掌，立法、行政及司法機關，各司不同國家任務，享有核心職權並發揮相互制衡之功能。其中，立法權僅能就抽象事件作一般性規範，若制定處置性或個別性法律，無論係對具體事項或特定人，無異於取代行政權或司法權之行使，而紊亂行政與立法之界線，並破壞權力分立原則。蘇俊雄大法官釋字第 520 號協同意見書指出：「**公法學理**上固未禁止『措施性法律』之存在，但**對所謂之『個案性法律』（Einzellfallgesetz）仍多所質疑**；解釋理由就此是否混同『措施法』與『個案法』之概念，恐有檢討的餘地。尤其，立法者雖得制定措施性法律，但不得因而侵及行政權之核心領域；故在未受理案件並依權力分立原則審查該等立法之具體內容以前，本席以為其合憲性恐不應遽予肯認」[27]。

(三) 又，**美國憲法第 1 條第 9 項第 3 款亦明確禁止針對特定個人或群體，訂定剝奪權利之法律：「國會不得立法針對特定個人予以剝奪權利或立法溯及既往（No bill of attainder or *ex post facto* Law shall be passed.）」**（附件 1）。美國聯邦最高法院於 1867 年 *Cummins v. Missouri* 案，將「剝奪權利之個案法律（bill of attainder）」定義為：「未經司法審判即課予處罰之立法行為。」（附件 2）；另於 1946 年 *U.S. v. Lovett* 案，聯邦最高法院更明確指出，國會針對三名涉及叛亂活動之公務人員，立法禁止渠等請領薪水，即構成 bill of attainder，應屬違憲而無效（附

[27] 大法官釋字第 520 號解釋，蘇俊雄大法官協同意見書第五點第 2 段。

件 3）。此外，於 1965 年 *U.S. v. Brown* 案，美國聯邦最高法院進而強調，不論是具體指名或透過敘述之方式（by name or by description）而對可得確定之個人或群體（specifically designated persons or groups），透過立法直接加以處罰者，即構成「剝奪權利之個案法律」，應屬違憲而無效（附件 4）。

(四) 黨產條例第 4 條第 1 款關於「政黨」之定義，法文形式上雖屬抽象而未具體指涉，惟**由立法院審議之始，各政黨均以國民黨為對象進行討論**[28]；且黨產條例第 4 條第 1 款適用範圍特定為 76 年 7 月 15 日前成立之政黨，依據內政部民政司政黨名冊，我國截至 105 年 7 月 18 日止，曾依法成立並備案之政黨共 302 個，扣除已解散或撤銷備案之 5 個政黨，現存政黨共有 297 個，受該條規範者僅國民黨等 10 個政黨，此 10 個政黨依內政部 105 年 9 月 2 日臺內民字第 1050433653 號函[29]，即國民黨、中國青年黨、中國民主社會黨、中國新社會黨、中國中和黨、民主進步黨、青年中國黨、中國民主青年黨、民主行動黨、中國中青黨。

(五) 惟同條例第 5 條進一步規定不當黨產之要件為：「（第 1 項）政黨、附隨組織自中華民國 34 年 8 月 15 日起取得，或其自中華民國 34 年 8 月 15 日起交付、移轉或登記於受託管理人，並於本條例公布日時尚存在之現有財產，除黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息外，推定為不當取得之財產。（第 2 項）政黨、附隨組織自中華民國 34 年 8 月 15 日起以無償或交易時顯不相當之對價取得之財產，除黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息外，雖於本條例公布日已非政

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[28] 參見立法院第 9 屆第 1 會期內政、財政、司法及法制委員會第 1-4 次聯席會議紀錄。

[29] 黨產會 105 年 9 月 8 日新聞稿。

黨、附隨組織或其受託管理人所有之財產，亦推定為不當取得之財產。」即以**「自 34 年 8 月 15 日起取得……交付……」**之時點認定財產之不當取得與否，而符合第 4 條定義之 10 個政黨中，**僅有斯時作為中華民國惟一執政黨之國民黨，可能擁有第 5 條時間要件定義之財產**，是結合黨產條例第 4 條及第 5 條要件後，僅國民黨受系爭法條規範，亦即，**黨產條例之立法設計，乃藉由政黨成立報備時間及財產擁有時間，具體特定該條例適用之政黨僅國民黨一黨**，此條例具有個案立法之實，應無疑義。

(六) 黨產條例第 4 條第 1 款立法理由稱：「考量 76 年 7 月 15 日解嚴前成立的政黨，其體制多未完備，且其在解嚴前的政治環境即得生存，其取得之財產有重新加以檢視之必要。另按動員勘亂時期人民團體法於 78 年修正公布後，增訂『政治團體』專章，開放政治性團體結社，始確立政黨之法律地位，依主管機關統計資料顯示，目前合法備案之政黨數目約三百個，為避免本條例規範政黨數目過多，造成不必要之申報、調查程序。爰於第一款明定本條例所稱政黨，指中華民國 76 年 7 月 15 日解除戒嚴前成立並於 78 年 1 月 27 日動員勘亂時期人民團體法修正公布後依該法第 65 條但書備案者。」即以避免規範對象過多，增加不必要勞費為由，而制定以設立報備時間為規範對象之標準。

(七) 另第 5 條立法理由雖稱：「在過去威權體制，因黨國不分，政黨依當時法制環境或政治背景所取得之財產，形式上或能符合當時法令，但充其量僅能認其符合形式法治國原則，惟其混淆國家與政黨之分際，破壞政黨公平競爭之環境，而與實質法治國原則不符。」云云，惟並未說明該條規範設定不當黨產係自 34 年 8 月 15 日起擁有之財產，此特定日期如何界定？又如何與立法理由所

謂黨國不分連結？蓋我國迄 36 年 12 月 25 日始立憲，在此前之政治體制紊亂，何以立憲前於 34 年 8 月 15 日起取得之財產，即係因黨國不分而取得，尚乏實證分析或具體說明。此外，立憲前政治實體之屬性，如何以立憲後之法治國原則衡量，亦未見立法理由加以論述。足徵系爭黨產條例自始立法裁量之規範對象即僅國民黨，至於立法理由所稱黨國不分等空泛之詞，及前述減省勞費之庶務性枝節事由，僅為矯飾之辭，實難作為支持系爭黨產條例捨其他政黨，**獨對國民黨形成差別待遇**之正當理由，與其立法目的間亦不具實質關連，遑論得認符合平等原則。復且，**黨產條例適用結果，造成國民黨賴以存續之財產陷於處分不能困境，悖離黨產條例第 1 條所揭櫫之「建立政黨公平競爭環境」立法目的**，反引致結合立法權與行政權之執政黨政權，藉此消滅反對黨之政黨政治危機，誠非妥適之立法，更悖於平等原則。學者李惠宗就立法權行使之正當性，亦曾表示：「立法者作為一種民意代表者，代表著不同階層及不同利害關係，作為一抽象的利益衝突的調協者，立法者擁有廣大的立法裁量。立法者在制定法律的過程中，即在進行第一次的利益衡量。故曰：『法律秩序是立法者抽象利益衡量的結果』。此種利益衡量，有時候是把既成事實，透過法律規定形塑成一種『價值』，有時候反而加深既存的不公平事實」[30]，頗堪思量。

(八) 此外，黨產條例主要在處理國民黨自 34 年 8 月 15 日起擁有之財產，即立法追溯既往，嚴重破壞法安定性，故須採取較為嚴格之標準檢視，而使基本權能完全受到保障。釋字第 751 號解釋理由

[30] 李惠宗，論司法院大法官就性別平等的司法審查方法，司法院大法官 103 年度學術研討會論文集上冊，頁 65。

提及：「法治國原則為憲法之基本原則，首重人民權利之維護、法秩序之安定及信賴保護原則之遵守。因此，法律一旦發生變動，除法律有溯及適用之特別規定者外，原則上係自法律公布生效日起，向將來發生效力（釋字第 574 號及第 629 號解釋參照）。又如法律有溯及適用之特別規定，且溯及適用之結果有利於人民者，即無違信賴保護原則，非法律不溯及既往原則所禁止。」[31]黨產條例作為一部溯及至 34 年之特別法，其結果並非有利於人民、國民黨，不僅嚴重危及法安定性，更侵害人民結社權、財產權與名譽權等基本權之保障，此種針對單一特定政黨、溯及誅連九族以抄家滅族之立法，已溢出黨產條例第 1 條所稱建立政黨公平競爭環境，健全民主政治、以落實轉型正義之目的，且違反平等原則及禁止溯及既往原則，顯然無法通過憲法之檢驗。

七、黨產條例第 2 條規定黨產會不受中央行政機關組織基準法規定之限制，悖於憲法增修條文第 3 條第 3 項、第 4 項規定：

(一) 按，「國家機關之職權、設立程序及總員額，得以法律為準則性之規定」、「各機關之組織、編制及員額，應依前項法律，基於政策或業務需要決定之。」憲法增修條文第 3 條第 3 項、第 4 項定有明文。

(二) 立法者既依前揭憲法委託授權規定，選擇就各中央行政機關組織制定準則性規定之中央行政機關組織基準法以履行憲法義務，基於法安定性原則及憲法增修條文之規範，立法機關應受自我拘束，倘立法者得嗣後另行恣意排除該準則性規定效力，即有違憲法增修條文第 3 條第 3、4 項規定，故黨產條例第 2 條直接排除基準

[31] 大法官釋字第 751 號解釋理由書第二點（第 15 段）。

法之適用，顯然破壞我國行政組織規範之一體性，及前揭憲法規定之誡命，難認具組織上之合法性。

八、黨產條例過度限制行政院院長之免職權，縱於黨產會委員明顯趨附黨派、淪為特定政黨打手時，亦不得予以免職，顯然破壞責任政治及行政一體原則，應屬違憲：

(一) 按行政院為最高行政機關，行政院所屬部會之政務人員及委員會之委員，均應由行政院院長提請總統任命，並經行政院院長之副署，以彰顯「行政一體原則」，並確保行政院院長之人事權，此觀乎憲法第 37 條（「總統依法公布法律，發布命令，須經行政院院長之副署，或行政院院長及有關部會首長之副署。」）、第 41 條（「總統依法任免文武官員。」、第 53 條（「行政院為國家最高行政機關。」）及第 56 條（「行政院副院長，各部會首長及不管部會之政務委員，由行政院院長提請總統任命之。」）即明。

(二) 次按，獨立機關之設置，仍應保留行政院院長之一定之人事權限，以落實行政一體及責任政治，此釋字第 613 號解釋亦闡述甚明：「行政必須有整體之考量，無論如何分工，最終仍須歸屬最高行政首長統籌指揮監督，方能促進合作，提昇效能，並使具有一體性之國家有效運作，此即所謂行政一體原則。……賦予獨立機關獨立性與自主性之同時，仍應保留行政院院長對獨立機關重要人事一定之決定權限，俾行政院院長得藉由對獨立機關重要人員行使獨立機關職權之付託，就包括獨立機關在內之所有所屬行政機關之整體施政表現負責，以落實行政一體及責任政治。」[32]

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[32] 釋字第 613 號解釋理由書第 2 段及第 3 段。

(三) 再按，美國聯邦最高法院於 2010 年 *Free Enterprise Fund v. Public Company Accounting Oversight Board*[33]一案指出（附件 5），如過度限制行政首長之免職權，即有違行政一體原則，並模糊行政指揮及責任之分際，應屬違反權力分立原則，而屬違憲。

(四) 查黨產條例第 18 條第 1 項規定，黨產會委員享有四年之任期保障，非有同條例第 20 條（未超出黨派獨立行使職權）或第 21 條（死亡、辭職、失能或其他違法情事）之情形，行政院院長即不得予以免除或解除其職務，此顯然已經過度限制行政院院長之人事權。詳言之，黨產條例第 20 條第 1 項雖明文規定要求黨產會委員「應超出黨派之外，依據法律公正獨立行使職權，於任期中不得參與政黨活動」，然於委員公然參與政黨活動，配合政黨意旨行使職務之情下，行政院院長卻無從逕予免職或解職，只得依同條第 2 項靜待黨產會「委員會議決議通過後」，方得被動解除該委員之職務，此顯已過度限制行政院院長之人事權。

(五) 質言之，我國目前黨產會運作之實務，已經明顯出現黨產會委員單獨針對最大在野黨進行調查之情，且觀乎黨產會委員之名單，多位均曾任執政黨之政務官或為執政黨黨員，又或曾為執政黨周邊組織之成員，政治色彩至為濃厚；準此，如任何委員違反行政中立，趨附執政黨而對特定在野黨進行清算鬥爭，又或參與執政黨或特定政黨之政治活動時，實難期待黨產會其他委員將決議通過予以免職，此顯見黨產條例第 20 條（委員超出黨派行使職權）之規定必將流於具文，不啻放任黨產會將轉型正義作為政治鬥爭

[33] 561 U.S. 477 (2010)

之工具，並顯然破壞行政一體、責任政治，已達違憲限制行政院院長人事權之程度。

九、黨產條例第5條以「推定」方式，將除黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息外之政黨財產認定為不當黨產，使受不利處分之政黨承擔舉證責任，又，受推定財產依同條例第9條第1項、第5項及第27條第1項規定禁止處分，違反者不生效力，並將課處罰鍰，此等規定實已形成對財產權之不當限制，有違比例原則及正當法律程序：

(一)按財產權係憲法所保障之權利，且對人民基本權利之限制應遵循正當法律程序，此觀美國聯邦憲法增修條文第5條規定：「任何人……非經正當程序（due process of law），不應受生命、自由或財產之剝奪。」即明，蓋正當程序之要求乃確保人民之生命、自由與財產免於遭受國家權力恣意不合理之侵害[34]，斯旨亦經釋字第400號解釋及第689號解釋闡釋甚明：「**憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，並免於遭受公權力或第三人之侵害，俾能實現個人自由、發展人格及維護尊嚴**。」[35]「憲法上正當法律程序原則之內涵，除要求人民權利受侵害或限制時，**應有使其獲得救濟之機會與制度，亦要求立法者依據所涉基本權之種類、限制之強度及範圍、所欲追求之公共利益、決定機關之功能合適性、有無替代程序或各項可能程序成本等因素綜合考量，制定相應之法定程序**。」[36]

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[34] 湯德宗，論憲法上的正當程序保障，憲政時代第25卷第4期，頁4（2000）

[35] 釋字第400號解釋文。

[36] 釋字第689號解釋理由書第11段。

(二) 次按，法律創設「推定」概念，乃基於推定事實與基礎事實間具有一定程度之關聯性，基於一般經驗下，推定事實之存否通常可由基礎事實推導而出。**參酌我國其他法律針對財產取得推定為不法並予以追徵者**，如組織犯罪防制條例第 7 條第 2 項：「犯第三條之罪者，對於參加組織後取得之財產，未能證明合法來源者，除應發還被害人者外，應予追繳、沒收。如全部或一部不能沒收者，追徵其價額。」及貪污治罪條例第 10 條第 2 項：「犯第四條至第六條之罪者，本人及其配偶、未成年子女自犯罪時及其後三年內取得之來源可疑財物，經檢察官或法院於偵查、審判程序中命本人證明來源合法而未能證明者，視為其所得財物」，**皆以司法審查認有不法行為存在為前提，就與該不法行為有一定關聯者，始轉換行為人財產取得合法性之舉證責任。**

(三) 惟查，**黨產條例第 5 條**規定：「政黨、附隨組織自中華民國 34 年 8 月 15 日起取得，或其自中華民國 34 年 8 月 15 日起交付、移轉或登記於受託管理人，並於系爭條例公布日時尚存在之現有財產，除黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息外，推定為不當取得之財產。政黨、附隨組織自中華民國 34 年 8 月 15 日起以無償或交易時顯不相當之價額取得之財產，除黨費、政治獻金、競選經費之捐贈、競選費用補助金及其孳息外，雖於系爭條例公布日已非政黨、附隨組織或其受託管理人之財產，亦推定為不當取得之財產。」**未以政黨有任何不法行為存在為條件，逕將政黨除黨費、政治獻金、競選經費之捐贈、競選費用**補助金**及其孳息外之一切財產，不限制範圍及關聯性，一律概括推定為不當取得，並轉換不利處分之舉證責任予受處分人，直接以**

毫無目的及範圍限制方式，強制剝奪所有權人財產之一切處分權，顯非最小侵害手段，對財產權之限制更已逾越比例原則。

(四) 另查，**黨產條例第 5 條第 2 項將政黨及附隨組織無償或交易時顯不相當價額取得之財產均推定為不當取得財產**，其效力甚至及於黨產條例公布時已非政黨或附隨組織或受託管理人之財產，將推定範圍擴張，**在系爭條文規範之財產範圍達 70 餘年之情下，已實質影響並侵害善意第三人之財產權，且竟強加第三人需負於取得財產當時無從預見之舉證責任，始能捍衛其原依既有法秩序已合法取得之財產權利及處分權能，形同先為有罪推定，再要求自證無罪，此種侵害基本人權之立法，實無法達成維護政黨公平競爭之立法目的，亦非最小侵害**，且手段復不具適當性及必要性，黨產條例第 5 條與比例原則有違。

(五) 再查，黨產條例第 5 條規定，係不須經任何程序即可將政黨財產推定為不當取得財產，並將舉證責任轉嫁予人民。黨產條例雖規定依第 6 條所為之處分須經聽證，惟黨產條例第 9 條第 1 項、第 5 項及同法第 27 條第 1 項分別規定：「依第 5 條第 1 項推定為不當取得之財產，自本條例公布之日起禁止處分之。」「政黨、附隨組織或其受託管理人違反第 1 項規定之處分行為，不生效力。」「政黨、附隨組織或其受託管理人違反第九條第一項規定者，處該處分財產價值之一倍至三倍罰鍰。」換言之，政黨財產一旦被推定為不當取得，所有權人即喪失處分權能，前行政院長林全甚曾公開表示，不得作為黨工薪資發放之基礎，足見立法者藉系爭黨產條例「以推定之名，行鬥爭之實」之目的昭然。

(六) 就憲法保障財產權而言，人民對財產權擁有完全依其意志使用、收益及其他形成之權利，國家機關不得任意剝奪，**黨產條例規定**

於未經法院審判認定政黨是否「不法」取得前、復未明定限於政黨違背何種法律而取得之財產，率由黨產會逕行認定黨產是否「不當」取得，且在黨產條例公布之日起立即禁止處分，違反者除處分行為不生效力外，更面臨處分財產價值1倍至3倍之高額罰鍰，嚴重破壞財產之支配自由，得認黨產條例所架構系列規範限制，任意將一個權利主體（擁有權利能力之法人組織）所擁有之財產權恣意剝奪（行政機關如黨產會剝奪附隨組織如關係人之財產權，破壞了關於財產權歸屬之正當法律程序），並以違反禁止處分者，行為不生效力且加以處罰為手段，以貫徹針對特定權利主體所擁有財產權行使之限制，破壞財產之支配自由度，**嚴重到幾乎已是特定財產權之剝奪，損及財產權形成之制度性保障功能至鉅，故其恣意剝奪特定權利主體擁有之財產權**，**對政黨財產權之限制顯已違反正當法律程序、法律保留原則及比例原則**。

十、綜上所述，關於政黨財產之移轉、禁止等事項，重大影響政黨之存續，應屬憲法保留事項，系爭黨產條例僅具法律位階，顯然違反憲法保留原則，且有悖於憲法第1條、第2條所揭櫫之民主國原則，且黨產條例第2條第1項、第2項、第8條第5項及第14條以黨產會為主管機關，得主動進行政黨、附隨組織及其受託管理人不當取得財產之調查、返還、追徵、權利回復，及依聽證程序作成處分認定附隨組織等規定，侵犯司法權，違反權力分立及正當法律程序，另使黨產會不受中央行政機關組織基準法規定之限制，悖於憲法增修條文第3條第3項、第4項、第5條第5項規定。又，黨產條例第4條第1款、第5條第1項及第2項，乃針對特定政黨即國民黨之立法，並未具差別待遇之正當理由，復追溯處理該政黨70餘年前之財產，有違平等原則及禁止溯及既往原則，且黨產條例就第4

條第 2 款前段及後段規定以不同標準認定之附隨組織，全然未為不同規範，顯然悖於平等原則及比例原則。此外，黨產條例第 4 條第 2 款及第 4 款就「附隨組織」、「不當取得財產」之認定影響財產權重大，然其定義抽象不具體，受規範者無法預先知悉其意義以供遵守，除違反法律明確性原則外，並違反憲法第 7 條、第 15 條、第 23 條等規定。準此，系爭黨產條例確有前揭違憲情事，爰狀請　鈞院鑒核，迅予宣告系爭黨產條例違憲，以維法治，實感德便。

謹　狀

司法院　公鑒

【附件名稱及件數】

附件1： 司法院中譯外國法規-美利堅合眾國憲法。

附件2：71 U.S.277 (1866)

附件3：328 U.S.303 (1946)

附件4：381 U.S.437 (1965)

附件5：561 U.S. 477 (2010)

具狀人：財團法人國家發展基金會

代表人：劉曾華

財團法人民權基金會

代表人：邱大展

財團法人民族基金會

代表人：邱大展

代理人：葉慶元律師

中　華　民　國　109　年　6　月　20　日

The Constitution of the United States of America

美利堅合眾國憲法

一七八七年九月十七日憲法會議通過

一七八九年四月三十日批准生效

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.	<序文> 我們美國人民，為了建立一個更完善的聯邦，樹立公平的司法制度，保障國內的治安，籌設共同防衛，增進全民福利，使我們自己和後代子孫，永享自由的幸福，乃制定並確立了這一部美國憲法。
Article I Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.	第一條<立法> 第一項（國會） 憲法所授予之立法權，均屬於參議院與眾議院所組成之美國國會。
Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.	第二項（眾議院） 眾議院以各州人民每二年選舉一次之議員組織之，各州選舉人應具該州眾議院議員選舉人所需之資格。
No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.	凡年齡未滿二十五歲，為美國國民未滿七年，及當選時非其選出州之居民者，不得為眾議院議員。
Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term	眾議院議員人數及直接稅稅額應按美國所屬各州人口分配之。各州人口，包括所有自由民及服役滿相當期間之人，以及其他人民數額五分之三，但未被課稅之印第安人不計算之。人口之統計，應於美國國會第一次會議後三年內及此後每十年，依法律

of years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.	之規定舉行之。議員人數以每三萬人中選出一人為限，但每州最少應有議員一人。在舉行前項人口統計前，新罕布什爾州(New Hampshire)得選出三人，馬薩諸塞州(Massachusettes)八人，羅得島州(Rhode Island)及普洛威騰士墾植地(今羅得州之省會)一人，康涅狄克州(Connecticut)五人，紐約州(New York)六人，新澤西州(New Jersey)四人，賓夕爾法尼亞州(Pennsylvania)八人，德拉瓦州(Delaware)一人，馬里蘭州(Maryland)六人，佛吉尼亞州(Virginia)十人，北卡羅來納州(North Carolina)五人，南卡羅來納州(South Carolina)五人，喬治亞州(Georgia)三人。
When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.	任何一州所選議員中遇有缺額時，該州之行政機關應頒布選舉令以補足該項缺額。
The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.	眾議院應選定該院議長及其他職員；並唯眾議院有提出彈劾之權。
Section 3. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.	第三項（參議院） 美國參議院由每州州議會選舉參議員二人組織之，參議員任期六年，每一參議員有一表決權。
Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.	參議員於第一次選舉後集會時，應儘可能平均分為三組。第一組參議員應於第二年年終出缺，第二組參議員於第四年年終出缺，第三組參議員於第六年年終出缺，俾每二年得有三分之一參議員改選。在任何一州議會休會期間，參議員如因辭職或其他情由而有缺額時，該州行政長官得於州議會下次集會選人補充該項缺額前，任命臨時參議員。
No person shall be a Senator who shall not have attained	凡年齡未滿三十歲，為美國國民未滿九年，及當選

and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; And

十七、 對於經州讓與且經國會承受，用充美國政府所在地之區域（其面積不得超過十平方英里)行使完全之立法權。對於經州議會許可而購得之地方，用以建築要塞、軍火庫、兵工廠、船廠及其他必要之建築物者，亦行使同樣權利。

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

十八、 為執行以上各項權力，或為執行本憲法授予美國政府或政府中任何機關或官員之權力，國會得制訂一切必要而適當之法律。

Section 9.

第九項（禁止國會行使之權力）

The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

現有任何一州所允准予移入或准予販入之人，在一八〇八年之前，國會不得禁止之。但對於其入境，得課以每人不超過十元之稅金。

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

人身保護令狀之特權不得停止之。惟遇內亂外患而公共治安有需

要時，不在此限。

No bill of attainder or ex post facto Law shall be passed.

公權剝奪令或溯及既往之法律不得通過之。

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

人口稅或其他直接稅，除本憲法前所規定與人口調查統計相比例者外，不得賦課之。

No tax or duty shall be laid on articles exported from any state.

對於自各州輸出之貨物，不得課稅。

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

任何商務條例或稅則之規定不得優惠某州商港而薄於他州商港，開往或來自某一州之船舶，不得強其進入或航出他州港口，或繳付關稅。

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.	除法律所規定之經費外，不得從國庫中文撥款項。一切公款之收支帳目及定期報告書應時常公布之。
No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.	美國不得授予貴族爵位。凡在美國政府下受俸或任職之人，未經國會之許可，不得接受外國國王或君主所贈與之任何禮物、俸祿、官職或爵位。
Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.	第十項（禁止各州行使之權力） 任何州不得：加入任何條約、盟約或邦聯；頒發捕獲敵船許可狀；鑄造貨幣；發行信用票據;使用金銀幣以外之物，以作償還債務之法定貨幣；通過公權剝奪令，溯及既往之法律，或損害契約義務之法律，或授予貴族爵位。
No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.	無論何州，未經國會核准，不得對於進口貨或出口貨，賦課進口稅或出口稅，惟執行檢查法律上有絕對必要者，不在此限。任何一州，對於進口貨或出口貨所課之一切進口稅或出口稅之純所得應充作美國國庫之用；所有前項法律，國會得予修正與管理。
No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.	無論何州，未經國會核准，不得徵收船舶噸稅，不得於平時設立軍隊或戰艦，不得與他州或外國締結任何協定或契約，或交戰。但遭受實際侵犯或急迫之危險時，不在此限。
Article II Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice	第二條<行政> 第一項（總統） 行政權屬於美國總統。總統之任期為四年，副總統之任期亦同。總統與副總統，應依照左列程序選舉之。

2

CUMMINGS v. THE STATE OF MISSOURI.

