

# THE BILL OF ATTAINDER CLAUSES: PROTECTIONS FROM THE PAST IN THE MODERN ADMINISTRATIVE STATE

*John J. Cavaliere, III*<sup>†</sup>

## INTRODUCTION

To the Framers, enshrining prohibitions against bills of attainder in the Constitution<sup>1</sup> was essential to prevent tyranny. These provisions serve the twin aims of protecting individuals from an improper use of legislative power and reinforcing the doctrine of separation of powers.<sup>2</sup> The Constitution of the United States contains two clauses proscribing the issuing of bills of attainder—one applying to the federal government,<sup>3</sup> and the other to the states.<sup>4</sup> At first blush, this may seem like either a stylistic embellishment or an over-scrupulous redundancy. But this repetition was far from superfluous. Article I treated the legislative power of both the federal and state governments. Thus, the Framers were compelled to provide a separate clause restricting the states because this protection was so important.<sup>5</sup> Not even the

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<sup>†</sup> J.D. Candidate, 2014, Ave Maria School of Law; B.A., 2010, Florida State University. The author is grateful for his wife's unwavering support throughout law school. The author further wishes to acknowledge the invaluable feedback and assistance from Prof. Patrick T. Gillen of Ave Maria School of Law, and the editorial staff of the *Ave Maria Law Review*.

1. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10; *see also* U.S. CONST. art. III, § 3 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.”).

2. *See* *United States v. Brown*, 381 U.S. 437, 442–43 (1965) (calling the clauses “an implementation of the separation of powers . . . looked to as a bulwark against tyranny.”).

3. U.S. CONST. art. I, § 9, cl. 3.

4. U.S. CONST. art. I, § 10.

5. *Id.*; *see* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In that case, Chief Justice John Marshall stated:

[T]he original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if in every inhibition intended to act on state power, *words are employed which directly express that intent*.

*Id.* at 249 (emphasis added).

Bill of Rights initially enjoyed such constitutional stature.<sup>6</sup> This note advocates for the Bill of Attainder Clause's application to administrative agencies when they act pursuant to delegated authority and their action is treated as having the "force of law" by the federal judiciary—precisely because the Bill of Attainder Clause is such a vitally important check on the abuse of legislative power.<sup>7</sup>

While recent scholarship has examined the Bill of Attainder Clause in the modern context,<sup>8</sup> the issue of its direct application to administrative or executive agencies has been largely undeveloped.<sup>9</sup> This oversight is significant given the Supreme Court's frank recognition that administrative agencies, in a very real sense, actually determine the substantive impact of legislation in the many cases where legislation provides minimal guidance.<sup>10</sup> Further, the lower courts' reluctance to apply the clause to administrative and executive entities simply because an agency, not Congress, promulgates a rule, contravenes the principle that the Bill of Attainder Clause values substance over form and is "leveled at the thing and not the name."<sup>11</sup>

The Supreme Court's retreat from any meaningful non-delegation analysis in the modern era threatens to undermine the integrity of the Bill of Attainder Clause, which is a vitally important provision for the reasons given above. While the Constitution expressly states that the Bill of Attainder

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6. *Barron*, 32 U.S. (7 Pet.) at 250 ("These amendments [i.e., the Bill of Rights] contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."); *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (dubbing Article I, Section 10 Bill of Attainder, Ex Post Facto, and Contract Clauses a "bill of rights for the people of each state").

7. This note primarily focuses on the Article I, Section 9 provision applying to the federal government. The Supreme Court does not differentiate between the clauses beyond the federal-state distinction. Thus, a general bill of attainder doctrine has developed based on cases under both clauses. *See, e.g.*, *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847–88 (1984) (considering Article I, Section 9 and discussing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (considering Article I, Section 10)); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 383 (Miller, J., dissenting) ("I shall speak of principles equally applicable to both.").

8. *See, e.g.*, Jane Y. Chong, Note, *Targeting the Twenty-First-Century Outlaw*, 122 YALE L.J. 724 (2012); Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177 (2011); Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203 (2010); Jacob Reynolds, Note, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177 (2005).

9. David Kairys, Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of 'Subversives'*, 67 COLUM. L. REV. 1490, 1490 (1967); *cf.* Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203 (2011) (arguing drone strikes ordered by the President raise bill of attainder issues, but not discussing agency rulemaking).

10. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (discussing non-delegation doctrine and intelligible principle test); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (discussing gap-filling regulations).

11. *Cummings*, 71 U.S. (4 Wall.) at 325.