Supreme Court

71 U.S. 277

18 L.Ed. 356

4 Wall. 277

CUMMINGS
v.
THE STATE OF MISSOURI.

December Term, 1866

1
[Syllabus from pages 277-279 intentionally omitted]

2
IN January, 1865, a convention of representatives of the people of Missouri assembled at St. Louis, for the purpose of amending the constitution of the State. The representatives had been elected in November, 1864. In April, 1865, the present constitution—amended and revised from the previous one—was adopted by the convention; and in June, 1865, by a vote of the people. The following are the third, sixth, seventh, ninth, and fourteenth sections of the second article of the constitution:

3
SEC. 3. At any election held by the people under this Constitution, or in pursuance of any law of this State, or under any ordinance or by-law of any municipal corporation, no person shall be deemed a qualified voter, who *has ever been in armed hostility to the United States, or to the lawful authorities thereof*, or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines, money, goods, letters, or information; or has ever disloyally held communication with such enemies; or has ever advised or aided any person to enter the service of such enemies; *or has ever, by act or word, manifested his adherence to the cause* of such enemies, or his *desire for their triumph* over the arms of the United States, or *his sympathy* with those engaged in exciting or carrying on rebellion against the United States;

or has ever, except under overpowering compulsion, submitted to the authority, or been in the service, of the so-called 'Confederate States of America;' or has ever left this State, and gone within the lines of the armies of the so-called 'Confederate States of America,' with the purpose of adhering to said States or armies; or has ever been a member of, or connected with, any order, society, or organization, inimical to the government of the United States, or to the government of this State; or has ever been engaged in guerilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as 'bush-whacking;' or *has ever knowingly and willingly harbored, aided, or countenanced any person* so engaged; or *has ever come into or left this State, for the purpose of avoiding enrolment for or draft into the military service of the United States; or has ever, with a view to avoid enrolment in the militia of this State, or to escape the performance of duty therein*, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or as a southern sympathizer, or *in any other terms indicating his disaffection to the Government of the United States* in its contest with rebellion, or his sympathy with those engaged in such rebellion; or, having ever voted at any election by the people in this State, or in any other of the United States, or in any of their Territories, or held office in this State, or in any other of the United States, or in any of their Territories, or under the United States, shall thereafter have sought or received, under claim of alienage, the protection of any foreign government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this State, or in the army of the United States: *nor shall any such person be capable of holding in this State any office of honor, trust, or profit, under its authority; or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other property in trust for the use of any church, religious society, or congregation*. But the foregoing provisions, in relation to acts done against the United States, shall not apply to any person not a citizen thereof, who shall have committed such acts while in the service of some foreign country at war with the United States, and who has, since such acts, been naturalized, or may hereafter be naturalized, under the laws of the United States and the oath of loyalty hereinafter prescribed, when taken by any such person, shall be considered as taken in such sense.

4
SEC. 6. The oath to be taken as aforesaid shall be known as the Oath of Loyalty, and shall be in the following terms:

5
'I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States

against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.'

6

SEC. 7. Within sixty days after this Constitution takes effect, every person in this State holding any office of honor, trust, or profit, under the Constitution or laws thereof, or under any municipal corporation, or any of the other offices, positions, or trusts, mentioned in the third section of this Article, shall take and subscribe the said oath. If any officer or person referred to in this section shall fail to comply with the requirements thereof, his office, position, or trust, shall, *ipso facto*, become vacant, and the vacancy shall be filled according to the law governing the case.

7

SEC. 9. No person shall assume the duties of any state, county, city, town, or other office, to which he may be appointed, otherwise than by a vote of the people; nor shall any person, after the expiration of sixty days after this Constitution takes effect, be permitted to practise as an attorney or counsellor at law; nor, after that time, shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath.

8

SEC. 14. Whoever shall, after the times limited in the seventh and ninth sections of this Article, hold or exercise any of the offices, positions, trusts, professions, or functions therein specified, without having taken, subscribed, and filed said oath of loyalty, shall, on conviction thereof, be punished by fine, not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both such fine and imprisonment; and whoever shall take said oath falsely, by swearing or by affirmation, shall, on conviction thereof, be adjudged guilty of perjury, and be punished by imprisonment in the penitentiary not less than two years.

9

In September, A.D. 1865, after the adoption of this constitution, the Reverend Mr. Cummings, a priest of the Roman Catholic Church, was indicted and convicted in the Circuit Court of Pike County, in the State of Missouri, of the crime of teaching and preaching in that month, as a priest and minister of that religious denomination, without having first taken the oath prescribed by the constitution of the State; and was sentenced to pay a fine of five hundred dollars and to be committed to jail until said fine and costs of suit were paid.

10

On appeal to the Supreme Court of the State, the judgment was affirmed; and the case was brought to this court on writ of error, under the twenty-fifth section of the Judiciary Act.

11
Mr. David Dudley Field, for Mr. Cummings, plaintiff in error:

12
My argument will first be directed to that part of the oath which affirms that the person taking it has never '*been in armed hostility to* the United States, or to the lawful authorities thereof, or to *the government of this State;*' . . . and has never '*given aid, comfort, countenance, or support to persons engaged in any such hostility;*' . . . and has never '*been a member of or connected with any order, society, or organization inimical* to the government of the United States, or *to the government of this State*.' If the imposition of this is repugnant to the Constitution or laws of the United States, the whole oath must fall; for all parts of it must stand or fall together. Mr. Cummings was convicted, because he had not taken the oath, as a whole. If there be any part of it which he was not bound to take, his conviction was illegal. The oath is not administered by portions, and there is no authority so to administer it.

13
My first position is, that this provision of the constitution of Missouri is repugnant to the Constitution and laws of the United States; because it requires or countenances disloyalty to the United States.

14
Stripping the case of everything not immediately pertaining to the first position, the oath required may be considered as if it contained only these words:

15
'I hereby declare, on oath, that I have never been in armed hostility to the government of the State of Missouri, nor given aid, comfort, countenance, or support to persons engaged in any such hostility, and have never been a member of or connected with any organization inimical to the government of this State.'

16
This is not an oath of loyalty to the United States. The government of Missouri has been, in fact, hostile to the United States. This is matter of history. Being in armed hostility to this hostile State government was an act of loyalty to the United States: an act not to be punished, but to be rewarded.

17
The loyal citizens of the State were obliged to array themselves against its government; they did so; they took up arms against it; they seized its camp and overthrew its forces. Had it not been for this act of hostility the State might have been drawn into the abyss of secession. It was, therefore, an act which was not only lawful but which was required of the citizen by his allegiance to the United States.

18

The Constitution and laws of the United States require allegiance and active support from every citizen, whatever may be the attitude of the State government. The difference between the Constitution and the Confederation consists in this, chiefly, that under the Constitution the United States act directly upon the citizen, and not upon the State. What the United States lawfully require must be done, though it be the seizure of the State capitol. The State of Missouri could not subject the plaintiff in error to any loss or inconvenience for giving, in 1861, a cup of coffee to the soldiers who under General Lyon marched out to St. Louis to take Camp Jackson.

19

Let us consider, *in the second place*, the tendency of this oath, in its relation to *possible* occurrence. It certainly is possible for the government of a State to be hostile to the United States. The governments of the eleven States lately in rebellion were so. If the legislature of South Carolina were to pass a law excluding from the pulpit and the offices of religious teachers every person who has been, at any time during the late war, 'connected with any organization *inimical* to the government' of South Carolina, that law would be held disloyal and unconstitutional. Suppose the legislature of South Carolina were to go further, and enact that no person, white or black, should ever vote in that State, who, during the war, gave aid, comfort, or countenance to persons engaged in armed hostility to the government of South Carolina, would not every lawyer pronounce such a law utterly void?

20

If such an oath were required in Tennessee, the present President of the United States could not take it, and would be disqualified. If it were required in Virginia, more than one of our generals and admirals would be disqualified. And so of thousands of other citizens of the States lately in rebellion, who fought in the Union ranks, and opposed the governments of their own States.

21

There may be collisions between the Federal and the State governments, not breaking out, as the last has done, into flagrant war. A State government may attempt to resist the execution of a judgment of a Federal court; and the President may be obliged to call out the militia to assist the marshal. In such event, every man in the ranks will be in armed hostility to the government of the State. But the State cannot make him suffer for it.

22

This results from the rule of the Constitution, that the instrument itself, and the laws made in pursuance of it, are the supreme law of the land; and whatever obstructs or impairs, or tends to obstruct or impair, their free and full operation is unconstitutional and void.

23

The second position which I take is, that the provision imposing this oath as a condition of continuing to preach or teach as a minister of the Gospel, is repugnant to that part of the tenth section of the first article of the Constitution of the United States which prohibits the States from passing 'any bill of attainder' or '*ex post facto* law.'

24

Here, again, let us take a particular part of the oath, and refer to so much as affirms that the person taking it has never, 'by act or word, manifested his . . . sympathy with those . . . engaged in . . . carrying on rebellion against the United States.' Making a aimple sentence of this portion, it would read thus:

25

'I declare, on oath, that I have never, by act or word, manifested my sympathy with those engaged in rebellion against the United States.'

26

It may be assumed that previous to the adoption of this Constitution it had not been declared punishable or illegal to manifest, by act or word, sympathy with those who were drawn into the Rebellion. It would be strange, indeed, if a minister of the Gospel, whose sympathies are with all the children of men—the good and the sinful, the happy and the sorrowing—might not manifest such sympathy by an act of charity or a word of consolation. We will start, then, with the assumption that the act which the plaintiff in error is to affirm that he has not done was at that time lawful to be done.

27

Test oaths, in general, have been held odious in modern ages, for two reasons: one, because they were inquisitorial; and the other, because they were used as instruments of proscription and cruelty. In both respects they are contrary to the spirit, at least, of our institutions, and are indefensible, except when applied to matters outside of the domain of *rights*, and when *prospective* in their operation. Whatever the people may give or withhold at will, they may have a constitutional right to burden with any condition they please. This is at once the origin and extent of the rule.

28

When applied to *past* acts, another principle interposes its shield; that is, that no person can justly be made to accuse himself. This is incorporated in the fifth amendment, in the following words:

29

'No person . . . shall be compelled, in any criminal case, to be a witness against himself.'

30

And although this prohibition is in terms applied to criminal cases, it cannot be evaded by making that civil in form which is essentially criminal in character.

31

Retrospective test oaths, that is to say, oaths that the persons taking them have not theretofore done certain things, are almost unknown.

32
Among the constitutional guarantees against the abuse of *Federal* power thrown around the American citizen, are these three: First, he cannot be punished till judicially tried; second, he cannot be tried for an act innocent when committed; and, third, when tried he cannot be made to bear witness against himself.

33
Two of these guarantees, and the last two, are set also against the abuse of *State* power.

34
The prohibition to pass an *ex post facto* law is, in the sense of the Constitution, a prohibition to pass any law which 'renders an act punishable in a manner in which it was not punishable when it was committed.' The question in the present case, therefore, becomes simply this: Is it a punishment to deprive a Christian minister of the liberty of preaching and teaching his faith? What is punishment? The infliction of pain or privation. To inflict the penalty of death, is to inflict pain and deprive of life. To inflict the penalty of imprisonment, is to deprive of liberty. To impose a fine, is to deprive of property. To deprive of any natural right, is also to punish. And so is it punishment to deprive of a privilege.

35
Depriving Mr. Cummings of the right or privilege, whichever it may be called, of preaching and teaching as a Christian minister, which he had theretofore enjoyed, and of acting as a professor or teacher in a school or educational institution, was in effect a punishment.

36
It is not necessary to inquire whether it was intended as a punishment. If the legislature may punish a citizen, by deprivation of office or place, on the ground that his continuing to hold it would be dangerous to the State, then every punishment, by deprivation of political or civil rights, is taken out of the category of prohibited legislation. Congress and the State legislatures—for in this respect they lie under the same prohibition—can pass retroactive laws at will, depriving the citizen of everything but his life, liberty, and accumulated capital.

37
The imposition of this oath was, however, *intended* as a punishment. This is evident from its history and its circumstances. It is patent to all the world that the object of the exclusion was to affect the person, and not the profession. Mr. Cummings may possibly, at some moment during the last five years, have manifested, by act or word, his sympathy with those engaged in carrying on rebellion against the United States; he may have given alms to the wounded rebel prisoners lying in our hospitals, or he may have spoken to them words of

consolation; but no reason can be assigned, from all that, why he should not solemnize marriage or teach the ten commandments; nor can any man arrive at the belief that the convention which devised this constitution had any such notion.

38

Let us turn now to the other prohibition, that against passing any 'bill of attainder.' This expression is generic, and includes not only legislative acts to punish for felonies, but every legislative act which inflicts punishment without a judicial trial. If the offence be less than felony, the act is usually called a bill of pains and penalties.

39

It is not necessary that the persons to be affected by a bill of attainder should be named in the bill. The attainder passed in the 28th year of Henry VIII, against the Earl of Kildare and others (chap. 18, A. D. 1536), enacted that 'all such persons which be, or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said late earl, &c., in his or their false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged, and convicted of high treason.'

40

It is therefore certain, that if Mr. Cummings had been by name designated in the contitution of Missouri, and thereby declared to be deprived of his right to preach as a minister of religion, or to teach in a seminary of learning, for the reason that he had done some of the acts mentioned in the oath, such an attempt would have been in contravention of the prohibition against passing a bill of attainder; and it is equally certain, that if he had been thereunder judicially convicted for doing the same things, being not punishable when done, the conviction would have been in contravention of the other prohibition against passing an *ex post facto* law.

41

Does it make any difference that these results are effected by means of an oath, or its tender and refusal? There is only this difference, that these means are more odious than the other. The legal result must be the same, if there is any force in the maxim, that what cannot be done directly cannot be done indirectly; or as Coke has it, in the 29th chapter of his Commentary upon Magna Charta, '*Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud*.'

42

The constitutional prohibition was intended to protect every man's rights against that kind of legislation which seeks either to inflict a penalty without a trial or to inflict a new penalty for an old matter. Of what avail will be the prohibition, if it can be evaded by changing a few forms? It is unquestionably beyond the competency of the State of Missouri, by any legislation, organic or statutory, to enact in so many words, that if Mr. Cummings on some ocasion, before it was made punishable, manifested by an act or a word sympathy with the rebels, therefore he shall, upon trial and conviction thereof, be deprived of the right (or privilege) which he has long enjoyed, of preaching and teaching as a Christian minister. It must be equally incompetent to enact, that all those Christian ministers, without naming

them, who thus acted, shall be thus deprived. And this is because it is prohibited to the State to pass an *ex post facto* law. It is also unquestionably beyond the competency of the State, to enact in so many words, that because Mr. Cummings, on some occasion, after it was made punishable, manifested such sympathy, therefore he shall, without trial and conviction thereof, be deprived of his profession. It must be equally incompetent to enact that all those Christian ministers who have thus acted shall be thus deprived. And this because it is prohibited to the State to pass a bill of attainder.

43

It does not help this kind of legislation that its taking effect was made to depend on the neglect or refusal to take a prescribed oath; nor help it, to declare that the omission to take the oath is deemed a confession of guilt. If Mr. Cummings had even admitted in the presence of the convention his alleged complicity, that would not have dispensed with a judicial trial.

44

The legal positions taken on the part of Mr. Cummings may be thus restated. He is punished by deprivation of his profession, for an act not punishable when it was committed, and by a legislative instead of a judicial proceeding. If this is held to be constitutional because it is not done directly, but indirectly, through the tender and refusal of an oath, so contrived as to imply, if declined, a confession of having committed the act, then the prohibition may be evaded at pleasure. You cannot imagine an instance of oppression, that the Constitution was designed to prevent, which may not be effected by this means. Suppose the case of a man tried for treason, and acquitted by a jury. The legislature may nevertheless enact, that if the person acquitted by a jury does not take an oath that he is innocent, he shall be deprived of political and civil rights or privileges. Suppose that the legislature of New York were to pass an act disqualifying from preaching the Gospel, or healing the sick, or practising at the bar, all who during the last year were 'connected with any organization inimical' to the administration of the State government. Such an act would of course be adjudged inconsistent with the Federal Constitution. But suppose, instead of passing the law in this form, it should be in the form of requiring an oath from every person desiring to preach the Gospel, or to heal the sick, or practise at the bar, that he had not been connected with such an organization, would that make the case any better? You can punish in two ways: you can charge with the alleged crime, and proving it, punish for it; or you can require the party to purge himself on oath; and if he refuses, punish him by exclusion from a right, privilege, or employment.

45

Mr. Montgomery Blair filed a brief, on the same side, and after citing several authorities, and enforcing some of the arguments of Mr. Field, thus referred especially to the opinions of Alexander Hamilton.

46

Mr. John C. Hamilton, in his 'History of the Republic of the United States,'[1] says:

47

'The animosity natural to the combatants in a civil conflict, the enormities committed by the Tories, when the scale of war seemed to incline in their favor, or where they could continue their molestations with impunity; the inroads and depredations which they made on private property and on the persons of non-combatants, and the harsh and cruel councils of which they were too often the authors, appeared to place them beyond the pale of humanity. This was merely the popular feeling.

48

'In the progress of the conflict, and particularly in its earliest periods, *attainder* and confiscation had been resorted to generally . . . as a means of war; but it was a fact important to the history of the revolting colonies, that acts prescribing penalties usually offered to the persons against whom they were directed the option of avoiding them by acknowledging their allegiance to the existing government.'

49

But there were exceptions to this wise policy. In New York, especially, there was a formidable party who indulged the worst feelings and went to the greatest extremes. The historian of the Republic thus narrates the matter:

50

'Civil discord,' says this author, 'striking at the root of each social relation, furnished pretexts for the indulgence of malignant passions; and the public good, that oft abused pretext, was interposed as a shield to cover offences which there were no laws to restrain. The frequency of abuse created a party interested in its continuance and exemption from punishment, which, at last, became so strong that it rendered the legislature of the State subservient to its views, and induced the enactment of laws *attainting* almost every individual whose connections subjected him to suspicion, who had been quiescent, or whose possessions were large enough to promise a reward to this criminal cupidity.'

51

'Two bills followed. One was entitled, 'An act declaring a certain *description of persons* without the protection of the laws, and for other purposes therein mentioned.' On its being considered, a member, a violent partisan, . . . moved an amendment prescribing a *test oath*, which was incorporated in the act. It disfranchised the loyalists forever. The Council of Revision rejected this violent bill, on the ground that the 'voluntary remaining in a country overrun by the enemy,' an act perfectly innocent, was made penal, and was retrospective, contrary to the received opinions of all civilized nations, and even the known principles of common justice, and was highly derogatory to the honor of the State, and totally inconsistent with the public good.'

52

The act nevertheless was passed. In regard to the test oath, General Hamilton said:

53

'A share in the sovereignty of the State which is exercised by the citizens at large in voting at the elections, is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law. It is that right by which we exist, as a free people, and it will certainly therefore never be admitted that less ceremony ought to be used in divesting any citizen of that right than in depriving him of his property. Such a doctrine would ill suit the principles of the Revolution which taught the inhabitants of this country to risk their lives and fortunes in asserting their liberty, or, in other words, their right to a share in the government. Let me caution against precedents which may in their consequences render our title to this great privilege precarious.'

General Hamilton further remarks:

54
'The advocates of the bill pretend to appeal to the spirit of Whigism, while they endeavored to put in motion all the furious and dark passions of the human mind. The spirit of Whigism is generous, humane, beneficent, and just. These men inculcate revenge, cruelty, persecution, and perfidy. The spirit of Whigism cherished legal liberty, holds the rights of every individual sacred, condemns or punishes no man without regular trial and conviction of some crime declared by antecedent laws, reprobates equally the punishment of the citizen by arbitrary acts of the legislature as by the lawless combinations of unauthorized individuals, while these men are the advocates for *expelling* a large number of their fellow-citizens, unheard, untried, or, if they cannot effect this, they are for disfranchising them in the face of the Constitution, without the judgment of their peers and contrary to the law of the land. . . . Nothing is more common, than for a free people in times of heat and violence to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of *disfranchisement, disqualification*, and *punishments* by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure, by general descriptions, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious, without *hearing or trial*, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense. . . . The people are sure to be losers in the event, whenever they suffer a departure from the rules of general and equal justice, or from the true principles of universal liberty.'

55
There is another sentiment of the great statesman and lawgiver which may be deemed not inappropriate to the present unhappy times. He says:

56
'There is a bigotry in polities as well as in religion, equally pernicious to both. The zealots of either description are ignorant of the advantage of a spirit of toleration. It is remarkable, though not extraordinary, that those characters throughout the

States who have been principally instrumental in the Revolution are the most opposed to persecuting measures. Were it proper, I might trace the truth of these remarks from that character who has been THE FIRST in conspicuousness, through the several gradations of those, with very few exceptions, who either in the civil or military line, have borne a distinguished part in the war.'*Mr. G. P. Strong, contra, for the State, defendant in error*.

57
I. The separate States were originally possessed of all the attributes of sovereignty, and these attributes remain with them, except so far as the people may have parted with them in forming the Federal Constitution.[2]

58
The author of the Federalist, No. 45, says:

59
'The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.'

60
II. Among the rights reserved to the States which may be considered as established upon principle, and by unvarying usage beyond question or dispute, is the exclusive right of each State to determine the qualification of voters and office-holders, and the terms and conditions upon which members of the political body may exercise their various callings and pursuits within its jurisdiction. Authorities already cited establish this proposition; so, also, do others.[3]

61
III. The provisions of the second article of the Constitution of Missouri come within the range of these reserved rights, and are neither 'bills of attainder,' or of pains and penalties, nor '*ex post facto* laws,' nor 'laws impairing the obligation of contracts.' They are designed to regulate the 'municipal affairs' of the State, that is, to prescribe who shall be voters, who shall hold office, who shall exercise the profession of the law, and who shall mould the character of the people by becoming their public teachers.

62
Bills of pains and penalties, and *ex post facto* laws, are such as relate exclusively to crimes and their punishments.[4]

63
The true interpretation of these laws by our own courts is settled by numerous cases in addition to those already cited.[5]

64
Not one of these examples of bills of pains and penalties, or *ex post facto* laws, bears any resemblance to the constitutional provisions which the court is now called to pass upon. They were, in terms, acts defining and punishing crimes. They

designated the persons to be affected by them, and did not leave it *optional* whether they would suffer the penalty or not.

65
IV. Every private calling is subject to such regulations as the State may see fit to impose. The privilege of appearing in courts as attorneys-at-law, and the privilege of exercising the functions of a public teacher of the people, have always been the subjects of legislation, and may be withheld or conferred, as may best subserve the public welfare. Private rights have always been held subordinate to the public good.

66
Even the freedom of religious opinion, and the rights of conscience which we so highly prize, are secured to us by the State constitutions, and find no protection in the Constitution of the United States.

67
If any State were so unwise as to establish a *State religion*, and require every priest and preacher to be licensed before he attempted to preach or teach, there is no clause in the Federal Constitution that would authorize this court to pronounce the act unconstitutional or void.[6]

68
V. But we are told that this is not an oath of loyalty to the government of the United States, because it requires a declaration that the party has not taken up arms against the government of the State.

69
The Constitution of the United States is a part of the government of the State. It is as much the Constitution of the people of Missouri as the State constitution. Those who defended the one defended the other. The State government was never hostile to the Federal government. The hostility of Governor Jackson was individual and personal, and was intended to subvert both State and Federal governments.

70
Mr. Hamilton says:[7] 'We consider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of one whole.'

71
Chief Justice McKean[8] also says: 'The government of the United States forms a part of the government of each State. These (the State and National) form *one complete* government.'

72
Mr. Jefferson,[9] speaking of the State and Federal governments, says: 'They are co ordinate departments of one simple and integral whole.'

73
Mr. J. B. Henderson, on the same side, for the State, defendant in error:

74

Do the provisions of the second article of the Missouri constitution conflict with the Constitution of the United States? The acts objected to are not acts of a State legislature. Even in regard to the constitutionality of such acts it has ever been thought a delicate duty to pass. If doubt exists, that doubt is always given in favor of the law. If ordinary acts of legislation are to be presumed valid, and are to be set aside only when patient examination brings them, beyond doubt, into conflict with the supreme law of the land, how much stronger the presumption in favor of the act of the people themselves in framing such organic laws as they may think demanded by the exigency of the times and necessary to their safety?

75

The tenth amendment to the Constitution of the United States provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

76

No question, therefore, can arise as to the power of the people of Missouri to adopt the provisions in question unless they fall within the powers delegated to the United States, or are prohibited to the States by the Federal Constitution. The subject-matter of them is clearly not within the powers delegated to the United States, but belongs to that class of legislation reserved to the States or to the people, and unless it be directly prohibited to the States by some clause or clauses of the Federal Constitution the provisions must be held valid. Among the powers prohibited to the States is one in the tenth section of the first article of the Constitution, which provides 'that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' This clause is chiefly relied on to avoid the provisions alluded to in the constitution of Missouri.

77

It has been decided that bills of pains and penalties, which inflict a milder degree of punishment, are included within bills of attainder, which refer to capital offences. It has been said by an accurate writer[10] that in cases of bills of attainder, 'the legislature assumes judicial magistracy, weighing the enormity of the charge and the proof adduced in support of it, and then deciding the political necessity and moral fitness of the penal judgment.' He says these acts, instead of being general, are levelled against the particular delinquent; instead of being permanent they expire, as to their chief and positive effects, with the occasion. Now, do these provisions fall within this definition? *To be obnoxious as bills of attainder, the provisions must operate against some particular delinquent, or specified class of delinquents, and not against the whole community.* They must not be permanent laws, operating as a rule to control the conduct of the whole community, but must expire upon the infliction of punishment on the individual or individuals named. Before these provisions can be called bills of attainder, it must appear that they criminate the defendant for the commission of some act specified in the third section of the second article of the Constitution; and that they assume to pronounce the punishment for that act. The law itself must assume to convict him.

78
If any means be left by which the defendant can escape the punishment prescribed in the act, the act cannot be a bill of attainder; for a bill of attainder assumes the guilt and punishes the offender whatever he may do to escape. If the act in question applies as well to the entire community as to him, and operates upon all alike, only prescribing an oath, which may or may not be taken by him and others, as a condition of a future privilege, it is in no sense a bil of attainder.

79
If any objection really exist against these provisions of the Missouri constitution it is because they are retrospective in their operation. Whether they are *ex post facto* laws is, therefore, the chief question for our examination.

80
Before proceeding to that examination, an argument of one of the counsel for the plaintiff must be noticed. He errs not perhaps in logical deduction, but in the statement of premises.

81
He argues thus: Mr. Cummings had the right to preach. A test oath is prescribed for a person following his profession which he cannot truthfully take, hence he has to forfeit his right to preach.

82
This is called a punishment, for the acts of which he is guilty, and of which he cannot purge himself by oath. The punishment, then, consists in the forfeiture of this assumed right to preach the Gospel. Of course, punishment must be impending to make the objection apply. The real objection to an *ex post facto* law is not that it declares a past innocent action a crime, but in the fact that it undertakes, after so declaring, to punish it. The Constitution of the United States steps in to prevent the punishment, not the passage of the act. Now, if the supposed forfeiture pronounced by the act is no punishment at all in the eye of the law, the objection ceases.

83
What is this thing we call punishment for crime in this country? Punishment under our institutions, legally considered, must affect person or property. It must take the 'life' of an individual, impose restraints on his 'liberty,' or deprive him of his 'property.' Common sense teaches us that no man is punished by the loss of something that never was his absolute property. If I retake from my neighbor what I had granted him during my pleasure, I inflict no loss on him. He loses nothing. I gain nothing. The thing may be of value, but it is mine. If the thing taken has no value, although he may not have received it of me, he does not suffer. Punishment is to inflict suffering. This view of the subject is strengthened by the language of the fifth article of Amendments to the Federal Constitution, and by similar language in each State constitution. This article declares, first, that prosecutions, except in particular cases, shall be commenced by presentment or indictment of a grand jury. Coming to the trial, it is next provided, that no man shall be twice tried for the same offence, nor compelled to be a witness against himself, and then, in

the same connection, it provides that he shall not 'be deprived of his life, liberty, or property, without due process of law.' The latter part of the clause evidently refers to the punishment of crime. *To punish one, then, is to deprive him of life, liberty, or property. To take from him anything less than these, is no punishment at all.* These are natural rights, and to take them away is what we properly call punishment. All other rights are conventional, and may at any time be resumed by the public, in the most summary way, without any regard to due process of law. Hence, public offices have always been taken away from the incumbents, by the sovereign act of the people, without consulting the incumbents, without informing them, without hearing them in their defence, and yet nobody ever supposed this to be a punishment of the incumbents. It is not a punishment, because it deprives them of no property whatever. The public, it is true, had given them a trust, but the public had created that trust for their own purposes, and the public can resume it whenever necessity or convenience require it. And the public alone can judge of that necessity or convenience.

84
Let us now proceed to the examination of *ex post facto* laws.

85
Story, J.,[11] defines an *ex post facto* law to be one 'whereby an act is declared a crime, and made punishable as such, which was not a crime when done: or whereby the act, if a crime, is aggravated in enormity or punishment, or whereby different or less evidence is required to convict an offender than was required when the act was committed.' This court, in the case of *Fletcher* v. *Peck*, said:

86
'An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.'

87
In *Watson et al.* v. *Mercer*,[12] this court said:

88
'The phrase *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed.'

89
Each and every act enumerated in the third section may have been committed, and yet no provision of this State constitution attempts to punish it. Indeed, it makes no provision to punish even in the future the commission of such acts as are therein specified. The acts enumerated are not denounced in the constitution as crimes at all, nor is any punishment whatever attached to their commission. How, then, is this test oath an *ex post facto* law? It does not operate on the past. If one stands on his past record, however guilty he may be, this provision cannot touch him. If he is ever punished for what he has done, it must be according to some previous existing law, and not under this act. This act does not deal with the past. It looks only to the future. If it refers to the past at all, it is only for the purpose of

ascertaining moral character and fitness for the discharge of high civil duties, which give credit and influence in the community, and can never be safely intrusted in the hands of base or incompetent men.

90
But to proceed with the definition. Justice Washington, delivering the opinion of the court in *Ogden* v. *Saunders*,[13] speaking of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, said: 'The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character.'

91
In *Calder* v. *Bull*, the first great case involving a definition of the term *ex post facto*, in this court, Chase, J., delivered the opinion of the court, and gave a definition which has been ever since substantially adopted as the law. He said, it is:

92
'*First*. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

93
'*Second*. Every law that aggravates a crime and makes it greater than it was when committed.

94
'*Third*. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

95
'*Fourth*. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offence in order to convict the offender.'

96
Does this provision of the State constitution assume to declare any act already done by the defendants, at any time, to be criminal? Is it, in any sense, a criminal law to operate upon the past? If it had declared that previous acts of practising law, innocent as they were when done, should now be offences, and might be punished in the courts, the provision could not, and should not, be enforced. If the provision had declared that any person guilty of a previous expression of sympathy with the public enemy, or of previously enrolling himself as disloyal, to evade military service in the Union forces, or of seeking foreign protection as an alien against military service, might now be indicted and punished therefor, by fine and imprisonment, or both, I could well understand an argument against its validity. But this provision does no such thing. It declares no past act of the defendant to be an offence, nor does it prescribe for any such act an forfeiture whatever, much less the deprivation of a property right. What is a criminal law? It defines an offence, and fixes the punishment, and the mode of inflicting it. If it stamps as crime an innocent past action it is no law. But if it looks only to the future, and gives the choice to the citizen to violate it or comply with it, it is a valid law, at least so far

as this prohibition is concerned. This act, it is true, defines an offence, but the offence defined is one that cannot be committed before the expiration of sixty days after the act shall have been adopted. No man is compelled to be guilty. That is not the case under an *ex post facto* law. In such cases there is no option for the victim. The act to be punished is done, and cannot be undone.

97

A punishment is also denounced in the act, but that punishment is to be applied only to acts of the future. This act, then, does not make a crime of an action which was innocent when done, and proceed to punish it, and it cannot in that respect be classed as an *ex post facto* law.

98

If one be guilty of treason, of course he cannot in such case take the oath, and must therefore stand excluded. It is not a new or additional penalty or forfeiture for the crime of treason. It was not so intended. In its true purpose, such an act is not a criminal law at all, much less an *ex post facto* law. It is an act to fix the qualifications of voters, and applies to the innocent as well as to the guilty. If a man, having long enjoyed the franchise, be excluded by the sovereign act of the people, unless he will take an oath that he can read and write, is it to be construed an act to punish ignorance, or an act to preserve the purity and usefulness of the ballot-box? If an act were passed vacating the offices of all sheriffs who had not practised law for five years under a license, before their election, is the act void?

99

But we are told that this act alters the legal rules of evidence, and receives less testimony than was necessary at the time the act was committed to convict the offender. If perjury be committed, and at the time of its commission two witnesses are required to convict, we can understand that a subsequent act authorizing a conviction on the testimony of one witness is not valid. We can well understand that a law which makes testimony competent, that was not competent at the time of the act, is void. But the law will not be declared void until its obnoxious provisions are attempted to be enforced in some specific case, that is, until a case arises. The difficulty here is that plaintiffs in error insist that they are on trial for the offences, or rather the acts of disloyalty, named in the third section. But they are not now on trial, for no conviction or judgment therefor can follow these proceedings. The taking of the oath is not an acquittal of the offences or acts enumerated. The refusal to take it is not a conviction, nor does it tend to a conviction. This act has nothing to do with the trial or conviction of the offender for past actions; it fixes no rule or rules of evidence by which a conviction may be had more easily, for there can be no trial or conviction at all under the act for anything previously done.

100

The Constitution provides that no person 'shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.' It is insisted that the provisions of the Missouri law conflict with this clause, which clothes in language a great principle of national right. If, on

the trial of the case of Mr. Cummings, he had been compelled to testify against himself, there would be some ground for the complaint. We have already attempted to show that he is not deprived of life, liberty, or property under this law. He is surely not deprived of life or liberty, and the right to pursue his profession is not such an absolute right of property as to be above the control and regulation of State law. It is said he is punished without the right of trial 'by an impartial jury,' and without the right 'to be confronted by the witnesses against him;' without the right of 'compulsory process for obtaining witnesses' in his favor, and without that other invaluable right, 'the assistance of counsel' in his defence. Suppose it were so, what has this court to do with it? These great rights are only secured by the Constitution 'in all criminal prosecutions' set on foot by the United States and not in those set on foot by the States. And now, in the present prosecution against Mr. Cummings for violating the act itself, or in any prosecution that may be hereafter instituted against him, or other persons, for such violation, if any of these rights shall be denied them we may say the act is unjust, but that is the end of it. The State may do acts of injustice if it chooses. We must trust something to the States. Mr. Cummings, however, had the right of trial by jury; the right to be confronted with the witnesses against him; the right of process to compel the attendance of his witnesses; and even those beyond the limits of our own country will know that he has had 'the assistance of counsel,' for he was ably defended in the courts of the State, and they who now defend him are known wherever enlightened jurisprudence itself is known.

101
Whenever prosecutions arise under these provisions, there will, doubtless, be granted, in Missouri, to the accused, all these guarantees of constitutional liberty. The State cannot deny them to one of its citizens without denying them to all; and to suppose a people so lost to common sense as to deprive themselves, voluntarily, of these great and essential rights, necessary to a condition of freedom, is to suppose them incapable of self-government.

102
But an objection is also urged which is well calculated to excite interest. The rights of conscience are sacred rights. They are too often confounded, however, with the unrestrained license to corrupt, from the pulpit, the public taste or the public morals. However this may be, the American people are exceedingly sensitive on the subject of religious freedom; and whenever, the people are told, as they have been in this case, that the indefeasible right to worship God according to the dictates of conscience is about to be invaded, the public mind at once arouses itself to repel the invasion. The first article of the amendments to the Constitution is in these words:

103
'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'

104
The third clause of the sixth article declares that

105
'No religious test shall ever be required as a qualification to any office or public trust under the United States.'

106
Story, J., commenting on these provisions, says:

107
'The whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions.'

108
The Jew, the infidel, and the Christian are equal only in the national councils. The States may make any discrimination in favor of any sect or denomination of Christians, or in favor of the infidel and against the Christian. North Carolina had the right to exclude the Catholic from public trusts; and other States have the right, so long exercised, to deny ministers of all denominations a place in their legislative halls. Congress cannot establish a national faith; but where are the limitations on the powers of the States to do so? There are none, unless they be found in this provision against bills of attainder and *ex post facto* laws—a provision which, in its present interpretation, saps and withers every right once fondly claimed by the States. In the formation of State constitutions, I have never doubted the power to regulate the modes of worship or prescribe forms for the public observance of religion. Hence it is that the bills of right, to be found in all the State constitutions, attempt to secure this great right of free and unrestricted worship against the caprice or bigotry of State legislators. But within the limits of the State constitution, when thus framed, the legislature has entire control of the subject.

109
It is said these oaths are unprecedented. They are, no doubt, extraordinary, perhaps unprecedented; but the provisions themselves are no more extraordinary than the circumstances which called them into existence. These last are not known to all, and indeed are known fully but to few. I must ask the privilege of departing so far from the line of strict legal argument as partially to state them. Such a statement is indispensable truly to understand this case.

110
The bare recital of these provisions, I am aware, has fallen harshly on the public ear. Loyal men in other States hesitated to justify them, while the disloyal hastened to denounce them. Beyond the limits of Missouri, they, perhaps, have had but few advocates. But beyond those limits, no man knows the terrible ordeal through which her people passed during the late Rebellion. To appreciate their conduct properly, one must have been on the soil of the State, and that alone is not sufficient: he must have been an active participant in the struggle for national life and personal security. The men of Missouri, at an early day in this war, learned to be positive men. They were for, or they were against. When the struggle came, each man took his place. The governor and the legislature were disloyal. A

convention called by that legislature, merely to give character to the mockery of secession, proved to be loyal, and refused to submit an ordinance of secession to a pretended vote of the people. Hence came a fierce war of opinion. The first great contest was for political power. Each party saw the absolute necessity of obtaining it. With it, ultimate success might be achieved; without it, success was impossible. In the midst of this controversy, while the issue was yet in doubt, Fort Sumter was attacked, and civil war suddenly broke upon the land. In Missouri, it was a hand-to-hand contest, each party fighting for the possession of power, and each feeling that expulsion was the penalty of failure. Acts of the grossest treason were committed; but no man could be found who confessed himself present, or who would speak the truth against his neighbor. His silence, however, made him no less earnest. Neighbors and friends of long standing separated and joined hostile forces. Each county had its military camps, and each municipal township its opposing military and political organization. Traitors and spies came from the confederate armies of Arkansas and Texas to organize regiments secretly in the State, and found shelter and food in the houses of the disloyal. Organized armies sprang into existence around us, and joined the advancing hosts, to assist in the work of devastation and death. Some who did not themselves go into open rebellion from prudential reasons, some too old to bear arms, urged others to go, and furnished means and money to equip them. Some acted as spies in their respective neighborhoods, and sent secret information to the enemy, which often sealed the fate of their neighbors. The merchant in his store-room talked treason to his customers; the school teacher instilled its poison into the minds of his pupils; the attorney harangued juries in praise of those whose virtue demanded the great charters of English liberty, and denounced the spirit of this age for its submission to usurpation and tyranny. And even the minister of heaven, forgetting of what world his Master's kingdom was, went forth to perform the part allotted to him in this great work of iniquity.

111

No man was idle. No man could be idle. Men might be silent, but they were earnest; because life, and things dearer than life, depended on the issue. The whole man, mental and physical, was employed. The whole community was alike employed, and every profession, and every avocation in life was made subservient to the great end,—the success or overthrow of the government. On the day when the delegates to the convention which framed this constitution were elected, General Price, at the head of twenty thousand desperate men from Arkansas, Texas, Louisiana, and Missouri, was sweeping through the State, leaving be hind him smouldering ruins and human suffering; and he and they who made this desolate path, were received with shouts of joy and approbation by thousands of citizens, who sought by the ballot, on that day, to give lasting welcome to the invaders.

112

I have referred to these things to vindicate the people of Missouri against the charges which have been made against them, and to show the reasons and the reasonableness of their action.

113

Mr. Reverdy Johnson, for the plaintiff in error, Mr. Cummings, in reply:

114

I. Is the provision in the constitution of Missouri obnoxious to the objection of being *ex post facto?*

115

Opposing counsel seem to suppose that the clause in the Federal Constitution which would prevent an *ex post facto* law is not applicable to the organic law of a State. They argue that even if a provision such as is contained in the constitution of Missouri would be void in a statute law of the State, yet it is not void when in her constitution.

116

There is no warrant for the distinction. The ninth section of the first article of the Constitution of the United States restrains Congress from passing any bill of attainder or any *ex post facto* law, and the great men by whom that instrument was framed were so well satisfied that legislation of this description was inconsistent with all good government, that they deemed it necessary to impose the same restriction upon the States; and this they did by providing that 'no State'—not *no legislature of a State*, but that '*no State*'—should pass any *ex post facto* law or any bill of attainder. If we consult the contemporaneous construction—and which has ever been received almost as conclusive authority upon its meaning—given it by the Federalist, we will find[14] that it was not thought necessary to vindicate the Constitution upon the ground that it contained a provision of this description. It was thought sufficient to say that the provision was but a declaration of a fundamental principle of free government, a principle without which no such government could long exist, and that it was adopted not because there was any doubt in regard to it upon the part of the convention, or because any doubt was entertained what would be the public opinion in relation to it, but because it was so universally held to be important that it was deemed necessary not only by express constitutional provision to inhibit to Congress the power to pass such laws, but to prohibit the States at any time from doing so either.

117

It can make no difference, therefore, whether such legislation is found in a constitution or in a law of a State; if it be within the prohibition it is void; and the only question, therefore, is whether the constitution of Missouri, in the particular which is involved in this case, is not liable to the objection of being *ex post facto*.

118

My brothers of the other side suppose that there is no *punishment* imposed by the constitution of Missouri upon one who refuses to take the oath. They do not mean, surely, no punishment in the general sense of the term; that he whose livelihood depends on his profession is not, in the general acceptation of the term, punished if he is not permitted to pursue it; that he whose business it is, claiming to derive his authority from a higher than any human source, to preach peace on earth, good will to men, is not punished when he is told that he shall do neither; that a man is

not punished when he is prevented from teaching his own child (for this oath comprehends that act) the ways which he believes are the only ways that lead to perpetual happiness in the future; cannot teach him what he deems to be man's duty to man and man's duty to God;—without taking an oath which any State from party, political, or religious prejudice, may think proper to prescribe.

119
A prohibition of the sort here enacted, operating to the extent that it does, is not only punishment but most severe punishment; perhaps the most severe.

120
And, if it is a punishment in fact, wny is it not a punishment that falls within the inhibition of the Constitution? The inhibition is absolute and as comprehensive as language can make it.

121
Now what does the constitution of Missouri assume? It assumes that there are persons in the State of Missouri who have been guilty of disloyalty to the United States. Opposing counsel argue that it was of importance to the future welfare of Missouri, when the constitution was adopted, that such a provision as this should be incorporated in her fundamental law. And why? Because, as they assert, there were secret, silent, insidious traitors in her midst; traitors, also, whose hands were red with the blood of loyal citizens. The argument, therefore, as well as the provision itself, assumes that crime has been committed, and that it is important to the State that all who have been guilty of that crime shall forever be excluded from any of the offices or the employments mentioned in the third section of the second article of the constitution. Then it was put there evidently for the *purpose of disfranchising* those who were thus assumed to be guilty. Whether they were guilty or not, and how they were to be punished if that guilt should be established by due dourse of law, is one question. Whether, if guilty, they could be punished in the way in which they are punished by this constitution is a different question. If they are guilty, and are so to be punished, how that guilt is to be established is a third question.

122
How was their guilt to be established, according to the requirements of the constitution, if the charge of treason was made against them? By two witnesses. What would be the effect upon an individual if he was convicted? No disfranchisement. Capacity to hold office as far as any positive legal disability was concerned—capacity to appear as attorney—capacity to pursue his religious pursuits; all would remain unaffected.

123
What does this provision in the constitution of Missouri do? It assumes that it is not sufficient that society is secured by such punishment as the previous law provided. If the court should think proper in its discretion to award the punishment of imprisonment, and the party survives, he cannot be punished again in any way in the remainder of his life. If he seeks employment afterwards, the question of prior guilt may be held to affect his character; but that found to be fair and he

trustworthy, the road to honor and to office may be open to him. This constitution of Missouri says that this is not enough; that the public safety demands that, if he is guilty, he shall be excluded from all offices in that State; not only from all offices, but from all employments; not only from professional employment, but from carrying on the avocation with which, in his own belief, heaven itself has endowed him; not only that, but from being an officer in any municipal or other corporation, although he may own nearly all the stock, and from holding any trust.

124

Is that not *ex post facto?* The very definition of such a law, which opposing counsel have given upon the authority of this court in the case of *Calder* v. *Bull*, and in the subsequent cases, brings such a provision within it. Even if we were to stop here, any law, and, as has been already shown, any constitution, which imposes a punishment for crime in addition to that which the existing law at the time of its commission imposed, is *ex post facto*.

125

But that is not all. It not only imposes an additional punishment, but it changes altogether the evidence by which, under the previous law, the crime was to be established. Two witnesses to the same overt act were necessary to prove the offence of treason. This constitution says, in effect, that 'it is true that hundreds and thousands in the State of Missouri have been guilty of acts of disloyalty which would subject them to punishment for treason under the existing law; and it is true that they may be punished under that law effectively, provided the government which thinks proper to prosecute them can establish their guilt by such evidence as the constitution demands; but that will not answer out purpose; we cannot accomplish our end in that mode; we not only propose to aggravate the punishment, but we propose to establish the crime by evidence which is now inadmissible for that purpose.' And what is that evidence as they themselves present it? 'You, Mr. Cummings, desire to preach, to solemnize marriage, to bury the dead, to administer the sacrament of the Eucharist, to console the dying; you shall not do either, unless you will swear that you have not committed the offence: you must purge yourself by your own oath, or, as far as we are concerned, we find you guilty. We believe you are guilty; and if you are guilty, we do not mean that you shall execute your religious functions at all. And we make the fact of your refusing to swear that you are innocent conclusive evidence of your guilt, and punish you accordingly.'

126

Now, Congress has treated an exclusion from the right to hold office as a punishment. The act of the 10th April, 1790, defines and punishes perjury, and for punishment, it is declared that the party shall undergo 'imprisonment not exceeding three years, and a fine not exceeding eight hundred dollars; and shall stand in the pillory for one hour, and be *thereafter rendered incapable of giving testimony in any of the courts of the United States until such time as the judgment so given against the said offender shall be reversed.*'[15] It is plain that to take from him the privilege of being a witness was considered a punishment. By the twenty-

first section, the crime defined is that of attempting to corrupt a judge, and as punishment, it is declared that the party 'shall be fined and imprisoned, and *shall forever be disqualified to hold any office of honor, trust, or profit under the United States*.' In accordance with the impression that that was not only punishment, but punishment of a very severe nature, we find in the act of July 17, 1862,[16] 'an act to suppress insurrection, to punish treason,' &c., passed of course whilst the Rebellion was in full force, this provision:

127
'That every person guilty of either of the offences described in this act shall be *forever incapable and disqualified to hold any office under the United States*.'

128
Counsel on the other side maintain that the exclusion of the priest from the right to preach or to teach is not *ex post facto* legislation within the meaning of those terms in the Constitution, because it is not the legal consequence of any crime; something having no connection with the crime. They admit, therefore, that if the punishment can attach itself to the crime, and it be a punishment not known to the laws at the time the crime was committed, it is void. Now, what does the State constitution do? Does it not exclude because of the crime, in consequence of the crime, and only in consequence of the crime? If it does, it is, in the judgment of Missouri, or in the judgment of its constitution, a punishment of the crime just as effectually as if a party was tried upon an indictment and convicted, and the law authorized a party, upon that conviction, to be excluded from the right to practise or to preach. That no proceeding, judicial in its nature, is provided for, can make no difference; a proceeding still more effective is provided. A proceeding by indictment might or might not accomplish the end; the two witnesses required might not be found; the party might, therefore, be acquitted. His guilt might be in his own bosom, and no witness could be found, and, consequently, he would be acquitted. And as its object was to strike at the crime, and remove those who were supposed to be loyal in the State of Missouri from the contamination of the crime or of the criminal, it requires him to swear that he has not committed it, and tells him, 'Not swearing, we find you have committed the crime, and will punish you accordingly.'

129
Suppose that, instead of excluding Mr. Cummings from the practice of his calling, it had said that if he did not answer he should be subjected to a pecuniary penalty, a fine, or to imprisonment, both or either; would not that be void because of the restriction? And if so, must not this be held void, provided we agree with Congress in the opinion contained in the two acts already referred to, that exclusion from the right to hold office is 'punishment?'

130
The degree, the extent, the character of the punishment, has nothing to do with the fact of punishment. Admit that Mr. Cummings and all standing in like relation are punished by this State constitution, and the constitution falls just as absolutely as if, instead of ordaining that persons should be punished by not being permitted

to exercise and carry on their occupations, it had said, 'if you do not swear to your innocence we infer you to be guilty, and we fine and imprison you.' It would be as much in that case, and not more, a consequence of the crime, as it is in this case. And once hold it to be consequential upon the crime, and you bring it within the inhibition, provided the punishment which it does inflict is not the punishment which the law inflicted at the time the crime is alleged to have been committed.

131
As a member of that Church which claims to have its authority directly through a regular and unbroken apostolic succession from the Author of our religion, Mr. Cummings is found in the enjoyment and practice of all the privileges belonging to the function and of all the sacred rights which are incident to it. The Constitution of the United States, to be sure, so far as the article which proclaims that there shall be no interference with religion is concerned, is not obligatory upon the State of Missouri; but it announces a great principle of American liberty, a principle deeply seated in the American mind, and now almost in the entire mind of the civilized world, that as between a man and his conscience, as relates to his obligations to God, it is not only tyrannical but unchristian to interfere. It is almost inconceivable that in this civilized day the doctrines contained in this constitution should be considered as within the legitimate sphere of human power. 'This question,' it has been truly said by another clergyman sought to be restrained by this constitution, 'is not one merely of loyalty or disloyalty, past, present, or prospective. The issue is whether the Church shall be free or not to exercise her natural and inherent right of calling into, or rejecting from, her ministry whom she pleases; whether yielding to the dictation of the civil power she shall admit those only who, according to its judgment, are fit for the office, or, admitting those to be fit, whether she shall not be free to admit those also who, though at first not fit, afterwards become so through pardon and forgiveness.

132
'The question is whether the Church is not as much at liberty and as fully competent nowadays as at the beginning to call in as well the saints as those who were sinners, as well the Baptist and Evangelist as St. Peter and St. Paul, the denier and persecutor of the Redeemer, as well as his presanctified messenger and beloved disciple. With all these questions the State itself has nothing to do. Their decision is the high and unapproachable prerogative of the Church, under the guidance of its Redeemer, who alone is the searcher of hearts, and whose power it is to recall or reject whom he pleases.'

133
My associate, in his opening of the case, has stated that the State government of Missouri was at one time, 1861, hostile to the government of the United States; and that loyal citizens were obliged to take up arms and overthrow it. No doubt the fact must be so admitted. Governor Claiborne Jackson, holding the executive authority of the State under a proper election, and the judiciary and the legislative departments of the same State holding their respective authorities under a proper election, held in pursuance of a constitution then existing and not disputed, were at

one time in the full possession of all the sovereignty of the State of Missouri, as far as that sovereignty was delegated by the people to its government. The Representatives of the State elected during the continuance of that constitution were received here. Their Senators were here, chosen by that legislature, and their credentials testified by the then governor. Their courts were in session under the authority of that constitution.

134

Under the decision in *Luther* v. *Borden*,[17] the court cannot go beyond these facts for the purpose of ascertaining in what condition, politically, Missouri was, for the purpose of answering the inquiry, what was the government of Missouri in 1861? Then it is plain that this oath calls upon the party to swear that he has been loyal to two governments of Missouri, one of which was directly opposed to the other.

135

Opposing counsel, indeed, say that the government of Missouri does not mean the government strictly speaking of the State of Missouri, constituted by the people of the State of Missouri; but that the government of Missouri is a compound, according to their view, consisting of the constitution and laws of Missouri and the Constitution and laws of the United States. But the argument is without force. When a law speaks of a State government it does not mean the government of the United States. Nor does it mean to include any authority over the people of a State which the government of the United States may possess by virtue of the Constitution of the United States. It means that political institution created by the people of the State for the government of the people of the State, without any regard at all to the other inquiry, over what subjects the people of that State have a right by government to assume jurisdiction.

136

If this is so, and it be true that a State governments is one governments as contradistinguished from all others, and that the government of the United States is another government as contradistinguished from a State government, then an oath which requires a party to swear that he has committed no act of hostility against the State government, and no act of hostility as against the government of the United States, is an oath which, if he has committed acts of hostility against the State government, renders it impossible that he can enjoy the franchise made dependent upon the failure to exercise any acts of hostility. Yet that is this oath.

137

It is said that what Missouri has done, in regulating the qualifications of those who are to hold office and pursue certain professions, is simply the right to define the qualifications which Missouri, in the exercise of her sovereignty, thinks proper to demand. Is it so? In one sense it is so; but is that the sense in which the provision has been incorporated in the constitution? To prescribe age, property qualifications, or any other qualification that anybody has an equal opportunity of acquiring, is one thing; to disqualify because of imputed crimes, is quite another thing. The powers of government exerted in the doing of these two things are entirely distinct. In the one, the power to regulate the qualifications for office, or

for the pursuit of callings, only is involved; in the other, the power of forfeiture under the power to punish is involved, and those two powers are altogether distinct. The one is the power which belongs to every government to define and punish crime. The other, that which belongs to every free government to provide for the manner in which its agents are to be chosen, and the conditions upon which its citizens may exercise their various callings and pursuits.

138

Mr. Justice FIELD delivered the opinion of the court.

139

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the test oath imposed by the constitution of that State. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the circuit courts of the State of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

140

The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts, against which it is directed, constitute offences of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offences in the laws of any State, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever 'been in armed hostility to the United States, or to the lawful authorities thereof,' but, among other things, that he has ever, 'by act or word,' manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his *desire* for their triumph over the arms of the United States, or his *sympathy* with those engaged in rebellion, or has ever *harbored* or *aided any person* engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever *entered* or *left* the State for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, *in any terms*, his *disaffection* to the government of the United States in its contest with the Robellion.

141

Every person who is unable to take this oath is declared incapable of holding, in the State, 'any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation.'

142

And every person holding, at the time the constitution takes effect, any of the offices, trusts, or positions mentioned, is required, within sixty days thereafter, to take the oath; and, if he fail to comply with this requirement, it is declared that his office, trust, or position shall *ipso facto* become vacant.

143
No person, after the expiration of the sixty days, is permitted, without taking the oath, 'to practice as an attorney or counsellor-at-law, nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages.'

144
Fine and imprisonment are prescribed as a punishment for holding or exercising any of 'the offices, positions, trusts, professions, or functions' specified, without having taken the oath; and false swearing or affirmation in taking it is declared to be perjury, punishable by imprisonment in the penitentiary.

145
The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the Rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified.

146
But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States. On behalf of Missouri, it is urged that they only prescribe a qualification for holding certain offices, and practising certain callings, and that it is therefore within the power of the State to adopt them. On the other hand, it is contended that they are in conflict with that clause of the counsel of Missouri, which forbids any State to pass a bill of attainder or an *ex post facto* law.

147

We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

148

These are general propositions and involve principles of the highest moment. But 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 which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

149

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean 'any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success.' It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

150
The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office many be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10 William III, chap. 32, if any person educated in or having made a profession of the Christian religion, did, 'by writing, printing, teaching, or advised speaking,' deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offence rendered incapably to hold any office or place of trust; and for the second he was rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail.[18]

151
By statute 1 George I, chap. 13, contempts against the king's title, arising from refusing or neglecting to take certain prescribed oaths, and yet acting in an office or place of trust for which they were required, were punished by incapacity to hold any public office; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of Parliament; and the offender was also subject to a forfeiture of five hundred pounds to any one who would sue for the same.[19]

152
'Some punishments,' says Blackstone, 'consist in exile or bainshment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like.'[20]

153
In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

154

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

155
Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri constitution being in effect punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

156
The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

157
It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck*,[21] Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.' "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

158
A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

159
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. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of

the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own nations of the enormity of the offence.

160
'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion, or 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.'[22]

161
These bills are generally directed against individuals by name; but they may be directed against a whole class. The bill against the Earl of Kildare and others, passed in the reign of Henry VIII,[23] enacted that 'all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said' late earl, and certain other parties, who were named, 'in his or their false and traitorous acts and purposes, shall in likewise stand, and be attainted, adjudged, and convicted of high treason;' and that 'the same attainder, judgment, and conviction against the said conforters, abettors, partakers, confederates, and adherents, shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act.'

162
These bills may inflict punishment absolutely, or may inflict it conditionally.

163
The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be forever banished from the realm; and that if he returned, or was found in England, or in any other of the king's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason; with the proviso, however, that if be surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect.[24]

164
'A British act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury.'[25]

165

If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

166

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

167

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

168

We proceed to consider the second clause of what Mr. Chief Justice Marshall terms a bill of rights for the people of each State—the clause which inhibits the passage of an *ex post facto* law.

169

By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

170

In *Fletcher* v. *Peck* Mr. Chief Justice Marshall defined an *ex post facto* law to be one 'which renders an act punishable in a manner in which it was not punishable when it was committed.' 'Such a law,' said that eminent judge, 'may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?'

171

The act to which reference is here made was one passed by the State of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act, annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime, which was not declared such by some previous law rendering him liable to that punishment, the chief justice was of opinion that the rescinding act had the effect of an *ex post facto* law, and was within the constitutional prohibition.

172

The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avoications. This deprivation is

punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

173

Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. It was no offence against any law to enter or leave the State of Missouri for the purpose of avoiding enrolment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law—'they impose a punishment for an act not punishable at the time it was committed.'

174

Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law—'they impose additional punishment to that prescribed when the act was committed.'

175

And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

176

The objectionable character of these clauses will be more apparent if we put them into the ordinary form of a legislative act. Thus, if instead of the general provisions in the constitution the convention had provided as follows: Be it enacted, that all persons who have been in armed hostility to the United States shall, upon conviction thereof, not only be punished as the laws provided at the time the offences charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts, and positions, and of exercising any of the pursuits mentioned in the second article of the constitution of Missouri;—no one would have any doubt of the nature of the enactment. It would be an *ex post facto* law, and void; for it would add a new punishment for an old offence. So, too, if the convention had passed an enactment of a similar kind with reference to those acts which do not constitute offences. Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the State of

Missouri, with intent to avoid enrolment or draft in the military service of the United States, shall, upon conviction thereof, be forever rendered incapable of holding any office of honor, trust, or profit in the State, or of teaching in any seminary of learning, or of preaching as a minister of the gospel of any denomination, or of exercising any of the professions or pursuits mentioned in the second article of the constitution; there would be no question of the character of the enactment. It would be an *ex post facto* law, because it would impose a punishment for an act not punishable at the time it was committed.

177

The provisions of the constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty, without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected. Take the case supposed by counsel—that of a man tried for treason and acquitted, or, if convicted, pardoned—the legislature may nevertheless enact that, if the person thus acquitted or pardoned does not take an oath that he never has committed the acts charged against him, he shall not be permitted to hold any office of honor or trust or profit, or pursue any avocation in the State. Take the case before us;—the constitution of Missouri, as we have seen, excludes, on failure to take the oath prescribed by it, a large class of persons within her borders from numerous positions and pursuits; it would have been equally within the power of the State to have extended the exclusion so as to deprive the parties, who are unable to take the oath, from any avocation whatever in the State. Take still another case:—suppose that, in the progress of events, persons now in the minority in the State should obtain the ascendency, and secure the control of the government; nothing could prevent, if the constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated or advised or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights.

178

A question arose in New York, soon after the treaty of peace of 1783, upon a statute of that State, which involved a discussion of the nature and character of these expurgatory oaths, when used as a means of inflicting punishment for past

conduct. The subject was regarded as so important, and the requirement of the oath such a violation of the fundamental principles of civil liberty, and the rights of the citizen, that it engaged the attention of eminent lawyers and distinguished statesmen of the time, and among others of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which, with his characteristic fulness and ability, he examines the oath, and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guarantees, secured by the Revolution, of the rights and liberties of the people.

179

'If we examine it' (the measure requiring the oath), said this great lawyer, 'with an unprejudiced eye, we must acknowledge, not only that it was an evasion of the treaty, but a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and, instead of obliging the State to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury. . . . It was a mode of inquiry who had committed and of those crimes to which the penalty of disqualification was annexed, with this aggravation, that it deprived the citizen of the benefit of that advantage, which he would have enjoyed by leaving, as in all other cases, the burden of the proof upon the prosecutor.

180

'To place this matter in a still clearer light, let it be supposed that, instead of the mode of indictment and trial by jury, the legislature was to declare that every citizen who did not swear he had never adhered to the King of Great Britain should incur all the penalties which our treason laws prescribe. Would this not be a palpable evasion of the treaty, and a direct infringement of the Constitution? The principle is the same in both cases, with only this difference in the consequences—that in the instance already acted upon the citizen forfeits a part of his rights; in the one supposed he would forfeit the whole. The degree of punishment is all that distinguishes the cases. In either, justly considered, it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one recognized by the laws and constitution of the State. I mean the trial by jury.

181

'Let us not forget that the Constitution declares that trial by jury, in all cases in which it has been formerly used, should remain inviolate forever, and that the legislature should at no time erect any new jurisdiction which should not proceed according to the course of the common law. Nothing can be more repugnant to the true genius of the common law than such an inquisition as has been mentioned into the consciences of men. . . . If any oath with retrospect to past conduct were to be made the condition on which individuals, who have resided within the British lines, should hold their estates, we should immediately see that this proceeding

would be tyrannical, and a violation of the treaty; and yet, when the same mode is employed to divest that right, which ought to be deemed still more sacred, many of us are so infatuated as to overlook the mischief.

182
'To say that the persons who will be affected by it have previously forfeited that right, and that, therefore, nothing is taken away from them, is a begging of the question. How do we know who are the persons in this situation? If it be answered, this is the mode taken to ascertain it—the objection returns—'tis an improper mode; because it puts the most essential interests of the citizen upon a worse footing than we should be willing to tolerate where inferior interests were concerned; and because, to elude the treaty, it substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law.'

183
Similar views have frequently been expressed by the judiciary in cases involving analogous questions. They are presented with great force in *The matter of Dorsey;*[26] but we do not deem it necessary to pursue the subject further.

184
The judgment of the Supreme Court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

185
AND IT IS SO ORDERED.

186
The CHIEF JUSTICE, and Messrs. Justice SWAYNE, DAVIS, and MILLER dissented. In behalf of this portion of the court, a dissenting opinion was delivered by Mr. Justice Miller. This opinion applied equally or more to the case of *Ex parte Garland* (the case next following), which involved principles of a character similar to those discussed in this case. The dissenting opinion is, therefore, published after the opinion of the court in that case.

1

Vol. 3, p. 24.

2

Declaration of Independence: Art. 2, Articles of Confederation; Art. 10, Amendments to the Constitution of the United States. Federalist, No. 45, p. 216, Masters, Smith & Co.'s edit. of 1857. Calder *v.* Bull, 3 Dallas, 386; City of New York *v.* Miln, 11 Peters, 102, 139.

3

Federalist, No. 45; Butler *v.* Pennsylvania, 10 Howard, 415; City of New York *v.* Miln, 11 Peters, 102, 139; In re Oliver, Lee & Co.'s Bank, 21 New York, 9.

4

1 Blackstone's Commentaries, 46; Sewall *v.* Lee, 9 Massachusetts, 367, citing 'Conspirator's Bill;' 2 Woodeson, 41, p. 621; Chase, J., in Calder *v.* Bull, 3 Dallas, 390, 391; Paterson, J., Id. 397; Carpenter *v.* Commonwealth of Pennsylvania, 17 Howard, 456, 463; The Earl of Strafford's Case, 3 Howell's State Trials, 1515; Sir John Fenwick's Case, 7 and 8 Wm. III, ch. 3; Bishop of Rochester's Case, 9 Geo. I, ch. 17.

5

Ross's Case, 2 Pickering, 165; Rand's Case, 9 Grattan, 738; Boston *v.* Cummins, 16 Georgia, 102; Charles River Bridge *v.* Warren Bridge, 11 Peters, 420.

6

Austin *v.* The State, 10 Missouri, 591; Simmons *v.* The State, 12 Id. 268; State *v.* Ewing, 17 Id. 515; The State of Mississippi *v.* Smedes & Marshall, 26 Mississippi, 47; The State *v.* Dews, R. M. Charlton, 397; Coffin *v.* The State, 7 Indiana, 157, 172; Conner *v.* City of New York, 2 Sandford, 355; Same case, 1 Selden, 285; Benford *v.* Gibson, 45 Ala. 521; West Feliciana Railroad Co. *v.* Johnson, 5 Howard's Mississippi, 277.

7

Federalist, No. 82.

8

3 Dallas, 473.

9

Letter to Major Cartwright, June 5, 1824; Jefferson's Works, vol. 4, p. 396.

10

Woodeson, Lecture 41.

11

Commentaries on the Constitution.

12

8 Peters, 110.

13

12 Wheaton, 267.

14

Number 44, by Mr. Madison.

15

1 Stat. at Large, p. 116, § 18.

16

12 Stat. at Large, pp. 589-590, § 3.

17

7 Howard, 1

18

4 Black 44.

19

Id. 124.

20

Id. 377.

21

6 Cranch, 137.

22

Commentaries, § 1344.

23

28 Henry VIII, chap. 18; 3 Stats. of Realm, 694.

24

Printed in 6 Howell's State Trials, p. 391.

25

Gaines *v.* Buford, 1 Dana, 510.

26

7 Porter, 294.

3

UNITED STATES v. LOVETT. SAME v. WATSON. SAME v. DODD.

Supreme Court

328 U.S. 303

66 S.Ct. 1073

90 L.Ed. 1252

UNITED STATES
v.
LOVETT. SAME v. WATSON. SAME v. DODD.

Nos. 809 to 811.

Argued May 3—6, 1946.

Decided June 3, 1946.

Mr. Ralph F. Fuchs, of Washington, D.C., for petitioner.

Mr. John C. Gall, of Washington, D.C., for the Congress of the United States, under House Resolution 386 and Public Law 249, 78th Congress, as amicus curiae by special leave of Court.

Mr. Charles A. Horsky, of Washington, D.C., for respondents.

Mr. Justice BLACK delivered the opinion of the Court.

1
In 1943 the respondents, Lovett, Watson, and Dodd, were and had been for several years working for the Government. The Government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in Section 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate.[1] 57 Stat. 431, 450. Notwithstanding the Congressional enactment, and the failure of the President to reappoint respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their

compensation ws discontinued after that date. To secure compensation for this post-November 15th work, respondents brought these actions in the Court of Claims. They urged that Section 304 is unconstitutional and void on the grounds that: (1) The Section, properly interpreted, shows a Congressional purpose to exercise the power to remove executive employees, a power not entrusted to Congress but to the Executive Branch of Government under Article II, Sections 1, 2, 3, and 4 of the Constitution; (2) the Section violates Article I, Section 9, Clause 3, of the Constitution which provides that 'no bill of attainder or ex post facto law shall be passed'; (3) the Section violates the Fifth Amendment, in that it singles out these three respondents and deprives them of their liberty and property without due process of law. The Solicitor General, appearing for the Government, joined in the first two of respondents' contentions but took no position on the third. House Resolution 386, 89 Cong.Rec. 10882, and Public Law 249, 78th Congress, 58 Stat. 113, authorized a special counsel to appear on behalf of the Congress. This counsel denied all three of respondents' contentions. He urged that Section 304 was a valid exercise of Congressional power under Article I, Section 8, Clause 1; Section 8, Clause 18; and Section 9, Clause 7 of the Constitution, which Sections empower Congress 'to lay and collect taxes * * * to pay the Debts and provide for the common Defence and general Welfare of the United States,' and 'to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,' and provide that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.' Counsel for Congress also urged that Section 304 did not purport to terminate respondents' employment. According to him, it merely cut off respondents' pay and deprived governmental agencies of any power to make enforceable contracts with respondents for any further compensation. The contention was that this involved simply an exercise of Congressional powers over appropriations, which according to the argument, are plenary and not subject to judicial review. On this premise counsel for Congress urged that the challenge of the constitutionality of Section 304 raised no justiciable controversy. The Court of Claims entered judgments in favor of respondents. Some of the judges were of the opinion that Section 304, properly interpreted, did not terminate respondents' employment, but only prohibited payment of compensation out of funds generally appropriated, and that, consequently, the continued employment of respondents was valid, and justified their bringing actions for pay in the Court of Claims. Other members of the Court thought Section 304 unconstitutional and void, either as a bill of attainder, an encroachment on exclusive executive authority, or a denial of due process. 66 F.Supp. 142, 104 Ct.Cl. 557. mwe granted certiorari because of the manifest importance of the questions involved. 327 U.S. 773, 66 S.Ct. 817.

2

In this Court the parties and counsel for Congress have urged the same points as they did in the Court of Claims. According to the view we take we need not decide whether Section 304 is an unconstitutional encroadchment on executive power or a denial of due process of law, and the section is not challenged on the ground that it

violates the First Amendment. Our inquiry is thus confined to whether the actions in the light of a proper construction of the Act present justiciable controversies and if so whether Section 304 is a bill of attainder against these respondents involving a use of power which the Constitution unequivocally declares Congress can never exercise. These questions require an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage. We, consequently, find it necessary to set out these circumstances somewhat in detail.

3

In the background of the statute here challenged lies the House of Representatives' feeling in the late thirties that many 'subversives' were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged. As part of its program against 'subversive' activities the House in May 1938 created a Committee on Un-American Activities, which became known as the Dies Committee after its Chairman, Congressman Martin Dies. H.R. 1282, 83 Cong.Rec. 7568-7587. This Committee conducted a series of investigations and made lists of people and organizations it thought 'subversive.' See e.g.: H.Rep. No. 1, 77th Cong., 1st Sess.; H.Rep.No.2748, 77th Cong., 2d Sess. The creation of the Dies Committee was followed by provisions such as Section 9A of the Hatch Act, 53 Stat. 1148, 1149, 18 U.S.C.A. § 61i, and Sections 15(f) and 17(b) of the Emergency Relief Appropriations Act of 1941, 54 Stat. 611, 15 U.S.C.A. §§ 721—728 note, which forbade the holding of a federal job by anyone who was a member of a political party or organization that advocated the overthrow of our Constitutional form of Government in the United States. It became the practice to include a similar prohibition in all appropriations acts, together with criminal penalties for its violation.[2] Under these provisions the Federal Bureau of Investigation began wholesale investigations of federal employees, which investigations were financed by special Congressional appropriations. 55 Stat. 292, 56 Stat. 468, 482. Thousands were investigated.

4

While all this was happening Mr. Dies on February 1, 1943, in a long speech on the floor of the House attacked thirty-nine named Government employees as 'irresponsible, unrepresentative, crackpot, radical bureaucrats' and affiliates of 'communist front organizations.' Among these named individuals were the three respondents. Congressman Dies told the House that respondents, as well as the other thirty-six individuals he named were because of their beliefs and past associations unfit to 'hold a government position' and urged Congress to refuse 'to appropriate money for their salaries.' In this connection he proposed that the Committee on Appropriations 'take immediate and vigorous steps to eliminate these people from public office.' 89 Cong.Rec. 474, 479, 486. Four days later an amendment was offered to the Treasury-Post Office Appropriato n Bill which provided that 'no part of any appropriation contained in this Act shall be used to pay the compensation of' the thirty-nine individuals Dies had attacked. 89 Cong.Rec. 645. The Congressional Record shows that this amendment precipitated a debate that continued for several days. Id. 645-742. All of those participating

agreed that the 'charges' against the thirty-nine individuals were serious. Some wanted to accept Congressman Dies' statements as sufficient proof of 'guilt,' while others referred to such proposed action as 'legislative lynching,' Id. at 651, smacking 'of the procedure in the French Chamber of Deputies, during in Reign of Terror.' Id. at 659. The Dies charges were referred to as 'indictments,' and many claimed this made it necessary that the named federal employees be given a hearing and a chance to prove themselves innocent. Id. at 771. Congressman Dies then suggested that the Appropriations Committee 'weigh the evidence and * * * take immediate steps to dismiss these people from the federal service.' Id. at 651. Eventually a resolution was proposed to defer action until the Appropriations Committee could investigate, so that accused federal employees would get a chance to prove themselves 'innocent' of communism or disloyalty, and so that each 'man would have his day in court,' and 'There would be no star chamber proceedings.' Id. at 711 and 713; but see Id. at 715. The resolution which was finally passed authorized the Appropriations Committee acting through a special subcommittee '* * * to examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States.' Id. at 734, 742. The Committee was to have full plenary powers, including the right to summon witnesses and papers, and was to report its 'findings and determination' to the House. It was authorized to attach legislation recommended by it to any general or special appropriation measure, notwithstanding general House rules against such practice. Id. at 734. The purpose of the resolution was thus described by the Chairman of the Committee on Appropriations in his closing remarks in favor of its passage: 'The third and the really important effect is that we will expedite adjudication and disposition of these cases and thereby serve both the accused and the Government. These men against whom charges are pending are faced with a serious situation. If they are not guilty they are entitled to prompt exoneration; on the other hand, if they are guilty, then the quicker the Government removes them the sooner and the more certainly will we protect the Nation against sabotage and fifth-column activity.' Id. at 741.

5

After the resolution was passed a special subcommittee of the Appropriations Committee held hearings in secret executive session. Those charged with 'subversive' beliefs and 'subversive' associations were permitted to testify, but lawyers including those representing the agencies by which the accused were employed were not permitted to be present. At the hearings, committee members, the committee staff, and whatever witness was under examination were the only ones present. The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and Federal Bureau of Investigation reports, the latter being treated as too confidential to be made public.

6

After this hearing the subcommittee's reports and recommendations were submitted to the House as part of the Appropriation Committee's report. The subcommittee stated that it had regarded the investigations 'as in the nature of an inquest of office' with the ultimate purpose of purging the public service of anyone found guilty of 'subversie activity.' The committee, stating that 'subversive activity' had not before been defined by Congress or by the courts formulated its own definition of 'subversive activity' which we set out in the margin.[3] Respondents Watson, Dodd, and Lovett were, according to the subcommittee guilty of having engaged in 'subversive activity within the definition adopted by the Committee.' H. Rep. No. 448, 78th Cong., 1st Sess. 5-7, 9. The ultimate finding and recommendation as to respondent Watson, which was substantially similar to the findings with respect to Lovett and Dodd, read as follows: 'Upon consideration of all the evidence, your committee finds that the membership and association of Dr. Goodwin B. Watson with the organizations mentioned and his views and philosophies as expressed in various statements and writings, constitute subversive activity within the definition adopted by your committee, and that he is, therefore, unfit for the present to continue in Government employment.' House Report No. 448, 78th Congress, 1st Session, 6. As to Lovett the Committee further reported that it had rejected a 'strong appeal' from the Secretary of the Interior for permission to retain Lovett in Government service, because as the Committee stated, it could not 'escape and conclusion that this official is unfit to hold a position with the Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States.' Id. at 12.

7

Section 304 was submitted to the House along with the Committee Report. Congressman Kerr was was chairman of the subcommittee stated that the issue before the House was simply: '* * * whether or not the people of this country want men who are not in sympathy with the institutions of this country to run it.' He said further: '* * * These people have no property rights in these offices. One Congress can take away their rights given them by another.' 89 Cong.Rec. 4583. Other members of the House during several days of debate bitterly attacked the measure as unconstitutional and unwise. Id. at 4482-4487, 4546-4556, 4581-4605. Finally Section 304 was passed by the House.

8

The Senate Appropriation Committee eliminated Section 304 and its action was sustained by the Senate. 89 Cong.Rec. 5024. After the first conference report which left the matter still in disagreement the Senate voted 69 to 0 against the conference report which left Section 304 in the bill. The House however insisted on the amendment and indicated that it would not approve any appropriation bill without Section 304. Finally after the fifth conference report showed that the House would not yield the Senate adopted Section 304. When the President signed the bill he stated: 'The Senate yielded, as I have been forced to yield, to avoid

delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.' H. Doc. 264, 78th Cong., 1st Sess.

I.

9

In view of the facts just set out we cannot agree with the two judges of the Court of Claims who held that Section 304 required 'a mere stoppage of disbursing routine, nothing more,' and left the employer governmental agencies free to continue employing respondents and to incur contractual obligations by virtue of such continued work which respondents could enforce in the Court of Claims. Nor can we agree with counsel for Congress that the Section did not provide for the dismissal of respondet § but merely forbade governmental agencies to compensate respondents for their work or to incur obligations for such compensation at any and all times. We therefore cannot conclude, as he urges, that Section 304 is a mere appropriation measure, and that since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

10

We hold that the purpose of Section 304 was not merely to cut off respondents' compensation through regular disbursing channels but permanently to bar them from government service, and that the issue of whether it is constitutional is justiciable. The Section's language as well as the circumstances of its passage which we have just described show that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency. Cf. United States v. Dickerson, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356. Any other interpretation of the Section would completely frustrate the purpose of all who sponsored Section 304, which clearly was to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job. What was challenged therefore is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work, except as jurors or soldiers. Respondents claimed that their discharge was unconstitutional; that they consequently rightfully continued to work for the Government and that the Government owes them compensation for services performed under contracts of employment. Congress has established the Court of Claims to try just such controversies. What is involved here is a Congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a Government job. Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, '* * * a limited constitution * * * (is) 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 the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.' Federalist Paper No. 78.

II.

11
We hold that Section 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that 'No Bill of Attainder or ex post facto Law shall be passed.' In Cummings v. State of Missouri, 4 Wall. 277, 323, 18 L.Ed. 356, this Court said, '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.' The Cummings decision involved a provision of the Missouri Reconstruction Constitution which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession. Cummings, a Catholic Priest, was convicted for teaching and preaching as a minister without taking the oath. The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never 'been a member of, or con ected with, any order, society, or organization, inimical to the government of the United States * * *.' In an illuminating opinion which gave the historical background of the Constitutional prohibition against bills of attainder, this Court invalidated the Missouri Constitutional provision both because it constituted a bill of attainder and because it had an ex post facto operation. On the same day the Cummings case was decided, the Court, in Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366, also held invalid on the same grounds an Act of Congress which required attorneys practicing before this Court to take a similar oath. Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Section 304. We do adhere to it.

12
Section 304 was designed to apply to particular individuals.[4] Just as the statute in the two cases mentioned it 'operates as a legislative decree of perpetual exclusion' from a chosen vocation. This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U.S.C. § 2, 18 U.S.C.A. § 2; acceptance of bribes by members of Congress, 18 U.S.C. §§ 199, 202, 203, 18 U.S.C.A. §§ 199,

202, 203; or by other government officials, 18 U.S.C. § 207, 18 U.S.C.A. § 207; and interference with elections by Army and Navy officers, 18 U.S.C. § 58, 18 U.S.C.A. § 58.

13
Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.[5] No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.'[6] The Constitution declares that that cannot be done either by a state or by the United States.

14
Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. See Duncan v. Kahanamoku, 66 S.Ct. 606. And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him. See Chambers v. State of Florida, 309 U.S. 227, 235—238, 60 S.Ct. 472, 476—478, 84 L.Ed. 716. When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one. Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here.

15
Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett, Watson, and Dodd. The judgment in their favor is affirmed.

16
Affirmed.

17

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

18

Mr. Justice FRANKFURTER, whom Mr. Justice REED joins, concurring.

19

Nothing would be easier than personal condemnation of the provision of the Urgency Deficiency Appropriation Act of 1943 here challenged. § 304, 57 Stat. 431, 450.[1]

20

But the judicial function exacts considerations very different from those which may determine a vote in Congress for or against a measure. And what may be decisive for a Presidential disapproval may not at all satisfy the established criteria which alone justify this Court's striking down an act of Congress.

21

It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. Although it was proposed at the Constitutional Convention to have this Court share in the legislative r ocess, the Framers saw fit to exclude it. And so 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Missouri, Kansas & Texas Ry. Co. of Texas v. May, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971. This admonition was uttered by Mr. Justice Holmes in one of his earliest opinions and it needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements.

22

Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint. The scrupulous observance, with some deviations, of the professed limits of this Court's power to strike down legislation has been, perhaps, the one quality the great judges of the Court have had in common. Particularly when congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason.

23

The inclusion of § 304 in the Appropriation Bill undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. And so the 'Court developed, for its own governance in cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Brandeis, J., concurring, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, at page 346, 56 S.Ct. 466, 480, at page 482, 80 L.Ed. 688. That a piece of legislation

under scrutiny may be widely unpopular is as irrelevant to the observance of these rules for abstention from avoidable adjudications as that it is widely popular. Some of these rules may well appear over-refined or evasive to the laity. But they have the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.

24
Such are the guiding considerations enjoined by constitutional principles and the best practice for dealing with the various claims of unconstitutionality so ably pressed upon us at the bar.

25
The Court reads § 304 as though it expressly discharged respondents from office which they held and prohibited them from holding any office under the Government in the future. On the basis of this reading the Court holds that the provision is a bill of attainder in that it 'inflicts punishment without a judicial trial', Cummings v. State of Missouri, 4 Wall. 277, 323, 18 L.Ed. 356, and is therefore forbidden by Article I, Section 9 of the Constitution. Congress is said to have inflicted this punishment upon respondents because it disapproved the beliefs they were thought to hold. Such a colloquial treatment of the statute neglects the relevant canons of constitutional adjudication and disregards those features of the legislation which call its validity into question on grounds other than inconsistency with the prohibition against bills of attainder. To characterize an act of Congress as a bill of attainder readily enlists, however, the instincts of a free people who are committed to a fair judicial process for the determination of issues affecting life, liberty, or property and naturally abhor anything that resembles legislative determination of guilt and legislative punishment. As I see it, our duty precludes reading § 304 as the Court reads it. But even if it were to be so read the provision is not within the constitutional conception of a bill of attainder.

26
Broadly speaking two types of constitutionalc laims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (e.g. 'due process,' 'equal protection of the laws,' 'just compensation'), and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.

27

The prohibition of bills of attainder falls of course among these very specific constitutional provisions. The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence. 'A bill of attainder, by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power in the form of a special statute * * * by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment per legem terrae.' Farrar, Manual of the Constitution (1867) 419. And see 2 Story, Commentaries on the Constitution (5th ed., 1891) 216; 1 Cooley, Constitutional Limitations (8th ed., 1927) 536. It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial, that the Constitution prohibited. It must be recalled that the Constitution was framed in an era when dispensing justice was a well-established function of the legislature. The prohibition against bills of attainder must be viewed in the background of the historic situation when moves in specific litigation that are now the conventional and, for the most part, the exclusive concern of courts were commonplace legislative practices. See Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648; Wilkinson v. Leland, 2 Pet. 627, 660, 7 L.Ed. 542; Baltimore & Susquehanna Railroad Co. v. Nesbit, 10 How. 395, 13 L.Ed. 469; Pound, Justice According to Law, II (1914) 14 Col.Rev. 1-12; Woodruff, Chancery in Massachusetts (1889) 5 L.Q.Rev. 370. Cf. Sinking-Fund Cases, 99 U.S. 700, 25 L.Ed. 496, 504. Bills of attainder were part of what now are staple judicial functions which legislatures then exercised. It was this part of their recognized authority which the Constitution prohibited when it provided that 'No Bill of Attainder * * * shall be passed.' Section 304 lacks the characteristics of the enactments in the Statutes of the Realm and the Colonial Laws that bear the hallmarks of bills of attainder.

28

All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable ex post facto. Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause 'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. But if it is no an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made. When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchial England and was employed in the colonies. They were familiar with its nature; they had experienced

its use; they knew what they wanted to prevent. It was not a law unfair in general, even unfair because affecting merely particular individuals, that they outlawed by the explicitness of their prohibition of bills of attainder. 'Upon this point a page of history is worth a volume of logic.' New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963, 16 A.L.R. 660. Nor should resentment against an injustice displace controlling history in judicial construction of the Constitution.

29
Not only does § 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. The punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties.

30
The Constitution outlaws this entire category of punitive measures. Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162; Cummings v. State of Missouri, 4 Wall. 277, 18 L.Ed. 356. The amount of punishment is immaterial to the classification of a challenged statute. But punishment is a prerequisite.

31
Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, Hawker v. People of State of New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002, or because he is no longer qualified, Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623. 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.' Cummings v. State of Missouri, 4 Wall. 277, 320, 18 L.Ed. 356.

32
Is it clear then that the respondents were removed from office, still accepting the Court's reading of the statute, as a punishment for past acts? Is it clear, that is, to that degree of certitude which is required before this Court declares legislation by Congress unconstitutional? The disputed section does not say so. So far as the House of Representatives is concerned, the Kerr Committee, which proposed the measure, and many of those who voted in favor of the Bill (assuming it is appropriate to go behind the terms of a statute to ascertain the unexpressed motive of its members), no doubt considered the respondents 'subversive' and wished to exclude them from the Government because of their past associations and their present views. But the legislation upon which we now pass judgment is the product of both Houses of Congress and the President. The Senate five times rejected the substance of § 304. It finally prevailed, not because the Senate joined

in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of § 304) without passing any judgment on their past conduct or present views.

33
Section 304 became law by the President's signature. His motive in allowing it to become law is free from doubt. He rejected the notion that the respondents wer 'subversive,' and explicitly stated that he wished to retain them in the service of the Government. H. Doc. No. 264, 78th Cong., 1st Sess. Historically, Parliament passed bills of attainder at the behest of the monarch. See Adams, Constitutional History of England (Rev. ed., 1935) 228-29. The Constitution, of course, provides for the enactment of legislation even against disapproval by the executive. But to hold that a measure which did not express a judgment of condemnation by the Senate and carried an affirmative disavowal of such condemnation by the President constitutes a bill of attainder, disregards the historic tests for the determining what is a bill of attainder. At the least, there are such serious objections to finding § 304 a bill of attainder that it can be declared unconstitutional only by a failure to observe that this Court reaches constitutional invalidation only through inescapable necessity. 'It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallability of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.' 1 Cooley, Constitutional Limitations (8th ed., 1927) 332.

34
But even if it be agreed, for purposes of characterizing the deprivation of the statute as punishment, that the motive of Congress was past action of the respondents, presumed motive cannot supplant expressed legislative judgment. 'The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express.' United States v. Goelet, 232 U.S. 293, 298, 34 S.Ct. 431, 433, 58 L.Ed. 610. Congress omitted from § 304 any condemnation for which the presumed punishment was a sanction. Thereby it negatived the essential notion of a bill of attainder. It may be said that such a view of a bill of attainder offers Congress too easy a mode of evading the prohibition of the Constitution. Congress need merely omit its ground of condemnation and legislate the penalty! But the prohibition against a 'Bill of Attainder' is only one of the safeguards of liberty in the arsenal of the Constitution. There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens. The restrictive function of this clause against bills of attainder was to take from the legislature a judicial function which the legislature once possessed. If Congress adopted, as it did, a form of statute so lacking in any pretension to the very quality which gave a bill of attainder its significance, that of a declaration of guilt under circumstances which made its determination grossly unfair, it simply passed an act which this Court ought not to denounce as a bill of attainder. And not the less so

because Congress may have been conscious of the limitations which the Constitution has placed upon it against passing bills of attainder. If Congress chooses to say that men shall not be paid, or even that they shall be removed from their jobs, we cannot decide that Congress also said that they are guilty of an offense. And particularly we cannot so decide as a necessary assumption for declaring an act of Congress invalid. Congress has not legislated that which is attributed to it, for the simple fact is that Congress has said nothing. The words Congress used are not susceptible of being read as a legislative verdict of guilt against the respondents no matter what dictionary, or what form of argumentation, we use as aids.

35
This analysis accords with our prior course of decision. In Cummings v. State of Missouri, supra, and Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366, the Court dealt with legislation of very different scope and significance from that now before us. While the statutes in those cases did not condemn or punish specific persons by name they proscribed all guilty of dei gnated offenses. Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment. Avoidance of legislative proscription for guilt under the Cummings and Garland statutes required positive exculpation. That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for insuring identification. These enactments followed the example of English bills of attainder which condemned a named person and 'his adherents.' Section 304 presents a situation wholly outside the ingredients of the statute that furnished the basis for the Cummings and Garland decisions.[2]

36
While § 304 is not a bill of attainder, as the gloss of history defines that phrase in the Constitution, acceptance of the Court's reading of § 304 would raise other serious constitutional questions. The first in magnitude and difficulty derives from the constitutional distribution of power over removal. For about a century this Court astutely avoided adjudication of the power of control as between Congress and the Executive of those serving in the Executive branch of the Government 'until it should be inevitably presented.' Myers v. United States, 272 U.S. 52, 173, 47 S.Ct. 21, 44, 71 L.Ed. 160. The Court then gave the fullest consideration to the problem. The case was twice argued and was under consideration for nearly three years. So far as the issues could be foreseen they were elaborately dealt with in opinions aggregating nearly two hundred pages. Within less than a decade an opinion of fifteen pages largely qualified what the Myers case had apparently so voluminously settled. Humphreys Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611. This experience serves as a powerful reminder of the Court's duty so to deal with congressional enactments as to avoid their invalidation unless a road to any other decision is barred.

37

The other serious problem the Court's interpretation of § 304 raises is that of due process. In one aspect this is another phase of the constitutional issue of the removal power. For, if § 304 is to be construed as a removal from office, it cannot be determined whether singling out three government employees for removal violated the Fifth Amendment until it is decided whether Congress has a removal power at all over such employees and how extensive it is. Even if the statute be read as a mere stoppage of disbursement the question arises whether Congress can treat three employees of the Government differently from all others. But that question we do not have to answer. In any event respondents are entitled to recover in this suit and their remedy—a suit in the Court of Claims—is the same whatever view one takes of the legal significance of § 304. To be sure, § 304 also purports to prescribe conditions relating to future employment of respondents by the Government. This too is a question not now open for decision. Reemployment by any agency of the Government, or the desire for reemployment, is not now in controversy, 'and consequently the subject may well be postponed until it actually arises for decision.' Wilson v. New, 243 U.S. 332, 354, 37 S.Ct. 298, 304, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas.1918A 1024. The 'great gravity and delicacy' of this Court's function in passing upon the validity of an act of Congress is called into action only when absolutely necessary. Liverpool, N.Y., and Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899. It should not be exercised on the basis of imaginary and non-existent facts. See Brandeis, J., concurring, in Ashwander v. Tennessee Valley Authorit, supra, 297 U.S. at pages 338, 345, 56 S.Ct. at pages 479—482, 80 L.Ed. 688.

38

Since it is apparent that grave constitutional doubts will arise if we adopt the construction the Court puts on § 304, we ought to follow the practice which this Court has established from the time of Chief Justice Marshall. The approach appropriate to such a case as the one before us was thus summarized by Mr. Justice Holmes in a similar situation: '* * * the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. United States v. Delaware & Hudson Co., 213 U.S. 366, 407, 408, 29 S.Ct. 527 (535, 536), 53 L.Ed. 836. United States v. Standard Brewery, 251 U.S. 210, 220, 40 S.Ct. 139 (141), 64 L.Ed. 229. State of Texas v. Eastern Texas R.R. Co., 258 U.S. 204, 217, 42 S.Ct. 281 (283), 66 L.Ed. 566; Bratton v. Chandler, 260 U.S. 110, 114, 43 S.Ct. 43 (44), 67 L.Ed. 157; Panama R. Co. v. Johnson, 264 U.S. 375, 390, 44 S.Ct. 391 (395), 68 L.Ed. 748. Words have been strained more than they need to be strained here in order to avoid that doubt. United States v. Jin Fuey Moy, 241 U.S. 394, 401, 402, 36 S.Ct. 658 (659), 60 L.Ed. 1061 (Ann.Cas.1917D, 854).' Blodgett v. Holden, 275 U.S. 142, 148, 276 U.S. 594, 48 S.Ct. 105, 107, 75 L.Ed. 206. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may

be avoided.' Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598.' Brandeis, J., concurring, in Ashwander v. Tennessee Valley Authority, supra, 297 U.S. at page 348, 56 S.Ct. at page 483, 80 L.Ed. 688.

39
We are not faced inescapably with the necessity of adjudicating these serious constitutional questions. The obvious, or at the least, the one certain construction of § 304 is that it forbids the disbursing agents of the Treasury to pay out of specifically appropriated moneys sums to compensate respondents for their services. We have noted the cloud cast upon this interpretation by manifestations by committees and members of the House of Representatives before the passage of this section. On the other hand, there is also much in the debates not only in the Senate but also in the House which supports the mere fiscal scope to be given to the statute. That such a construction is tenable settles our duty to adopt it and to avoid determination of constitutional questions of great seriousness.

40
Accordingly, I feel compelled to construe § 304 as did Mr. Chief Justice Whaley below, 66 F.Supp. 142, 104 Ct.Cl. 557, whereby it merely prevented the ordinary disbursal of money to pay respondents' salaries. It did not cut off the obligation of the Government to pay for services rendered and the respondents are, therefore, entitled to recover the judgment which they obtained from the Court of Claims.

1

Section 304 provides: 'No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by any with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this sections hall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.'

As we shall point out, the President signed the bill because he had to do so since the appropriated funds were imperatively needed to carry on the war. He felt, however, that section 304 of the bill was unconstitutional, and failed to reappoint respondents.

2

55 Stat. 92, § 5; 55 Stat. 265, § 504; 55 Stat. 303, § 7; 55 Stat. 366, § 10; 55 Stat. 408, § 3; 55 Stat. 446, § 5; 55 Stat. 466, § 704; 55 Stat. 492, House Doc. 833, 77th Cong., 2nd Sess.

3

'Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage.' H. Rep, No. 448, 78th Cong., 1st Sess., p. 5.

4

This is of course one of the usual characteristics of bills of attainder. See Wooddeson, Law Lectures: A Systematical View of the Laws of England (1792), No. 41, 622.

5

See Cummings v. State of Missouri, supra, 4 Wall. at 325, 329, 18 L.Ed. 356; see also Fletcher v. Peck, 6 Cranch 87, 138, 139, 3 L.Ed. 162; Burgess v. Salmon, 97 U.S. 381, 385, 24 L.Ed. 1104.

6

See dissent of Mr. Justice Miller in Cummings v. State of Missouri, supra, 4 Wall. at page 388, 18 L.Ed. 356; see also Wooddeson, supra, at 624, 638 et seq. Section 304 has all the characteristics of bills of attainder even as they are set out by Justice Miller's dissent except the corruption of blood. 4 Wall. at page 387, 18 L.Ed. 356. The American precedents do not consider corruption of blood a necessary element. Originally a judgment of death was necessary to attaint and the consequences of attainder were forfeiture and corruption of blood. Coke, First Institute (on Littleton) (Thomas Ed. 1818) Vol. III, 559, 563, 565. If the judgment was lesser punishment than death there was no attaint and the bill was one of pains and penalties. Practically all the American precedents are bills of pains and penalties. See Thompson, Anti-Loyal st Legislation During the American Revolution (1908) 3 Ill.L.Rev. 81, 153 et passim.; John C. Hamilton, History of the Republic of the United States (1859) Vol. III, 23—40. The Constitution in prohibiting bills of attainder undoubtedly included bills of pains and penalties as the majority in the Commings case held.

1

'Sec. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: Provided further, That this section shall not operate to deprive any such person of

payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.'

2

Even against the holding that such enactments were bills of attainder, Mr. Justice Miller wrote the powerful dissent concurred in by Mr. Chief Justice Chase, Mr. Justice Swayne, and Mr. Justice Davis. 4 Wall. 333, 382, 18 L.Ed. 366.

4

UNITED STATES, Petitioner, v. Archie BROWN.

Supreme Court

381 U.S. 437

85 S.Ct. 1707

14 L.Ed.2d 484

UNITED STATES, Petitioner,
v.
Archie BROWN.

No. 399.

Argued March 29, 1965.

Decided June 7, 1965.

Archibald Cox, Sol. Gen., for petitioner.

Richard Gladstein, San Francisco, Cal., for respondent.

Mr. Chief Justice WARREN delivered the opinion of the Court.

1
In this case we review for the first time a conviction under § 504 of the Labor-Management Reporting and Disclosure Act of 1959, which makes it a crime for a member of the Communist Party to serve as an officer or (except in clerical or custodial positions) as an employee of a labor union.[1] Section 504, the purpose of which is to protect the national economy by minimizing the danger of political strikes,[2] was enacted to replace § 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, which conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party.[3]

2
Respondent has been a working longshoreman on the San Francisco docks, and an open and avowed Communist, for more than a quarter of a century. He was elected to the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union for consecutive one-year terms in 1959, 1960, and 1961. On May 24, 1961, respondent was charged in a one-count indictment returned in the Northern District of California with 'knowingly and wilfully serv(ing) as a

member of an executive board of a labor organization * * * while a member of the Communist Party, in wilful violation of Title 29, United States Code, Section 504.' It was neither charged nor proven that respondent at any time advocated or suggested illegal activity by the union, or proposed a political strike.[4] The jury found respondent guilty, and he was sentenced to six months' imprisonment. The Court of Appeals for the Ninth Circuit, sitting en banc, reversed and remanded with instructions to set aside the conviction and dismiss the indictment, holding that § 504 violates the First and Fifth Amendments to the Constitution. 334 F.2d 488. We granted certiorari, 379 U.S. 899, 85 S.Ct. 187, 13 L.Ed.2d 174.

3
Respondent urges—in addition to the grounds relied on by the court below—that the statute under which he was convicted is a bill of attainder, and therefore violates Art. I, § 9, of the Constitution.[5] We agree that § 504 is void as a bill of attainder and affirm the decision of the Court of Appeals on that basis. We therefore find it unnecessary to consider the First and Fifth Amendment arguments.

I.

4
The provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously, and without debate.[6]

5
'No Bill of Attainder or ex post facto Law shall be passed (by the Congress).' Art. I, § 9, cl. 3.

6
'No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.' Art. I, § 10.

7
A logical starting place for an inquiry into the meaning of the prohibition is its historical background. The bill of attainder, a parliamentary act sentencing to death one or more specific persons, was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government.[7] In addition to the death sentence, attainder generally carried with it a 'corruption of blood,' which meant that the attainted party's heirs could not inherit his property.[8] The 'bill of pains and penalties' was identical to the bill of attainder, except that it prescribed a penalty short of death,[9] e.g., banishment,[10] deprivation of the right to vote,[11] or exclusion of the designated party's sons from Parliament.[12] Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them.[13] While some left the designated parties a way of escaping the penalty, others did not.[14] The use of bills of attainder and bills of pains and penalties was not limited to England. During the American Revolution,

the legislatures of all thirteen States passed statutes directed against the Tories; among these statutes were a large number of bills of attainder and bills of pains and penalties.[15]

8

While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

9

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

10

'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'[16]

11

The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is not to be performed by a given branch. For example, Article III's grant of 'the judicial Power of the United States' to federal courts has been interpreted both as a grant of exclusive authority over certain areas. Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by courts, e.g., Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153.

12

The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, 'in a representative republic * * * where the legislative power is exercised by an assembly * * * which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of

pursuing the objects of its passions * * *,' barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments.[17] The Bill of Attainder Clause was regarded as such a barrier. Alexander Hamilton wrote:

13
'Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.'[18]

14
Thus the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.

15
'Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode.'[19]

16
By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. 'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.' Fletcher v. Peck, 6 Cranch 87, 136, 3 L.Ed. 162.[20]

II.

17
It is in this spirit that the Bill of Attainder Clause was consistently interpreted by this Court—until the decision in American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, which we shall consider hereafter. In 1810, Chief Justice Marshall, speaking for the Court in Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162, stated that '(a) bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.' This means, of course, that what

were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause. The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups. See also Ogden v. Saunders, 12 Wheat. 213, 286, 6 L.Ed. 606.

18
The approach which Chief Justice Marshall had suggested was followed in the twin post-Civil War cases of Cummings v. State of Missouri, 4 Wall. 277, 18 L.Ed. 356, and Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366. Cummings involved the constitutionality of amendments to the Missouri Constitution of 1865 which provided that no one could engage in a number of specified professions (Cummings was a priest) unless he first swore that he had taken no part in the rebellion against the Union. At issue in Garland was a federal statute which required attorneys to take a similar oath before they could practice in federal courts. This Court struck down both provisions as bills of attainder on the ground that they were legislative acts inflicting punishment on a specific group: clergymen and lawyers who had taken part in the rebellion and therefore could not truthfully take the oath. In reaching its result, the Court emphatically rejected the argument that the constitutional prohibition outlawed only a certain class of legislatively imposed penalties:

19
'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment.' 4 Wall., at 320.

20
The next extended discussion of the Bill of Attainder Clause[21] came in 1946, in United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252, where the Court invalidated § 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, which prohibited payment of further salary to three named federal employees,[22] as a bill of attainder.

21
'(L)egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. * * * This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. * * * No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive

Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.'[27]

32

He suggests that for purposes of the Bill of Attainder Clause, such conflict-of-interest laws[28] are not meaningfully distinguishable from the statute before us. We find this argument without merit. First, we note that § 504, unlike § 32 of the Banking Act, inflicts its deprivation upon the members of a political group thought to present a threat to the national security. As we noted above, such groups were the targets of the overwhelming majority of English and early American bills of attainder. Second, § 32 incorporates no judgment censuring or condemning any man or group of men. In enacting it, Congress relied upon its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to any man—not just certain men or members of a certain political party. Thus insofar as § 32 incorporates a condemnation, it condemns all men. Third, we cannot accept the suggestion that § 32 constitutes an exercise in specification rather than rule-making. It seems to us clear that § 32 establishes an objective standard of conduct. Congress determined that a person who both (a) held a position in a bank which could be used to influence the investment policies of the bank or its customers, and (b) was in a position to benefit financially from investment in the securities handled by a particular underwriting house, might well be tempted to 'use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take.' 329 U.S., at 447, 67 S.Ct., at 414. In designating bank officers, directors and employees as those persons in position (a), and officers, directors, partners and employees of underwriting houses as those persons in position (b), Congress merely expressed the characteristics it was trying to reach in an alternative, shorthand way.[29] That Congress was legislating with respect to general characteristics rather than with respect to a specific group of men is well demonstrated by the fact that § 32 provides that the prescribed disqualification should not obtain whenever the Board of Governors determined that 'it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments'. We do not suggest that such an escape clause is essential to the constitutionality of § 32, but point to it only further to point up the infirmity of the suggestion that § 32, like § 504, incorporates an empirical judgment of, and inflicts its deprivation upon, a particular group of men.

33

It is argued, however, that in § 504 Congress did no more than it did in enacting § 32: it promulgated a general rule to the effect that persons possessing characteristics which make them likely to incite political strikes should not hold union office, and simply inserted in place of a list of those characteristics an alternative, shorthand criterion—membership in the Communist Party. Again, we cannot agree. The designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase; on the

contrary, it rests, as the Court in Douds explicitly recognized, 339 U.S., at 389, 70 S.Ct., at 679, upon an empirical investigation by Congress of the acts, characteristics and propensities of Communist Party members. In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics. For, as the Court noted in Schneiderman v. United States, 320 U.S. 118, 136, 63 S.Ct. 1333, 1342, 87 L.Ed. 1796, 'under our traditions beliefs are personal and not a matter of mere association, and * * * men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.'[30] Just last Term, in Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992, we held § 6 of the Subversive Activities Control Act to violate the Constitution because it 'too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that § 6 inflicted its deprivation upon all members of the Communist organizations without regard to whether there existed any demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate. Id., at 509—511, 84 S.Ct., at 1665—1666. These cases are relevant to the question before us. Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, 'it cannot automatically be inferred that all members shar(e) their evil purposes or participat(e) in their illegal conduct.' Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 246, 77 S.Ct. 752, 760, 1 L.Ed.2d 796. In utilizing the term 'members of the Communist Party' to designate those persons who are likely to incite political strikes, it plainly is not the case that Congress has merely substituted a convenient shorthand term for a list of the characteristics it was trying to reach.[31]

IV.

34
The Solicitor General argues that § 504 is not a bill of attainder because the prohibition it imposes does not constitute 'punishment.' In support of this conclusion, he urges that the statute was enacted for preventive rather than retributive reasons—that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events. He relies on American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, which upheld § 9(h) of the National Labor Relations Act, the predecessor of the statute presently before us. In Douds the Court distinguished Cummings, Garland and Lovett on the ground that in those cases

35
'the individuals involved were in fact being punished for past actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into future conduct.' Id., at 413, 70 S.Ct. at 691.

36
This case is not necessarily controlled by Douds. For to prove its assertion that § 9(h) was preventive rather than retributive in purpose,[32] the Court in Douds focused on the fact that members of the Communist Party could escape from the class of persons specified by Congress simply by resigning from the Party:

37
'Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.' Id., at 414, 70 S.Ct. at 692.

38
Section 504, unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party. However, even if we make the assumption that the five-year provision was inserted not out of desire to visit retribution but purely out of a belief that failure to include it would lead to pro forma resignations from the Party which would not decrease the threat of political strikes, it still clearly appears that § 504 inflicts 'punishment' within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

39
Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes that is, the legislature made a judgment, undoubtedly based largely on past acts and associations (as § 504 is)[33] that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.[34] It is also clear that many of the early American bills attainting the Tories were passed in order to impede their effectively resisting the Revolution.

40
'In the progress of the conflict, and particularly in its earliest periods, attainder and confiscation had been resorted to generally, throughout the continent, as a means of war. But it is a fact important to the history of the revolting colonies, that the acts prescribing penalties, usually offered to the persons against whom they were directed the option of avoiding them, by acknowledging their allegiance to the existing governments.

41
'It was a preventive, not a vindictive policy. In the same humane spirit, as the contest approached its close, and the necessity of these severities diminished, many of the states passed laws offering pardons to those who had been

disfranchised, and restoring them to the enjoyment of their property * * *.'[35]

42
Thus Justice Iredell was on solid historical ground when he observed, in Calder v. Bull, 3 Dall. 386, 399—400, 1 L.Ed. 648, that 'attainders, on the principle of retaliation and proscription, have marked all the vicissitudes of party triumph.' (Emphasis supplied.)

43
We think that the Court in Douds misread United States v. Lovett when it suggested, 339 U.S., at 413, 70 S.Ct., at 691, that that case could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons. In Lovett the Court, after reviewing the legislative history of § 304 of the Urgent Deficiency Appropriation Act, 328 U.S., at 308—313, 66 S.Ct., at 1075—1077, concluded that the statute was the product of a congressional drive to oust from government persons whose (congressionally determined) 'subversive' tendencies made their continued employment dangerous to the national welfare: 'the purpose of all who sponsored Section 304 * * * clearly was to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job.' Id., at 314, 66 S.Ct., at 1078. Similarly, the purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill positions which might affect interstate commerce.[36]

44
The Solicitor General urges us to distinguish Lovett on the ground that the statute struck down there 'singled out three identified individuals.' It is of course true that § 504 does not contain the words 'Archie Brown,' and that it inflicts its deprivation upon more than three people. However, the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference. It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people,[37] sometimes by description rather than nane.[38] Moreover, the statutes voided in Cummings and Garland were of this nature.[39] We cannot agree that the fact that § 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder.

45
We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in Lovett that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in Lovett: that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals.

46

This Court is always reluctant to declare that an Act of Congress violates the Constitution, but in this case we have no alternative. As Alexander Hamilton observed:

47
'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 the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'[40]

48
The judgment of the Court of Appeals is affirmed.

49
Affirmed.

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Mr. Justice WHITE, with whom Mr. Justice CLARK, Mr. Justice HARLAN, and Mr. Justice STEWART join, dissenting.

51
'A bill of attainder is a legislative act which inflicts punishment without a judicial trial.' Cummings v. State of Missouri, 4 Wall. 277, 323, 18 L.Ed. 356. When an enactment is challenged as an attainder, the central inquiry must be whether the disability imposed by the act is 'punishment' (i.e., is directed at an individual or a group of individuals) or is 'regulation' (i.e., is directed at controlling future conduct). Flemming v. Nestor, 363 U.S. 603, at 613—614, 80 S.Ct. 1367, at 1374—1375, 4 L.Ed.2d 1435; accord, Trop v. Dulles, 356 U.S. 86, 95 96, 78 S.Ct. 590, 595—596, 2 L.Ed.2d 630 (Warren, C.J., announcing judgment). Whether a punitive purpose would be inferred has depended in past cases on a number of circumstances, including the nature of the disability, whether it was traditionally regarded as punishment, whether it is rationally connected to a permissible legislative objective, as well as the specificity of the legislature's designation of the persons to be affected. See generally Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168—169, 83 S.Ct. 554, 567—568, 9 L.Ed.2d 644.

52
In this case, however, the Court discards this meticulous multifold analysis that has been deemed necessary in the past. Instead the Court places the burden of separating attainders from permissible regulation on an examination of the legislative findings implied by the nature of the class designated. The Bill of Attainder Clause, the Court says, was intended to implement the separation of powers by confining the legislature to rule-making and preventing legislative invasion of a function left exclusively to the courts—fact-finding connected with applications of a general rule to individuals or groups. Section 504 of the Labor-Management Reporting and Disclosure Act is therefore a bill of attainder because in

pursuit of its purpose of preventing political strikes, it has specified the persons—Communist Party members—who are to be disqualified from holding union office, rather than excluding all persons who might engage in the undesirable conduct. The vice in s 504 is that it does not set forth a rule generally applicable to 'any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes)' but has instead designated 'the persons who possess the feared characteristics,' members of the Communist Party. Ante, at 450.

53
At this point the Court implies that legislation is sufficiently general if it specifies a characteristic that makes it likely that individuals falling within the group designated will engage in conduct Congress may prohibit. But the Court then goes on to reject the argument that Communist Party membership is in itself a characteristic raising such a likelihood. The Court declares that '(e)ven assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, '* * * it cannot automatically be inferred that all members shar(e) their evil purposes or participat(e) in their illegal conduct." Ante, at 456. (Emphasis added.) This sudden shift in analysis—from likelihood to certainty—must mean that the Bill of Attainder Clause proscribes legislative action with respect to any group smaller than the total class possessing the characteristic upon which legislative power is premised whenever the legislation is based only on a finding about the average characteristics of the subgroup. The legislature may focus on a particular group or class only when the group designation is a 'shorthand phrase' for the feared characteristic—i.e., when it is common knowledge that all, not just some, members of the group possess the feared characteristic and thus such legislative designation would require no legislative fact-finding about individuals.[1]

54
In the Court's view, therefore, § 504 is too narrow in specifying the particular class; but it is also too broad in treating all members of the class alike. On both counts underinclusiveness and overinclusiveness—s 504 is invalid as a bill of attainder because Congress has engaged in forbidden fact-finding about individuals and groups and has thus strayed into the area reserved to the judiciary by the Constitution.

I.

55
It is not difficult to find some of the cases and statutes which the necessary implications of the Court's approach will overrule or invalidate.

56
American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, which upheld the predecessor statute to § 504 is obviously In that case the Court accepted the congressional findings about the Communist Party and about the propensity of Party members 'to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the

policies of a foreign government.' 339 U.S. at 388, 70 S.Ct., at 678. Moreover, Congress was permitted to infer from a person's 'political affiliations and beliefs' that such a person would be likely to instigate political strikes. 339 U.S., at 391 392, 70 S.Ct., at 680. Like § 504, the statute there under consideration did not cover all persons who might be likely to call political strikes. Nevertheless, legislative findings that some Communists would engage in illegal activities were sufficient to sustain the exercise of legislative power. The Bill of Attainder Clause now forbids Congress to do precisely what was validated in Douds.

57
Similarly invalidated are statutes denying positions of public importance to groups of persons identified by their business affiliations, commonly known as conflict-of-interest statutes. In the Douds case the Court found in such statutes support for its conclusion that Congress could rationally draw inferences about probable conduct on the basis of political affiliations and beliefs, which it considered comparable to business affiliations. The majority in the case now before us likewise recognizes the pertinency of such statutes and, in its discussion of Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441, 67 S.Ct. 411, 91 L.Ed. 408, strenuously —and unsuccessfully—attempts to distinguish them.

58
The statute involved in Agnew, § 32 of the Banking Act of 1933, 48 Stat. 194, as amended, 12 U.S.C. § 78 (1964 ed.), forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank. The Court expressly recognized that the statute was directed to the 'probability or likelihood' that a bank director who was also a partner or employee of an underwriting firm 'may use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take.' 329 U.S., at 447, 67 S.Ct., at 414. (Emphasis added.) And, as we noted in Douds, 339 U.S., at 392, 70 S.Ct., at 681, '(t)here was no showing, nor was one required, that all employees of underwriting firms would engage in such conduct.' See also Agnew, 329 U.S., at 449, 67 S.Ct., at 415.

59
In terms of the Court's analysis of the Bill of Attainder Clause, no meaningful distinction may be drawn between § 32 of the Banking Act and § 504. Both sections disqualify a specifically described group, officers and employees of underwriting firms in the one case and members of the Communist Party in the other. Both sections may be said to be underinclusive: others besides underwriters may have business interests conflicting with the duties of a bank director and others than Communists may call political strikes. Equally, both sections may be deemed overinclusive: neither section finds that all members of the group affected would violate their obligations to the office from which they are disqualified; some members would and perhaps others would not. Both sections are based on a probability or likelihood that this would occur. Both sections leave to the courts the task of determining whether particular persons are members of the designated groups and occupy the specified positions.

60
In attempting to distinguish the two sections, the Court states that in enacting § 32 of the Banking Act Congress made no judgment or condemnation of any specific group of persons. Instead, the Court reasons, 'Congress relied upon its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to any man—not just certain men or members of a certain political party.' Ante, at 454. But § 32 disqualifies only partners and employees of underwriting firms, not other businessmen with conflicting interests. And § 504 applies to any man who occupies the two positions of labor union leader and member of the Communist Party. If based upon 'its general knowledge of human psychology' Congress may make findings about a group including members and employees of underwriting firms which disqualify such persons from a certain office, why may not Congress on a similar basis make such a finding about members of the Communist Party? 'Because of their business connections, carrying as they do certain loyalties, interests and disciplines,' § 32 disqualifies members and employees of underwriting firms as posing 'a continuing threat of participation in the harmful activities * * *.' Douds, 339 U.S., at 392, 70 S.Ct., at 681. The same might be said about § 504, as was said about its predecessor: 'Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by § 9(h) would be subject to 'tempting opportunities' to commit acts deemed harmful to the national economy. In this respect, § 9(h) is not unlike a host of other statutes which prohibit specified groups of persons from holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.' Id., at 392, 70 S.Ct., at 681.

61
Conflict-of-interest statutes are an accepted type of legislation.[2] Indeed, our Constitution contains a conflict-of-interest provision in Art. I, § 6, cl. 2, which prohibits any Congressman from simultaneously holding office under the United States. If the Court would save the conflict-of-interest statutes, which apparently it would, it is difficult to understand why § 504 is stricken down as a bill of attainder.

62
Other legislative enactments relevant here are those statutes disqualifying felons from occupying certain positions. The leading case is Hawker v. People of State of New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002, which upheld a provision prohibiting convicted felons from practicing medicine against a claim that, as applied to one convicted before its enactment, it was an ex post facto law. The Court noted that a legislature may establish qualifications for the practice of medicine, and character may be such a qualification. Conviction of a felony, the Court reasoned, may be evidence of character:

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'It is not open to doubt that the commission of crime * * * has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience. * * *

64
'It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist.' 170 U.S., at 196—197, 18 S.Ct., at 576.

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Accord, De Veau v. Braisted, 363 U.S. 144, 159—160, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (Frankfurter, J., announcing judgment) (bill of attainder and ex post facto challenges).

66
Like § 504, the legislation challenged in Hawker was both overinclusive and underinclusive. Felons were not the only persons who might possess character defects making them unsuitable practitioners of medicine; and, as the Court expressly noted, not all felons would lack good moral character. Nevertheless, the legislature was permitted to disqualify all members of the class, rather than being required to delegate to the courts the responsibility of determining the character of each individual based on all relevant facts, including the prior conviction. The legislative findings that sustained the legislation attacked in Hawker were simply that a substantial number of felons would be likely to abuse the practice of medicine because of their bad character. It is just such findings respecting the average propensities of a given class of persons to engage in particular conduct that the Court will not now permit under the Bill of Attainder Clause. Though the Court makes no attempt to distinguish the Hawker-type laws it apparently would save them, see Trop v. Dulles, 356 U.S. 86, 96—97, 78 S.Ct. 590, 595—596, 2 L.Ed.2d 630 (Warren, C.J., announcing judgment), and with them the provision of the statute now before the Court which disqualifies felons from holding union office.[3]

67
The Court apparently agrees that the Subversive Activities Control Act was not a bill of attainder with regard to the Communist Party because, as the Court pointed out in Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625, the finding that the Party was a Communist-action organization was not made by the legislature but was made administratively, after a trial-type hearing and subject to judicial review. But this apparently does not settle whether the statute is a bill of attainder with respect to

Party members; for under today's approach, a finding about the Party and about some of its members does not cure the vice of overinclusiveness. The Subversive Activities Control Act attaches certain disqualifications to each Party member following the administrative-judicial finding that the Party is a Communist-action organization. Among other things, each Party member is disqualified from holding union office, almost the same disqualification as is involved here. Subversive Activities Control Act of 1950, § 5(a)(1)(E), added by the Act of Aug. 24, 1954, § 6, 68 Stat. 777, 50 U.S.C. § 784(a)(1)(E) (1958 ed.). I do not see how this and the other consequences attached to Party membership in that Act could survive examination under the principles announced today.

68
On the other hand, if the statutes involved in Hawker and Agnew are not bills of attainder, how can the Subversive Activities Control Act be an attainder with respect to members of the Communist Party? In the Communist Party case, the Board found that the '(Party's) principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives. This evidences domination and control over (the Party) by the Soviet Union, and a purpose to advance the objectives of the world Communist movement.' Modified Report of the Board, December 18, 1956, in Record in that case, p. 2538. That finding was expressly sustained by this Court. 367 U.S. 1, 57, 81 S.Ct. 1357, 1390. Certainly, if Hawker and Agnew are to be followed at all, these nonlegislative findings establish a sufficient probability or likelihood with regard to Party members—a sufficient temptation to Party members who are also union officers—to permit the legislature to disqualify Party members from union office as it did in the Subversive Activities Control Act.

69
And if the disqualification of Party members in the Subversive Activities Control Act is not a bill of attainder, neither is § 504. If it is § 504's specific designation of the Communist Party and its members which concerns the Court—if the Court would have the same concern if the statute in Agnew had disqualified the members of a particular underwriting firm—it seems to me that at this point this vice is no vice at all; for the Congress has provided in another statute, the Subversive Activities Control Act, for an adjudication about Communist-action organizations, the nature of the Party has now been adjudicated and an adequate probability about the future conduct of its members established to justify the disqualification which Congress has imposed. Compare Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 244, 77 S.Ct. 752, 759, 1 L.Ed.2d 796 (absent findings respecting nature of Communist Party at time of bar applicant's membership, membership in Party 15 years prior to application provides no rational ground for disqualification).

70
This, of course, is not the path the Court follows. Section 504 is said to impose punishment on specific individuals because it has disqualified all Communist Party members without providing for a judicial determination as to each member that he

will call a political strike. A likelihood of doing so based on membership is not enough. By the same token, a statute disqualifying Communists (or authorizing the Executive Branch to do so) from holding sensitive positions in the Government would be automatically infirm, as would a requirement that employees of the Central Intelligence Agency or the National Security Agency disclaim membership in the Communist Party, unless in each case it is proved by evidence other than membership in the Communist Party, the nature of which has already been adjudicated, that the individual would commit acts of disloyalty or subordinate his official undertakings to the interests of the Party.

71
But how does one prove that a person would be disloyal? The Communist Party's illegal purpose and its domination by a foreign power have already been adjudicated, both administratively and judicially. If this does not in itself provide a sufficient probability with respect to the individual who persists in remaining a member of the Party, or if a probability is in any event insufficient, what evidence with regard to the individual will be sufficient to disqualify him? If he must be apprehended in the act of calling one political strike or in one act of disloyalty before steps can be taken to exclude him from office, there is little or nothing left of the preventive or prophylactic function of § 504 or of the statutes such as the Court had before it in Hawker and Agnew.

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Examples of statutes that will now be suspect because of the Court's opinion but were, until today, unanimously accepted as legitimate exercises of legislative power could easily be multiplied. Such a catalogue in itself would lead one to inquire whether the Court's reasoning does not contain some flaw that explains such perverse results.

II.

73
One might well begin by challenging the Court's premise that the Bill of Attainder Clause was intended to provide a general dividing line between legislative and judicial functions and thereby to operate as the chief means of implementing the separation of powers. While it must be conceded that our system of government is based on the separation of powers and that the prohibition on bills of attainder is a judicially enforceable restraint on legislative power and therefore constitutes one among the many mechanisms implementing the separation of powers, that conclusion is the most that can be gleaned from the authorities cited by the Court. Some, like the statement quoted from Chief Justice Marshall, Fletcher v. Peck, 6 Cranch 87, 136, 3 L.Ed. 162, reflect views concerning 'whether the nature of society and of government does not prescribe some limits to the legislative power,' id., at 135, rather than an analysis of the bill-of-attainder provision. None assigns a preeminent position to that provision as compared with other restraints on the legislature.

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On the other hand, there are substantial reasons for concluding that the Bill of Attainder Clause may not be regarded as enshrining any general rule distinguishing between the legislative and judicial functions. Congress may pass legislation affecting specific persons in the form of private bills. It may also punish persons who commit contempt before it. So too, one may note that if Art. I, § 9, cl. 3, immortalizes some notion of the separation of powers at the federal level, then Art. I, § 10, necessarily does the same for the States. But it has long been recognized by this Court that '(w)hether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.' Dreyer v. People of State of Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L.Ed. 79; accord, e.g., Reetz v. People of State of Michigan, 188 U.S. 505, 507, 23 S.Ct. 390, 391, 47 L.Ed. 563; Carfer v. Caldwell, 200 U.S. 293, 297, 26 S.Ct. 264, 265, 50 L.Ed. 488; Sweezy v. State of New Hampshire, 354 U.S. 234, 255, 77 S.Ct. 1203, 1214, 1 L.Ed.2d 1311 (Warren, C.J., announcing judgment), 256—257, 77 S.Ct. 1214—1215 (Frankfurter, J., concurring), 268, 77 S.Ct. 1221 (Clark, J., dissenting).

III.

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The basic flaw in the Court's reasoning, however, is its too narrow view of the legislative process. The Court is concerned to separate the legislative and judicial functions by ensuring that the legislature does not infringe the judicial function of applying general rules to specific circumstances. Congress is held to have violated the Bill of Attainder Clause here because, on the one hand, § 504 does not encompass the whole class of persons having characteristics that would make them likely to call political strikes and, on the other hand, § 504 does single out a particular group, members of the Communist Party, not all of whom possess such characteristics. Because of this combination of underinclusiveness and overinclusiveness the Court concludes that Communist Party members were singled out for punishment, thus rejecting the Government's contention that § 504 has solely a regulatory aim.

76
The Court's conclusion that a statute which is both underinclusive and overinclusive must be deemed to have been adopted with a punitive purpose assumes that legislatures normally deal with broad categories and attack all of an evil at a time. Or if partial measures are undertaken, a legislature singles out a particular group for regulation only because the group label is a 'shorthand phrase' for traits that are characteristic of the broader evil. But this Court has long recognized in equal protection cases that a legislature may prefer to deal with only part of an evil. See, e.g., Railway Express Agency, Inc. v. People of State of New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086; People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184; Patsone v.

Commonwealth of Pennsylvania, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539. And it is equally true that a group may be singled out for regulation without any punitive purpose even when not all members of the group would be likely to engage in the feared conduct. '(I) f the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out.' Patsone v. Commonwealth of Pennsylvania, 232 U.S., at 144, 34 S.Ct., at 282. (Emphasis added.) That is, the focus of legislative attention may be the substantially greater likelihood that some members of the group would engage in the feared conduct compared to the likelihood that members of other groups would do so. This is true because legislators seldom deal with abstractions but with concrete situations and the regulation of specific abuses. Thus many regulatory measures are enacted after investigation into particular incidents or the practices of particular groups and after findings by the legislature that the practices disclosed are inimical to the public interest and should be prevented in the future. Not surprisingly, the resulting legislation may reflect in its specificity the specificity of the preceding legislative inquiry. See United States v. Boston & M.R. Co., 380 U.S. 157, 161—162, 85 S.Ct. 868, 870—871, 13 L.Ed.2d 728. But the fact that it does should not be taken, in itself, to be conclusive that the legislature's purpose is punitive. Admittedly the degree of specificity is a relevant factor—as when individuals are singled out by name—but because in many instances specificity of the degree here held impermissible may be wholly consistent with a regulatory, rather than a punitive purpose, the Court's per se approach cuts too broadly and invalidates legitimate legislative activity.

IV.

77
Putting aside the Court's per se approach based on the nature of the classification specified by the legislation, we must still test § 504 against the traditional definition of the bill of attainder as legislative punishment of particular individuals. In my view, § 504 does not impose punishment and is not a bill of attainder.

78
We have said that 'only the clearest proof could suffice' to establish that Congress' purpose was punitive rather than regulatory. Flemming v. Nestor, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435. A punitive purpose has been found when it could be said that a statute passed amid the fierce passions aroused by the Civil War bore no rational connection to any permissible legislative purpose. Cummings v. State of Missouri, 4 Wall. 277, 319, 322, 18 L.Ed. 356; see Dent v. State of West Virginia, 129 U.S. 114, 128, 9 S.Ct. 231, 235, 32 L.Ed. 623; Hawker v. People of State of New York, 170 U.S. 189, 198, 18 S.Ct. 573, 577, 42 L.Ed. 1002. The imposition of a particularly harsh deprivation without any discernible legitimate legislative purpose has similarly been characterized as penal. Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (Warren, C.J., announcing judgment). Similarly a punitive purpose has been found when such a purpose clearly appeared in the legislative history. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169, 83 S.Ct. 554, 568, 9 L.Ed.2d 644; United States v. Lovett, 328 U.S. 303,

308—314, 66 S.Ct. 1073, 1075—1078, 90 L.Ed. 1252. In other cases the analysis is more difficult. We summarized the relevant considerations in Kennedy v. Mendoza-Martinez, supra:

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'Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.' 372 U.S., at 168—169, 83 S.Ct., at 567, 568.

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An application of these criteria to § 504 compels the conclusion that it is regulatory rather than punitive.

81
Congress' concern with the possibility of political strikes is not simply a fictional concern advanced to mask a punitive purpose. Congress has sought to forestall political strikes since 1947, when it adopted § 9(h) of the National Labor Relations Act, which was sustained as a reasonable regulation in American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925. Section 504 was adopted as a fairer and more effective method of dealing with the same evil. H.R.Rep. No. 741, 86th Cong., 1st Sess. (1959), p. 33, U.S.Code Cong. & Admin.News 1959, p. 2424; 1 Leg.Hist. LMRDA 791. Section 9(h) had proved ineffective because many Communists would take the prescribed oath, which meant the only sanction available was a perjury prosecution that presented serious difficulties of proof. See Hearings before the House Committee on Un-American Activities, Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois, Area, 86th Cong., 1st Sess. (1959), pp. 519, 576; Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, Communist Domination of Unions and National Security, 82d Cong., 2d Sess. (1952), p. 54. Moreover, the oath requirement created inequities both because the disqualification imposed was visited on the whole union membership and because the taking of an oath was exacted of all union leaders, many of whom resented the requirement. See American Communications Ass'n v. Douds, 339 U.S., at 434—435, 70 S.Ct., at 701—702 (Jackson, J., concurring and dissenting); S.Rep. No. 187, 86th Cong., 1st Sess. (1959), pp. 7, 9, U.S.Code Cong. & Admin.News 1959, p. 2318; 1 Leg.Hist. LMRDA 403, 405. It was obviously reasonable for Congress to substitute § 504 for § 9(h), and no punitive purpose may be inferred from such congressional action.

82
Nor can it be denied that § 504 is reasonably related to a permissible legislative objective. In American Communications Ass'n v. Douds, we held that 'Congress could rationally find that the Communist Party is not like other political parties in

its utilization of positions of union leadership as means by which to being about strikes * * *' 339 U.S., at 391, 70 S.Ct., at 680, and therefore Congress could rationally infer that members of the Communist Party were likely to call political strikes. See also Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1, 93—94, 112, 81 S.Ct. 1357, 1408—1409, 1419, 6 L.Ed.2d 625. In 1956 the Subversive Activities Control Board found, after a trial-type hearing, that the Party's principal leaders and a substantial number of its members recognize the disciplinary power of the Soviet Union. Without question the findings previously made by Congress and the Subversive Activities Control Board afforded a rational basis in 1959 for Congress to conclude that Communists were likely to call political strikes, and sufficiently more likely than others to do so that special measures could appropriately be enacted to deal with the particular threat posed.

83

In view of Congress' demonstrated concern in preventing future conduct—political strikes—and the reasonableness of the means adopted to that end, I cannot conclude that § 504 had a punitive purpose or that it constitutes a bill of attainder. I intimate no opinion on the issues that the Court does not reach.

1

73 Stat. 536, 29 U.S.C. § 504 (1958 ed., Supp. IV). The section, which took effect on September 14, 1959, provides, in pertinent part:

'(a) No person who is or has been a member of the Communist Party * * * shall serve—

'(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization. * * *

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

'(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.'

2

In American Communications Ass'n v. Douds, 339 U.S. 382, 388, 70 S.Ct. 674, 678, 94 L.Ed. 925, this Court found that 'the purpose of § 9(h) of the (National Labor Relations) Act (was) to remove * * * the so-called 'political strike." Section 504 was designed to accomplish the same purpose as § 9(h), but in a more direct and effective way. H.R.Rep. No. 741, 86th Cong., 1st Sess., p. 33; H.R.Rep. No. 1147, 86th Cong., 1st Sess., p. 36, U.S.Code Cong. & Admin.News 1959, p. 2318.

3

61 Stat. 146, amending the National Labor Relations Act of 1935, 49 Stat. 449. Section 9(h) provided:

'No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.'

Section 9(h) was repealed by § 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 525.

4

Evidence that the executive board had never called a strike was, upon the motion of the Government, stricken from the record, and a defense offer to prove that the union had not been involved in a strike since 1948 was rejected by the court.

5

Respondent first raised the bill of attainder argument in his motion to dismiss the indictment.

6

Madison, Debates in the Federal Convention of 1787, p. 449 (Hunt and Scott ed. 1920).

7

E.g., 3 Jac. 1, c. 2; 10 & 11 Will. 3, c. 13; 13 Will. 3, c. 3; 9 Geo. 1, c. 15.

8

3 Coke, First Institute (on Littleton), p. 565 (Thomas ed. 1818); Chafee, Three Human Rights in the Constitution of 1787, p. 96 (1956). Cf. U.S.Const., Art. III, § 3, cl. 2.

9

II Wooddeson, A Systematical View of the Laws of England, p. 638, (1792); II Story, Commentaries on the Constitution of the United States, p. 210 (4th ed. 1873); see, e.g., 13 Car. 2, Stat. I, c. 15; 9 Geo. 1, c. 15.

10

II Wooddeson, A Systematical View of the Laws of England, p. 638 (1792); see, e.g., 19 Car. 2, c. 10; Proceedings Against Hugh and Hugh Le Despencer, 1 State Trials 23 (1320).

11

E.g., 11 Geo. 3, c. 55.

12

21 Rich. 2, c. 6.

13

E.g., 26 Hen. 8, c. 25 (priv.), 3 Statutes of the Realm, p. 529; 8 Will. 3, c. 5.

14

See note 32, infra.

15

Van Tyne, The Loyalists in the American Revolution, apps. B & C (1902); Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill.L.Rev. 81, 147; Reppy, The Spectre of Attainder in New York, 23 St. John's L.Rev. 1. See Respublica v. Gordon, 1 Dall. 233, 1 L.Ed. 115; Cooper v. Telfair, 4 Dall. 14, 1 L.Ed. 721.

16

The Federalist, No. 47, pp. 373—374 (Hamilton ed. 1880).

17

The Federalist, No. 48, pp. 383—384 (Hamilton ed. 1880) (Madison); see generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton) and 78 (Hamilton).

18

III (John C.) Hamilton, History of the Republic of the United States, p. 34 (1859), quoting Alexander Hamilton. James Madison expressed similar sentiments:

'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 favour of personal security and private rights * * *. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with 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.' The Federalist, No. 44, p. 351 (Hamilton ed. 1880).

19

1 Cooley, Constitutional Limitations, pp. 536—537 (8th ed. 1927). To the same effect, see Calder v. Bull, 3 Dall. 386, 389, 1 L.Ed.2d 648; United States v. Lovett, 328 U.S. 303, 317 318, 66 S.Ct. 1073, 1079—1080, 90 L.Ed. 1252; II Story, Commentaries on the Constitution of the United States, p. 210 (4th ed. 1873); III

Hamilton, History of the Republic of the United States, p. 31 (1859); Pound, Justice According to Law II, 14 Col.L.Rev. 1, 7—12. Macaulay's account of the attainder of Sir John Fenwick is particularly vivid:

'Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was open, performed the office both of judge and jury. They were not restrained, as a judge is restrained, by the sense of responsibility * * *. They were not selected, as a jury is selected, in a manner which enables a culprit to exclude his personal and political enemies. The arbiters of the prisoner's fate came in and went out as they chose. They heard a fragment here and thereof what was said against him, and a fragment here and there of what was said in his favor. During the progress of the bill they were exposed to every species of influence. One member might be threatened by the electors of his borough with the loss of his seat * * *. In the debates arts were practised and passions excited which are unknown to well-constituted tribunals, but from which no great popular assembly divided into parties ever was or ever will be free.' IX Macaulay, History of England, p. 207 (1900).

20

The same thought is reflected in the writings of Thomas Jefferson: '173 despots would surely be as oppressive as one. * * * (L)ittle will it avail us that they are chosen by ourselves. * * * (T)he government we fought for (is) one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. * * * If * * * the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy * * *.' Jefferson, Notes on the State of Virginia, pp. 157—158 (Ford ed. 1894). (Emphasis supplied.)

21

In 1872, in Pierce v. Carskadon, 16 Wall. 234, 21 L.Ed. 276, the Court voided as a bill of attainder a West Virginia statute conditioning access to the courts upon the taking of an oath similar to those involved in Cummings and Garland. In Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623, this Court upheld a West Virginia statute requiring that physicians obtain a license in order to practice. Appellant argued, inter alia, that the statute was a bill of attainder because the granting of a license was conditioned upon graduating from medical school, practicing for 10 years, or passing a special examination. The Court rejected the argument on the ground that the statute set forth general

qualifications applicable to all persons who wanted to practice medicine, id., at 124, 9 S.Ct., at 234, and did not single out a specific person or group for deprivation. See also Drehman v. Stifle, 8 Wall. 595, 19 L.Ed. 508.

22

Section 304 provided:

'No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: Provided, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943 * * *.'

23

Although it may be that underinclusiveness is a characteristic of most bills of attainder, we doubt that it is a necessary feature. We think it clear from the Lovett opinion that § 304 would have been voided even if it could have been demonstrated that no one other than Lovett, Watson and Dodd possessed the characteristics which Congress was trying to reach. The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.

24

We of course take no position on whether or not members of the Communist Party are in fact likely to incite political strikes. The point we make is rather that the Constitution forbids Congress from making such determinations.

25

See 367 U.S., at 146, 81 S.Ct., at 1436 (Black, J., dissenting).

26

'It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party.' Noto v. United States, 367 U.S. 290, 299, 81 S.Ct. 1517, 1521, 6 L.Ed.2d 836.

It is argued that § 504 is not a bill of attainder because prior to its enactment there had been an administrative adjudication (by the Subversive Activities Control Board) of 'the nature of the Party.' Compare Hawker v. People of State of New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002; DeVeau v. Braisted, 363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109. Even leaving aside the fact that the legislative history of § 504, see note 2, supra, indicates that Congress was acting in reliance on the findings it had made in 1947 rather than on those made

by the Board in 1953, we think that this argument misses the point of the Court's opinion in the Communist Party case, where the Court stressed that the Subversive Activities Control Act did not name the Communist Party but rather set forth a broad definition, which would permit the Party to escape the prescribed deprivations in the event its character changed.

27

48 Stat. 194, as amended, 49 Stat. 709, 12 U.S.C. § 78 (1964 ed.).

28

A similar example is furnished by provisions forbidding state officers or employees from concurrently holding certain other types of positions, such as positions with the Federal Government. See, e.g., Cal.Const., Art. IV, § 20; cf. N.Y.Const., Art. III, § 7; U.S.Const., Art. I, § 6, cl. 2.

29

The command of the Bill of Attainder Clause—that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics—does not mean that a legislature cannot use a shorthand phrase to summarize the characteristics with which it is concerned. For example, a legislature might determine that persons afflicted with a certain disease which has as one of its symptoms a susceptibility to uncontrollable seizures should not be licensed to operate dangerous machinery. In enacting a statute to achieve this goal, the legislature could name the disease instead of listing the symptoms, for in doing so it would merely be substituting a shorthand phrase which conveys the same meaning.

30

To the same effect, see Noto v. United States, 367 U.S. 290, 299—300, 81 S.Ct. 1517, 1521—1522, 6 L.Ed.2d 836; Wieman v. Updegraff, 344 U.S. 183, 190, 73 S.Ct. 215, 218, 97 L.Ed. 216.

31

We rely on the 'overbroadness' cases only to buttress our conclusion that § 504 cannot be rationalized on the ground that membership in the Communist Party is merely an equivalent, shorthand way of expressing those characteristics which render likely the incitement of political strikes. We of course do not hold that overbroadness is a necessary characteristic of a bill of attainder.

32

The Court's opinion in Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1, 88, 81 S.Ct. 1357, 1406, 6 L.Ed.2d 625, also referred to the fact that the members of the class affected by the statute could extricate themselves from the class at will. However, whereas the factor of escapability was considered in Douds to be probative of whether or not the statute was punitive, in the Communist Party case it was considered only as one factor tending to show that the Act in question was not directed at a specific group of persons but rather set forth a generally applicable definition. See note 26, supra. We do not read

either opinion to have set up inescapability as an absolute prerequisite to a finding of attainder. Such an absolute rule would have flown in the face of explicit precedent, Cummings v. State of Missouri, 4 Wall. 277, 324, 18 L.Ed. 356, as well as the historical background of the constitutional prohibition. A number of ante-Constitution bills of attainder inflicted their deprivations upon named or described persons or groups, but offered them the option of avoiding the deprivations, e.g., by swearing allegiance to the existing government. See, e.g., Del.Laws 1778, c. 29b; Mass. Acts of September 1778, c. 13; III Hamilton, History of the Republic of the United States, p. 25 (1859); see generally Note, 72 Yale L.J. 330, 339—340.

33

American Communications Ass'n v. Douds, 339 U.S. 382, 389, 70 S.Ct. 674, 679, 94 L.Ed. 925; see note 2, supra.

34

See Ex parte Law, 15 Fed.Cas. pp. 3, 9—10, 35 Ga. 285 (No. 8,126) (D.C.S.D.Ga. 1866). Professor Chafee has pointed out that even the death penalty was often inflicted largely for preventive purposes: 'There was no good middle ground between beheading and doing nothing. If the ousted adviser were left at liberty, he could readily turn his resentment into coercion or rebellion and make a magnificent comeback to the utter ruin of those who had driven him from his high place. Therefore, the usual object of Parliamentary proceedings against an important minister was to put him to death.' Chafee, Three Human Rights in the Constitution of 1787, pp. 103—104 (1956).

The preventive purpose of the 'Act for the Attainder of the pretended Prince of Wales of High Treason' of 1700, 13 Will. 3, c. 3, is demonstrated by the parliamentary declaration that anyone corresponding with the Prince or his followers would be subject to prosecution for treason. See also Chafee, supra, pp. 109—113 (impeachment and attainder of the Earl of Strafford), 115—118 (bill against the Earl of Clarendon).

35

III Hamilton, History of the Republic of the United States, p. 25 (1859); see, e.g., Mass. Acts of September 1778, c. 13 ('An Act to Prevent the Return of Tories'); cf. Md. Laws February 1777, c. 20 ('An Act to punish certain crimes and misdemeanors, and to prevent the growth of toryism'); see also II Story, Commentaries on the Constitution of the United States, p. 211, n. 1 (4th ed. 1873); authorities cited note 15, supra.

36

Nor do the deprivations imposed by the two statutes differ in any meaningful way. Section 304 cut off the salary of the specified individuals, thereby effectively barring them from government service, 328 U.S. at 316, 66 S.Ct., at 1079; § 504 provides that specified persons cannot serve as officers of, or engage in most kinds of employment with, labor unions. Compare Del.Laws 1778, c. 29b; Cummings v. State of Missouri, 4 Wall. 277, 317, 320, 18 L.Ed. 356; Ex parte Garland, 4 Wall. 333, 374, 18 L.Ed. 366.

37

E.g., 12 Car. 2, c. 30; 19 Geo. 2, c. 26; 11 Geo. 3, c. 55.

38

Note 13, supra.

39

See also Ex parte Law, 15 Fed.Cas. pp. 3, 8, 35 Ga. 285 (No. 8,126) (D.C.S.D.Ga.1866); United States v. Lovett, 328 U.S. 303, 327, 66 S.Ct. 1073, 1084, 90 L.Ed. 1252 (Frankfurter, J., concurring).

40

The Federalist, No. 78, pp. 576—577 (Hamilton ed. 1880).

1

An overbroadness challenge could also be made under the First Amendment on the ground that in § 504 Congress has too broadly and indiscriminately visited disabilities on a class defined in terms of associational ties. See Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992. But the Court expressly disavows decision of First Amendment claims, and I likewise put such questions aside.

2

See, e.g., § 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. § 20 (1964 ed.) (requiring competitive bidding for certain transactions between a common carrier and other corporations when there are common directors), United States v. Boston & M.R. Co., 380 U.S. 157, 85 S.Ct. 868, 13 L.Ed.2d 728; § 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U.S.C. § 78p(b) (1964 ed.) (providing that profits made by directors, officers, and principal shareholders through short-swing transactions in corporation stock shall inure to benefit of corporation), Blau v. Lehman, 368 U.S. 403, 411—413, 82 S.Ct. 451, 455—457, 7 L.Ed.2d 403 § 310(b) of the Trust Indenture Act of 1939, 53 Stat. 1157 (making certain conflicting interests grounds for disqualification of indenture trustees).

3

For a partial listing of similar statutes, see De Veau v. Braisted, 363 U.S. 144, 159, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (Frankfurter, J., announcing judgment). De Veau v. Braisted itself sustained against a bill of attainder challenge, without dissent on this issue, a state statute disqualifying felons from holding office in waterfront labor unions.

5

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010)

Justia Opinion Summary and Annotations

Syllabus Opinion (Roberts) Dissent (Breyer)

SYLLABUS
OCTOBER TERM, 2009
FREE ENTERPRISE FUND V. PUBLIC COMPANYACCOUNTING OVERSIGHT BD.

SUPREME COURT OF THE UNITED STATES

FREE ENTERPRISE FUND et al. *v.* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD et al.

certiorari to the united states court of appeals for the district of columbia circuit

No. 08–861. Argued December 7, 2009—Decided June 28, 2010

Respondent, the Public Company Accounting Oversight Board, was created as part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002. The Board is composed of five members appointed by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Unlike these organizations, the Board is a Government-created entity with expansive powers to govern an entire industry. Every accounting firm that audits public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. The Board may inspect registered firms, initiate formal investigations, and issue severe sanctions in its disciplinary proceedings. The parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397, and that its members are " 'Officers of the United States' " who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U. S. 1, 125–126. While the SEC has oversight of the Board, it cannot remove Board members at will, but only "for good cause shown," "in accordance with" specified procedures. §§7211(e)(6), 7217(d)(3). The parties also agree that the Commissioners, in turn, cannot themselves be removed by the President except for " 'inefficiency, neglect of duty, or malfeasance in office.' " *Humphrey's Executor* v. *United States*, 295 U. S. 602, 620.

The Board inspected petitioner accounting firm, released a report critical of its auditing procedures, and began a formal investigation. The firm and petitioner Free Enterprise Fund, a nonprofit organization of which the firm is a member, sued the Board and its members, seeking, *inter alia,* a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers. Petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring executive power on Board members without subjecting them to Presidential control. The basis for petitioners' challenge was that Board members were insulated from Presidential control by two layers of tenure protection: Board members could only be removed by the Commission for good cause, and the Commissioners could in turn only be removed by the President for good cause. Petitioners also challenged the Board's appointment as violating the Appointments Clause, which requires officers to be appointed by the President with the Senate's advice and consent, or—in the case of "inferior Officers"—by "the President alone, ... the Courts of Law, or ... the Heads of Departments," Art. II, §2, cl. 2. The United States intervened to defend the statute. The District Court found it had jurisdiction and granted summary judgment to respondents. The Court of Appeals affirmed. It first agreed that the District Court had jurisdiction. It then ruled that the dual restraints on Board members' removal are permissible, and that Board members are inferior officers whose appointment

is consistent with the Appointments Clause.

Held:

1. The District Court had jurisdiction over these claims. The Commission may review any Board rule or sanction, and an aggrieved party may challenge the Commission's "final order" or "rule" in a court of appeals under 15 U. S. C. §78y. The Government reads §78y as an exclusive route to review, but the text does not expressly or implicitly limit the jurisdiction that other statutes confer on district courts. It is presumed that Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is " 'wholly "collateral" ' to a statute's review provisions"; and if the claims are "outside the agency's expertise." *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 212–213.

These considerations point against any limitation on review here. Section 78y provides only for review of *Commission* action, and petitioners' challenge is "collateral" to any Commission orders or rules from which review might be sought. The Government advises petitioners to raise their claims by appealing a Board sanction, but petitioners have not been sanctioned, and it is no "meaningful" avenue of relief, *Thunder Basin*, *supra*, at 212, to require a plaintiff to *incur* a sanction in order to test a law's validity, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129. Petitioners' constitutional claims are also outside the Commission's competence and expertise, and the statutory questions involved do not require technical considerations of agency policy. Pp. 7–10.

2. The dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers. Pp. 10–27.

(a) The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, §1, cl. 1. Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary. See generally *Myers* v. *United States*, 272 U. S. 52. This Court has determined that this authority is not without limit. In *Humphrey's Executor*, *supra*, this Court held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. And in *United States* v. *Perkins*, 116 U. S. 483, and *Morrison* v. *Olson*, 487 U. S. 654, the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. However, this Court has not addressed the consequences of more than one level of good-cause tenure. Pp. 10–14.

(b) Where this Court has upheld limited restrictions on the President's removal power, only one level of protected tenure separated the President from an officer exercising executive power. The President—or a subordinate he could remove at will—decided whether the officer's conduct merited removal under the good-cause standard. Here, the Act not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested in other tenured officers—the Commissioners—who are not subject to the President's direct control. Because the Commission cannot remove a Board member at will, the President cannot hold the Commission fully accountable for the Board's conduct. He can only review the Commissioner's determination of whether the Act's rigorous good-cause standard is met. And if the President disagrees with that determination, he is powerless to intervene—unless the determination is so unreasonable as to constitute " 'inefficiency, neglect of duty, or malfeasance in office.' " *Humphrey's Executor*, *supra,* at 620.

This arrangement contradicts Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. If this dispersion of responsibility were allowed to stand, Congress could multiply it further by adding still more layers of good-cause tenure. Such diffusion of power carries with it a diffusion of accountability; without a clear and effective chain of command, the public cannot determine where the blame for a pernicious measure should fall. The Act's restrictions are therefore incompatible with the Constitution's separation of powers. Pp. 14–17.

(c) The " 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. " *Bowsher* v. *Synar*, 478 U. S. 714, 736. The Act's multilevel tenure protections provide a blueprint for the extensive expansion of legislative power. Congress controls the salary, duties, and existence of executive offices, and only Presidential oversight can counter its influence. The Framers created a structure in which "[a] dependence on the people" would be the "primary controul on the government," and that dependence is maintained by giving each branch "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51, p. 349. A key "constitutional means" vested in the President was "the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Congress 463. While a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, "[t]he Framers recognized

that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, *supra,* at 730. Pp. 17–21.

(d) The Government errs in arguing that, even if some constraints on the removal of inferior executive officers might violate the Constitution, the restrictions here do not. There is no construction of the Commission's good-cause removal power that is broad enough to avoid invalidation. Nor is the Commission's broad power over Board *functions* the equivalent of a power to remove Board *members*. Altering the Board's budget or powers is not a meaningful way to control an inferior officer; the Commission cannot supervise individual Board members if it must destroy the Board in order to fix it. Moreover, the Commission's power over the Board is hardly plenary, as the Board may take significant enforcement actions largely independently of the Commission. Enacting new SEC rules through the required notice and comment procedures would be a poor means of micromanaging the Board, and without certain findings, the Act forbids any general rule requiring SEC preapproval of Board actions. Finally, the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of good-cause removal. Pp. 21–27.

3. The unconstitutional tenure provisions are severable from the remainder of the statute. Because "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234, the "normal rule" is "that partial ... invalidation is the required course," *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504. The Board's existence does not violate the separation of powers, but the substantive removal restrictions imposed by §§7211(e)(6) and 7217(d)(3) do. Concluding that the removal restrictions here are invalid leaves the Board removable by the Commission at will. With the tenure restrictions excised, the Act remains " 'fully operative as a law,' " *New York* v. *United States*, 505 U. S. 144, 186, and nothing in the Act's text or historical context makes it "evident" that Congress would have preferred no Board at all to a Board whose members are removable at will, *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684. The consequence is that the Board may continue to function as before, but its members may be removed at will by the Commission. Pp. 27–29.

4. The Board's appointment is consistent with the Appointments Clause. Pp. 29–33.

(a) The Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]." Inferior officers "are officers whose work is directed and supervised at some level" by superiors appointed by the President with the Senate's consent. *Edmond* v. *United States*, 520 U. S. 651, 662–663. Because the good-

cause restrictions discussed above are unconstitutional and void, the Commission possesses the power to remove Board members at will, in addition to its other oversight authority. Board members are therefore directed and supervised by the Commission. Pp. 29–30.

(b) The Commission is a "Departmen[t]" under the Appointments Clause. *Freytag* v. *Commissioner*, 501 U. S. 868, 887, n. 4, specifically reserved the question whether a "principal agenc[y], such as" the SEC, is a "Departmen[t]." The Court now adopts the reasoning of the concurring Justices in *Freytag*, who would have concluded that the SEC is such a "Departmen[t]" because it is a freestanding component of the Executive Branch not subordinate to or contained within any other such component. This reading is consistent with the common, near-contemporary definition of a "department"; with the early practice of Congress, see §3, 1 Stat. 234; and with this Court's cases, which have never invalidated an appointment made by the head of such an establishment. Pp. 30–31.

(c) The several Commissioners, and not the Chairman, are the Commission's "Hea[d]." The Commission's powers are generally vested in the Commissioners jointly, not the Chairman alone. The Commissioners do not report to the Chairman, who exercises administrative functions subject to the full Commission's policies. There is no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]" that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, §2, cl. 2, and each House of Congress appoints its officers collectively, see, *e.g.*, Art. I, §2, cl. 5. Practice has also sanctioned the appointment of inferior officers by multimember agencies. Pp. 31–33.

537 F. 3d 667, affirmed in part, reversed in part, and remanded.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined. Breyer, J., filed a dissenting opinion, in which Stevens, Ginsburg, and Sotomayor, JJ., joined.

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010)

Justia Opinion Summary and Annotations

Syllabus **Opinion (Roberts)** Dissent (Breyer)

OPINION OF THE COURT
FREE ENTERPRISE FUND V. PUBLIC COMPANYACCOUNTING OVERSIGHT BD.
561 U. S. _____ (2010)

SUPREME COURT OF THE UNITED STATES
NO. 08-861

FREE ENTERPRISE FUND and BECKSTEAD AND WATTS, LLP, PETITIONERS *v.* PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD et al.

on writ of certiorari to the united states court of appeals for the district of columbia circuit

[June 28, 2010]

Chief Justice Roberts delivered the opinion of the Court.

Our Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). Article II vests "[t]he executive Power ... in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary. See generally *Myers* v. *United States*, 272 U. S. 52 (1926). This Court has determined, however, that this authority is not without limit. In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States* v. *Perkins*, 116 U. S. 483 (1886), and *Morrison* v. *Olson*, 487 U. S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors. The parties do not ask us to reexamine any of these precedents, and we do not do so.

We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot

remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws." *Id.*, at 693.

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of 2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private "nonprofit corporation," and Board members and employees are not considered Government "officer[s] or employee[s]" for statutory purposes. 15 U. S. C. §§7211(a), (b). The Board can thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale. See §§7211(f)(4), 7219.[Footnote 1]

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards. §§7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "such other requirements as the Board may prescribe." §7213(a)(2)(B).

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§7213–7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. §78a *et seq.*—a federal crime punishable by up to 20 years' imprisonment or $25 million in fines ($5 million for a natural person). §§78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary

proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of $15 million ($750,000 for a natural person). §7215(c)(4). Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397 (1995), and that its members are " 'Officers of the United States' " who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U. S. 1, 125–126 (1976) (*per curiam*) (quoting Art. II, §2, cl. 2); cf. Brief for Petitioners 9, n. 1; Brief for United States 29, n. 8.

The Act places the Board under the SEC's oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and alteration). §§7217(b)–(c). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are substantially insulated from the Commission's control. The Commission cannot remove Board members at will, but only "for good cause shown," "in accordance with" certain procedures. §7211(e)(6).

Those procedures require a Commission finding, "on the record" and "after notice and opportunity for a hearing," that the Board member

"(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;

"(B) has willfully abused the authority of that member; or

"(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof." §7217(d)(3).

Removal of a Board member requires a formal Commission order and is subject to judicial review. See 5 U. S. C. §§554(a), 556(a), 557(a), (c)(B); 15 U. S. C. §78y(a)(1). Similar procedures govern the Commission's removal of officers and directors of the private self-regulatory organizations. See §78s(h)(4). The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office," 295 U. S., at 620 (internal quotation marks omitted); see Brief for Petitioners 31; Brief for United States 43; Brief for Respondent Public Company Accounting Oversight Board 31 (hereinafter PCAOB Brief); Tr. of Oral Arg. 47, and we decide the case with that understanding.

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers. App. 71.

Before the District Court, petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. *Id.*, at 67–68. Petitioners also challenged the Act under the Appointments Clause, which requires "Officers of the United States" to be appointed by the President with the Senate's advice and consent. Art. II, §2, cl. 2. The Clause provides an exception for "inferior Officers," whose appointment Congress may choose to vest "in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* Because the Board is appointed by the SEC, petitioners argued that (1) Board members are not "inferior Officers" who may be appointed by "Heads of Departments"; (2) even if they are, the Commission is not a "Departmen[t]"; and (3) even if it is, the several Commissioners (as opposed to the Chairman) are not its "Hea[d]." See App. 68–70. The United States intervened to defend the Act's constitutionality. Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents. App. to Pet. for Cert. 110a–117a.

A divided Court of Appeals affirmed. 537 F. 3d 667 (CADC 2008). It agreed that the District Court had jurisdiction over petitioners' claims. *Id.*, at 671. On the merits, the Court of Appeals recognized that the removal issue was "a question of first impression," as neither that court nor this one "ha[d] considered a situation where a restriction on removal passes through two levels of control." *Id.*, at 679. It ruled that the dual restraints on Board members' removal are permissible because they do not "render the President unable to perform his constitutional duties." *Id.*, at 683. The majority reasoned that although the President "does not directly select or supervise the Board's members," *id.*, at 681, the Board is subject to the comprehensive control of the Commission, and thus the President's influence over the Commission implies a constitutionally sufficient influence over the Board as well. *Id.*, at 682–683. The majority also held that Board members are inferior officers subject to the Commission's direction and supervision, *id.*, at 672–676, and that their appointment is otherwise consistent with the Appointments Clause, *id.*, at 676–678.

Judge Kavanaugh dissented. He agreed that the case was one of first impression, *id.*, at 698, but argued that "the double for-cause removal provisions in the [Act] ... combine to

eliminate any meaningful Presidential control over the [Board]," *id.*, at 697. Judge Kavanaugh also argued that Board members are not effectively supervised by the Commission and thus cannot be inferior officers under the Appointments Clause. *Id.*, at 709–712.

We granted certiorari. 556 U. S. ____ (2009).

II

We first consider whether the District Court had jurisdiction. We agree with both courts below that the statutes providing for judicial review of Commission action did not prevent the District Court from considering petitioners' claims.

The Sarbanes-Oxley Act empowers the Commission to review any Board rule or sanction. See 15 U. S. C. §§7217(b)(2)–(4), (c)(2). Once the Commission has acted, aggrieved parties may challenge "a final order of the Commission" or "a rule of the Commission" in a court of appeals under §78y, and "[n]o objection ... may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so." §§78y(a)(1), (b)(1), (c)(1).

The Government reads §78y as an exclusive route to review. But the text does not expressly limit the jurisdiction that other statutes confer on district courts. See, *e.g.*, 28 U. S. C. §§1331, 2201. Nor does it do so implicitly. Provisions for agency review do not restrict judicial review unless the "statutory scheme" displays a "fairly discernible" intent to limit jurisdiction, and the claims at issue "are of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 207, 212 (1994) (internal quotation marks omitted). Generally, when Congress creates procedures "designed to permit agency expertise to be brought to bear on particular problems," those procedures "are to be exclusive." *Whitney Nat. Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411, 420 (1965). But we presume that Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "wholly collateral to a statute's review provisions"; and if the claims are "outside the agency's expertise." *Thunder Basin*, *supra*, at 212–213 (internal quotation marks omitted). These considerations point against any limitation on review here.

We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory. Section 78y provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule.

The Government suggests that petitioners could first have sought Commission review of the Board's "auditing standards, registration requirements, or other rules." Brief for United States 16. But petitioners object to the Board's existence, not to any of its auditing standards. Petitioners' general challenge to the Board is "collateral" to any Commission orders or rules from which review might be sought. Cf. *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 491–492 (1991). Requiring petitioners to select and challenge a Board rule at random is an odd procedure for Congress to choose, especially because only *new* rules, and not existing ones, are subject to challenge. See 15 U. S. C. §§78s(b)(2), 78y(a)(1), 7217(b)(4).

Alternatively, the Government advises petitioners to raise their claims by appealing a Board sanction. Brief for United States 16–17. But the investigation of Beckstead and Watts produced no sanction, see *id.*, at 7, n. 5; Reply Brief for Petitioners 29, n. 11 (hereinafter Reply Brief), and an uncomplimentary inspection report is not subject to judicial review, see §7214(h)(2). So the Government proposes that Beckstead and Watts *incur* a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony. Brief for United States 17. If the Commission then affirms, the firm will win access to a court of appeals—and severe punishment should its challenge fail. We normally do not require plaintiffs to "bet the farm ... by taking the violative action" before "testing the validity of the law," *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129 (2007); accord, *Ex parte Young*, 209 U. S. 123 (1908), and we do not consider this a "meaningful" avenue of relief. *Thunder Basin*, 510 U. S., at 212.

Petitioners' constitutional claims are also outside the Commission's competence and expertise. In *Thunder Basin*, the petitioner's primary claims were statutory; "at root ... [they] ar[o]se under the Mine Act and f[e]ll squarely within the [agency's] expertise," given that the agency had "extensive experience" on the issue and had "recently addressed the precise ... claims presented." *Id.*, at 214–215. Likewise, in *United States* v. *Ruzicka*, 329 U. S. 287 (1946), on which the Government relies, we reserved for the agency fact-bound inquiries that, even if "formulated in constitutional terms," rested ultimately on "factors that call for [an] understanding of the milk industry," to which the Court made no pretensions. *Id.*, at 294. No similar expertise is required here, and the statutory questions involved do not require "technical considerations of [agency] policy." *Johnson* v. *Robison*, 415 U. S. 361, 373 (1974). They are instead standard questions of administrative law, which the courts are at no disadvantage in answering.

We therefore conclude that §78y did not strip the District Court of jurisdiction over these claims, which are properly presented for our review.[Footnote 2]

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers.

A

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, §1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). "This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986) (internal quotation marks omitted). And it soon became the "settled and well understood construction of the Constitution." *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The landmark case of *Myers* v. *United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." 272 U. S., at 164. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we explained in *Myers*, the President therefore must have some "power of removing those for whom he can not continue to be responsible." *Id.*, at 117.

Nearly a decade later in *Humphrey's Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for " 'inefficiency, neglect of duty, or malfeasance in office.' " 295 U. S., at 620 (quoting 15 U. S. C. §41). The Court distinguished *Myers* on the ground that *Myers* concerned "an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."

295 U. S., at 627. By contrast, the Court characterized the FTC as "quasi-legislative and quasi-judicial" rather than "purely executive," and held that Congress could require it "to act ... independently of executive control." *Id.*, at 627–629. Because "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," the Court held that Congress had power to "fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime." *Id.*, at 629.

Humphrey's Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers*, *supra*, at 119, 127; *Hennen*, *supra*, at 259–260. This Court has upheld for-cause limitations on that power as well.

In *Perkins*, a naval cadet-engineer was honorably discharged from the Navy because his services were no longer required. 116 U. S. 483. He brought a claim for his salary under statutes barring his peacetime discharge except by a court-martial or by the Secretary of the Navy "for misconduct." Rev. Stat. §§1229, 1525. This Court adopted verbatim the reasoning of the Court of Claims, which had held that when Congress " 'vests the appointment of inferior officers in the heads of Departments[,] it may limit and restrict the power of removal as it deems best for the public interest.' " 116 U. S., at 485. Because Perkins had not been " 'dismissed for misconduct ... [or upon] the sentence of a court-martial,' " the Court agreed that he was " 'still in office and ... entitled to [his] pay.' " *Ibid.[Footnote 3]*

We again considered the status of inferior officers in *Morrison*. That case concerned the Ethics in Government Act, which provided for an independent counsel to investigate allegations of crime by high executive officers. The counsel was appointed by a special court, wielded the full powers of a prosecutor, and was removable by the Attorney General only " 'for good cause.' " 487 U. S., at 663 (quoting 28 U. S. C. §596(a)(1)). We recognized that the independent counsel was undoubtedly an executive officer, rather than " 'quasi-legislative' " or " 'quasi-judicial,' " but we stated as "our present considered view" that Congress had power to impose good-cause restrictions on her removal. 487 U. S., at 689–691. The Court noted that the statute "g[a]ve the Attorney General," an officer directly responsible to the President and "through [whom]" the President could act, "several means of supervising or controlling" the independent counsel—"[m]ost importantly ... the power to remove the counsel for good cause." *Id.*, at 695–696 (internal quotation marks omitted). Under those circumstances, the Court sustained the statute. *Morrison* did not, however, address the consequences of more than one level of good-cause tenure—leaving the issue, as both the court and dissent below recognized, "a question of first impression" in this

as both the court and dissent below recognized, "a question of first impression" in this Court. 537 F. 3d, at 679; see *id.*, at 698 (dissenting opinion).

B

As explained, we have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions. They are only responsible for their own determination of whether the Act's rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor*, 295 U. S., at 620 (internal quotation marks omitted).

This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (Breyer, J., concurring in judgment).[Footnote 4]

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. Tr. of Oral Arg. 47–48. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see *Freytag* v. *Commissioner*, 501 U. S. 868, 879–880 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York* v. *United States*, 505 U. S. 144, 182 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, §2, cl. 2. They instead look to the President to guide the "assistants or deputies ... subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive's oversight, this Act

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

C

Respondents and the dissent resist this conclusion, portraying the Board as "the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.' " *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276 (1991) (*MWAA*) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)); see, *e.g.*, *post,* at 6 (opinion of Breyer, J.). According to the dissent, Congress may impose multiple levels of for-cause tenure between the President and his subordinates when it "rests agency independence upon the need for technical expertise." *Post,* at 18. The Board's mission is said to demand both "technical competence" and "apolitical expertise," and its powers may only be exercised by "technical professional experts." *Post,* at 18 (internal quotation marks omitted). In this respect the statute creating the Board is, we are told, simply one example of the "vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, [that] provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives." *Post,* at 8.

No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the " 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' " for " '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.' " *Bowsher*, 478 U. S., at 736 (quoting *Chadha*, 462 U. S., at 944).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.

administrative state.

For example, the dissent dismisses the importance of removal as a tool of supervision, concluding that the President's "power to get something done" more often depends on "who controls the agency's budget requests and funding, the relationships between one agency or department and another, ... purely political factors (including Congress' ability to assert influence)," and indeed whether particular *unelected* officials support or "resist" the President's policies. *Post,* at 11, 13 (emphasis deleted). The Framers did not rest our liberties on such bureaucratic minutiae. As we said in *Bowsher*, *supra,* at 730, "[t]he separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress."

In fact, the multilevel protection that the dissent endorses "provides a blueprint for extensive expansion of the legislative power." *MWAA*, *supra,* at 277. In a system of checks and balances, "[p]ower abhors a vacuum," and one branch's handicap is another's strength. 537 F. 3d, at 695, n. 4 (Kavanaugh, J., dissenting) (internal quotation marks omitted). "Even when a branch does not arrogate power to itself," therefore, it must not "impair another in the performance of its constitutional duties." *Loving* v. *United States*, 517 U. S. 748, 757 (1996).[Footnote 5] Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that "the Legislature has no right to diminish or modify." 1 Annals of Cong., at 463 (J. Madison).[Footnote 6]

The Framers created a structure in which "[a] dependence on the people" would be the "primary controul on the government." The Federalist No. 51, at 349 (J. Madison). That dependence is maintained, not just by "parchment barriers," *id.,* No. 48, at 333 (same), but by letting "[a]mbition ... counteract ambition," giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others," *id.,* No. 51, at 349. A key "constitutional means" vested in the President—perhaps *the* key means—was "the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong., at 463. And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51, at 349, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, *supra,* at 730.

Calls to abandon those protections in light of "the era's perceived necessity," *New York*, 505 U. S., at 187, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Id.*, at 187–188. Neither

issue of comparable gravity would, in the long run, be far worse." Id., at 187–188. Neither respondents nor the dissent explains why the Board's task, unlike so many others, requires *more* than one layer of insulation from the President—or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as "elementary arithmetical logic," *post,* at 23, two layers are not the same as one.

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman's lament, to "persuad[ing]" his unelected subordinates "to do what they ought to do without persuasion." *Post,* at 11 (internal quotation marks omitted). In its pursuit of a "workable government," Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

D

The United States concedes that some constraints on the removal of inferior executive officers might violate the Constitution. See Brief for United States 47. It contends, however, that the removal restrictions at issue here do not.

To begin with, the Government argues that the Commission's removal power over the Board is "broad," and could be construed as broader still, if necessary to avoid invalidation. See, *e.g., id.,* at 51, and n. 19; cf. PCAOB Brief 22–23. But the Government does not contend that simple disagreement with the Board's policies or priorities could constitute "good cause" for its removal. See Tr. of Oral Arg. 41–43, 45–46. Nor do our precedents suggest as much. *Humphrey's Executor*, for example, rejected a removal premised on a lack of agreement " 'on either the policies or the administering of the Federal Trade Commission,' " because the FTC was designed to be " 'independent in character,' " "free from 'political domination or control,' " and not " 'subject to anybody in the government' " or " 'to the orders of the President.' " 295 U. S., at 619, 625. Accord, *Morrison*, 487 U. S., at 693 (noting that "the congressional determination to limit the removal power of the Attorney General was essential . . . to establish the necessary independence of the office"); *Wiener* v. *United States*, 357 U. S. 349, 356 (1958) (describing for-cause removal as "involving the rectitude" of an officer). And here there is judicial review of any effort to remove Board members, see 15 U. S. C. §78y(a)(1), so the Commission will not have the final word on the propriety of its own removal orders. The removal restrictions set forth in the statute mean what they say.

Indeed, this case presents an even more serious threat to executive control than an "ordinary" dual for-cause standard. Congress enacted an unusually high standard that

must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. §7217(d)(3); see §78y(a). The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board's authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under §7217(d)(3).[Footnote 7]

The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. Cf. §§78s(h)(4), 7217(d)(3). While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Alternatively, respondents portray the Act's limitations on removal as irrelevant, because —as the Court of Appeals held—the Commission wields "at-will removal power over Board *functions* if not Board members." 537 F. 3d, at 683 (emphasis added); accord, Brief for United States 27–28; PCAOB Brief 48. The Commission's general "oversight and enforcement authority over the Board," §7217(a), is said to "blun[t] the constitutional impact of for-cause removal," 537 F. 3d, at 683, and to leave the President no worse off than "if Congress had lodged the Board's functions in the SEC's own staff," PCAOB Brief 15.

Broad power over Board functions is not equivalent to the power to remove Board members. The Commission may, for example, approve the Board's budget, §7219(b), issue binding regulations, §§7202(a), 7217(b)(5), relieve the Board of authority, §7217(d)(1), amend Board sanctions, §7217(c), or enforce Board rules on its own, §§7202(b)(1), (c). But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.

Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents' premise that the Commission's power in this regard is plenary. As described above, the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. See *supra,* at 3–4. Its powers are, of course, subject to some latent Commission control. See *supra,* at 4–5. But the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within

the Executive Branch.

The Government and the dissent suggest that the Commission could govern and direct the Board's daily exercise of prosecutorial discretion by promulgating new SEC rules, or by amending those of the Board. Brief for United States 27; *post,* at 15. Enacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging the Board's affairs. See §§78s(c), 7215(b)(1), 7217(b)(5); cf. 5 U. S. C. §553, 15 U. S. C. §7202(a), PCAOB Brief 24, n. 6.[Footnote 8] So the Government offers another proposal, that the Commission require the Board by rule to "secure SEC approval for any actions that it now may take itself." Brief for United States 27. That would surely constitute one of the "limitations upon the activities, functions, and operations of the Board" that the Act forbids, at least without Commission findings equivalent to those required to fire the Board instead. §7217(d)(2). The Board thus has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction.

Finally, respondents suggest that our conclusion is contradicted by the past practice of Congress. But the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes "good cause," and rigorous procedures that must be followed prior to removal.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. See, *e.g.,* PCAOB Brief 43. As Judge Kavanaugh noted in dissent below:

"Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency." 537 F. 3d, at 669.

The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. *Post,* at 23–31. The dissent itself, however, stresses the very size and variety of the Federal Government, see *post,* at 7–8, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board. See *post,* at 28–31.

For example, many civil servants within independent agencies would not qualify as "Officers of the United States," who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley*, 424 U. S., at 126.[Footnote 9] The parties here concede that Board members are executive "Officers," as that term is used in the Constitution. See *supra,* at 4; see also Art. II, §2, cl. 2. We do not decide the status of other Government employees, nor do we decide whether "lesser functionaries subordinate to officers of the United States" must be subject to the same sort of control as those who exercise "significant authority pursuant to the laws." *Buckley*, *supra,* at 126, and n. 162.

Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board. Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control, see 5 U. S. C. §§2302(a)(2)(B), 3302, 7511(b)(2), and members of the Senior Executive Service may be reassigned or reviewed by agency heads (and entire agencies may be excluded from that Service by the President), see, *e.g.*, §§3132(c), 3395(a), 4312(d), 4314(b)(3), (c)(3); cf. §2302(a)(2)(B)(ii). While the full extent of that authority is not before us, any such authority is of course wholly absent with respect to the Board. Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.[Footnote 10]

Finally, the dissent wanders far afield when it suggests that today's opinion might increase the President's authority to remove military officers. Without expressing any view whatever on the scope of that authority, it is enough to note that we see little analogy between our Nation's armed services and the Public Company Accounting Oversight Board. Military officers are broadly subject to Presidential control through the chain of command and through the President's powers as Commander in Chief. Art. II, §2, cl. 1; see, *e.g.*, 10 U. S. C. §§162, 164(g). The President and his subordinates may also convene boards of inquiry or courts-martial to hear claims of misconduct or poor performance by those officers. See, *e.g.*, §§822(a)(1), 823(a)(1), 892(3), 933–934, 1181–1185. Here, by contrast, the President has no authority to initiate a Board member's removal for cause.

There is no reason for us to address whether these positions identified by the dissent, or any others not at issue in this case, are so structured as to infringe the President's constitutional authority. Nor is there any substance to the dissent's concern that the "work of all these various officials" will "be put on hold." *Post,* at 31. As the judgment in this case demonstrates, restricting certain officers to a single level of insulation from the President affects the conditions under which those officers might some day be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any

officer's continuance in office. The only issue in this case is whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot.

IV

Petitioners' complaint argued that the Board's "freedom from Presidential oversight and control" rendered it "and all power and authority exercised by it" in violation of the Constitution. App. 46. We reject such a broad holding. Instead, we agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute.

"Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–329 (2006). Because "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932), the "normal rule" is "that partial, rather than facial, invalidation is the required course," *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985). Putting to one side petitioners' Appointments Clause challenges (addressed below), the existence of the Board does not violate the separation of powers, but the substantive removal restrictions imposed by §§7211(e)(6) and 7217(d)(3) do. Under the traditional default rule, removal is incident to the power of appointment. See, *e.g.*, *Sampson* v. *Murray*, 415 U. S. 61, 70, n. 17 (1974); *Myers*, 272 U. S., at 119; *Ex parte Hennen*, 13 Pet., at 259–260. Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.

The Sarbanes-Oxley Act remains " 'fully operative as a law' " with these tenure restrictions excised. *New York*, 505 U. S., at 186 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987)). We therefore must sustain its remaining provisions "[u]nless it is evident that the Legislature would not have enacted those provisions ... independently of that which is [invalid]." *Ibid.* (internal quotation marks omitted). Though this inquiry can sometimes be "elusive," *Chadha*, 462 U. S., at 932, the answer here seems clear: The remaining provisions are not "incapable of functioning independently," *Alaska Airlines*, 480 U. S., at 684, and nothing in the statute's text or historical context makes it "evident" that Congress,

faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will. *Ibid.*; see also *Ayotte*, *supra,* at 330.

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be "Officers of the United States." Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.

V

Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.

First, petitioners argue that Board members are principal officers requiring Presidential appointment with the Senate's advice and consent. We held in *Edmond* v. *United States*, 520 U. S. 651, 662–663 (1997), that "[w]hether one is an 'inferior' officer depends on whether he has a superior," and that " 'inferior officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent. In particular, we noted that "[t]he power to remove officers" at will and without cause "is a powerful tool for control" of an inferior. *Id.*, at 664. As explained above, the statutory restrictions on the Commission's power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a "Hea[d] of Departmen[t]."

But, petitioners argue, the Commission is not a "Departmen[t]" like the "Executive departments" (*e.g.*, State, Treasury, Defense) listed in 5 U. S. C. §101. In *Freytag*, 501 U. S., at 887, n. 4, we specifically reserved the question whether a "principal agenc[y], such as ... the Securities and Exchange Commission," is a "Departmen[t]" under the Appointments Clause. Four Justices, however, would have concluded that the Commission is indeed such a "Departmen[t]," see *id.*, at 918 (Scalia, J., concurring in part and concurring in judgment), because it is a "free-standing, self-contained entity in the Executive Branch," *id.*, at 915.

Id., at 915.

Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, see Brief for United States 37–39; PCAOB Brief 30–33, and we do. Respondents' reading of the Appointments Clause is consistent with the common, near-contemporary definition of a "department" as a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person." 1 N. Webster, American Dictionary of the English Language (1828) (def. 2) (1995 facsimile ed.). It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint "an assistant, and deputy postmasters, at all places where such shall be found necessary," §3, 1 Stat. 234—thus treating him as the "Hea[d] of [a] Departmen[t]" without the title of Secretary or any role in the President's Cabinet. And it is consistent with our prior cases, which have never invalidated an appointment made by the head of such an establishment. See *Freytag*, *supra*, at 917; cf. *Burnap* v. *United States*, 252 U. S. 512, 515 (1920); *United States* v. *Germaine*, 99 U. S. 508, 511 (1879). Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a "Departmen[t]" for the purposes of the Appointments Clause.[Footnote 11]

But petitioners are not done yet. They argue that the full Commission cannot constitutionally appoint Board members, because only the Chairman of the Commission is the Commission's "Hea[d]."[Footnote 12] The Commission's powers, however, are generally vested in the Commissioners jointly, not the Chairman alone. See, *e.g.*, 15 U. S. C. §§77s, 77t, 78u, 78w. The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies. See Reorg. Plan No. 10 of 1950, §1(b)(1), 64 Stat. 1265. The Chairman is also appointed from among the Commissioners by the President alone, *id.*, §3, at 1266, which means that he cannot be regarded as "the head of an agency" for purposes of the Reorganization Act. See 5 U. S. C. §904. (The Commission as a whole, on the other hand, does meet the requirements of the Act, including its provision that "the head of an agency [may] be an individual or a commission or board with more than one member.")[Footnote 13]

As a constitutional matter, we see no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]" that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, §2, cl. 2, and each House of Congress, too, appoints its officers collectively, see Art. I, §2, cl. 5; *id.*, §3, cl. 5. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere,

including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember agencies. See *Freytag*, *supra,* at 918 (Scalia, J., concurring in part and concurring in judgment); see also Classification Act of 1923, ch. 265, §2, 42 Stat. 1488 (defining "the head of the department" to mean "the officer *or group of officers* ... who are not subordinate or responsible to any other officer of the department" (emphasis added)); 37 Op. Atty. Gen. 227, 231 (1933) (endorsing collective appointment by the Civil Service Commission). We conclude that the Board members have been validly appointed by the full Commission.

In light of the foregoing, petitioners are not entitled to broad injunctive relief against the Board's continued operations. But they are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive. See *Bowsher*, 478 U. S., at 727, n. 5 (concluding that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court (internal quotation marks omitted)).

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." The Federalist No. 70, at 478.

While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Footnote 1

The current salary for the Chairman is $673,000. Other Board members receive $547,000. Brief for Petitioners 2.

Brief for Petitioners 3.

Footnote 2

The Government asserts that "petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." Brief for United States 22. The Government does not appear to dispute such a right to relief as a general matter, without regard to the particular constitutional provisions at issue here. See, *e.g., Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *Bell* v. *Hood*, 327 U. S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); see also *Ex parte Young*, 209 U. S. 123, 149, 165, 167 (1908). If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.

Footnote 3

When *Perkins* was decided in 1886, the Secretary of the Navy was a principal officer and the head of a department, see Rev. Stat. §415, and the Tenure of Office Act purported to require Senate consent for his removal. Ch. 154, 14 Stat. 430, Rev. Stat. §1767. This requirement was widely regarded as unconstitutional and void (as it is universally regarded today), and it was repealed the next year. See Act of Mar. 3, 1887, ch. 353, 24 Stat. 500; *Myers* v. *United States*, 272 U. S. 52, 167–168 (1926); see also *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986). *Perkins* cannot be read to endorse any such restriction, much less in combination with *further* restrictions on the removal of inferiors. The Court of Claims opinion adopted verbatim by this Court addressed only the authority of the Secretary of the Navy to remove inferior officers.

Footnote 4

Contrary to the dissent's suggestion, *post*, at 12–14 (opinion of Breyer, J.), the second layer of tenure protection does compromise the President's ability to remove a Board member the Commission wants to retain. Without a second layer of protection, the Commission has no excuse for retaining an officer who is not faithfully executing the law. With the second layer in place, the Commission can shield its decision from Presidential review by finding that good cause is absent—a finding that, given the Commission's own protected tenure, the President cannot easily overturn. The dissent describes this conflict merely as one of

four possible "scenarios," see *post,* at 12–13, but it is the central issue in this case: The second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so.

Footnote 5

The dissent quotes *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) (*per curiam*), for the proposition that Congress has "broad authority to 'create' governmental ' "offices" ' and to structure those offices 'as it chooses.' " *Post,* at 2. The *Buckley* Court put " 'offices' " in quotes because it was actually describing legislative positions that are not really offices at all (at least not under Article II). That is why the very next sentence of *Buckley* said, "*But* Congress' power ... is inevitably bounded by the express language" of the Constitution. 424 U. S., at 138–139 (emphasis added).

Footnote 6

The dissent attributes to Madison a belief that some executive officers, such as the Comptroller, could be made independent of the President. See *post,* at 17–18. But Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of "years, unless sooner removed by the President"; he would thus be "dependent upon the President, because he can be removed by him," and also "dependent upon the Senate, because they must consent to his [reappointment] for every term of years." 1 Annals of Cong. 612 (1789).

Footnote 7

The Government implausibly argues that §7217(d)(3) "does not expressly make its three specified grounds of removal exclusive," and that "the Act could be construed to permit other grounds." Brief for United States 51, n. 19. But having provided in §7211(e)(6) that Board members are to be removed "in accordance with [§7217(d)(3)], for good cause shown," Congress would not have specified the necessary Commission finding in §7217(d)(3)—including formal procedures and detailed conditions—if Board members could also be removed without any finding at all. Cf. PCAOB Brief 6 ("Cause exists where" the §7217(d)(3) conditions are met).

Footnote 8

Contrary to the dissent's assertions, see *post,* at 15–16, the Commission's powers to conduct its own investigations (with its own resources), to remove particular provisions of law from the Board's bailiwick, or to require the Board to perform functions "other" than inspections and investigations, §7211(c)(5), are no more useful in directing individual

inspections and investigations, §7211(c)(3), are no more useful in directing individual enforcement actions.

Footnote 9

One "may be an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its office[r]." *United States* v. *Germaine*, 99 U. S. 508, 509 (1879). The applicable proportion has of course increased dramatically since 1879.

Footnote 10

For similar reasons, our holding also does not address that subset of independent agency employees who serve as administrative law judges. See, *e.g.*, 5 U. S. C. §§556(c), 3105. Whether administrative law judges are necessarily "Officers of the United States" is disputed. See, *e.g.*, *Landry* v. *FDIC*, 204 F. 3d 1125 (CADC 2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§554(d), 3105, or possess purely recommendatory powers. The Government below refused to identify either "civil service tenure-protected employees in independent agencies" or administrative law judges as "precedent for the PCAOB." 537 F. 3d 667, 699, n. 8 (CADC 2008) (Kavanaugh, J., dissenting); see Tr. of Oral Arg. in No. 07–5127 (CADC), pp. 32, 37–38, 42.

Footnote 11

We express no view on whether the Commission is thus an "executive Departmen[t]" under the Opinions Clause, Art. II, §2, cl. 1, or under Section 4 of the Twenty-Fifth Amendment. See *Freytag* v. *Commissioner*, 501 U. S. 868, 886–887 (1991).

Footnote 12

The Board argued below that petitioners lack standing to raise this claim, because no member of the Board has been appointed over the Chairman's objection, and so petitioners' injuries are not fairly traceable to an invalid appointment. See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaint in Civil Action No. 1:06–cv–00217–JR (DC), Doc. 17, pp. 42–43; Brief for Appellees PCAOB et al. in No. 07–5127 (CADC), pp. 32–33. We cannot assume, however, that the Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world. See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 533 (1962) (plurality opinion).

Footnote 13

Petitioners contend that finding the Commission to be the head will invalidate numerous appointments made directly by the Chairman, such as those of the "heads of major [SEC] administrative units." Reorg. Plan No. 10, §1(b)(2), at 1266. Assuming, however, that these individuals are officers of the United States, their appointment is still made "subject to the approval of the Commission." *Ibid.* We have previously found that the department head's approval satisfies the Appointments Clause, in precedents that petitioners do not ask us to revisit. See, *e.g., United States* v. *Smith*, 124 U. S. 525, 532 (1888); *Germaine*, 99 U. S., at 511; *United States* v. *Hartwell*, 6 Wall. 385, 393–394 (1868).