Clauses apply to Congress and the states,<sup>12</sup> the provisions' application to executive and administrative agencies is not clear.<sup>13</sup> In fact, the Supreme Court has not decided the issue.<sup>14</sup> Apart from the Ninth Circuit back in 1966,<sup>15</sup> lower courts have avoided ruling on the issue by deciding cases on other grounds,<sup>16</sup> or by applying a high standard of review for case-specific reasons.<sup>17</sup> Indeed, only the Seventh Circuit has indicated a willingness to engage the merits of the bill of attainder analysis to regulations and executive orders; however, the court assumed that the clause applied to agencies without deciding the issue, and ultimately concluded that since the underlying claim would have failed on the merits, it did not need to rule on whether the clause applied in the first place.<sup>18</sup>

Despite the Seventh Circuit's indulgence of the argument in dicta, no circuit has concluded that the Bill of Attainder Clause, a vitally important check on legislative power, applies to an administrative or executive body when promulgating rules with the force of law pursuant to congressional delegation.<sup>19</sup> Following the principle that Congress cannot delegate power that it does not possess itself,<sup>20</sup> this note argues that such results are wrong precisely because these entities exercise legislative power, at least in certain instances, and therefore should be subject to the same constraints on legislative power as Congress.

To accomplish this, Part I considers the Bill of Attainder Clause as a check on legislative power, particularly focusing on the Supreme Court's rationale expressed in the watershed precedent following the Civil War that regards substance over form.<sup>21</sup> Part II examines how courts have handled the preliminary question of whether the clause applies to administrative or executive agencies, beginning with the Supreme Court's rare discussion of the question and its "no-decisions." Part II then turns to the circuits'

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12. U.S. CONST. art. I, § 9 ("No Bill of Attainder . . . shall be passed."); U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder[.]").

13. *Dehainaut v. Pena*, 32 F.3d 1066, 1070–71 (7th Cir. 1994).

14. *Id.*

15. *Marshall v. Sawyer*, 365 F.2d 105, 112–13 (9th Cir. 1966).

16. *See Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) (finding punishment element lacking and declining to decide whether the clause applies to executive agencies).

17. *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 855–56 (10th Cir. 1995) (reviewing for abuse of discretion and affirming denial of preliminary injunction on ripeness grounds).

18. *Dehainaut*, 32 F.3d at 1070–71.

19. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

20. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *see also Peters v. Hobby*, 349 U.S. 331, 352 (1955) (Douglas, J., concurring) (discussed *infra*, Part II).

21. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

unpersuasive handling of the issue, which declines to hold that the clause applies as a preliminary matter before advancing to the merits.

Part III demonstrates how the circuits' approach is disingenuous, precisely because there is well-settled recognition that in the class of cases given "force of law" deference by the judiciary, administrative and executive agencies are, in substance, exercising legislative power.<sup>22</sup> Part III begins with an examination of the "non-delegation" doctrine and the "intelligible principle" test, and proceeds to consider the development of the *Chevron-Mead* doctrine in which the Court tacitly embraces the exercise of legislative power by entities that are, in form, not legislative—especially in the class of cases given *Mead* "force of law" deference. This is based on the Court's recognition that the exercise of regulatory power is, in substance, legislative in nature. Part III concludes that, as a preliminary matter, the Bill of Attainder Clause should apply to instances when an agency is regulating with the force of law and the federal judiciary recognizes its lawmaking function.

#### I. THE BILL OF ATTAINDER CLAUSES: CONSTITUTIONAL CHECKS ON LEGISLATIVE POWER

Because this note is concerned with the preliminary question of whether bill of attainder protections apply to administrative agencies and the Executive Branch, success on the merits of a bill of attainder claim is beyond its scope. Instead, this note focuses on the preliminary question that has produced questionable holdings by courts confronted with challenges to administrative action advanced under the Bill of Attainder Clauses. The reason is simple: courts must move beyond the preliminary issue before advancing to the merits,<sup>23</sup> as Part II demonstrates below. Thus, this section looks at some of the broad rationale of the Court's bill of attainder doctrine in order to show that the Bill of Attainder Clause should apply to certain administrative and executive action.

That the bill of attainder protections are fundamental checks on legislative power was apparent from the beginning of the Republic. In dicta

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22. See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (finding Internal Revenue rule to carry force of law); *Mead*, 533 U.S. at 221 (finding Customs regulations to lack "force of law"); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

23. For the most recent Supreme Court cases establishing the merits, see *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984) (elements of claim are "specification of the affected persons, punishment, and lack of a judicial trial"); *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 468–69 (1977); *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968); *United States v. Brown*, 381 U.S. 437, 440 (1965); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 86–88 (1961); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

in the Contract Clause case, *Fletcher v. Peck*, Chief Justice Marshall recognized this when he stated: “A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained.”<sup>24</sup> This statement is significant because it would later be used to justify a broad construction of the Bill of Attainder Clauses.<sup>25</sup>

In addition to individual protection from governmental misconduct, the Bill of Attainder Clause has been recognized as “an important ingredient of the doctrine of ‘separation of powers.’”<sup>26</sup> In *United States v. Brown*, the Court cited James Madison: “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.”<sup>27</sup> The Court explained further: “[the clauses] 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.”<sup>28</sup> Accordingly, the Framers were seeking to avoid aggrandizement in Congress and state legislatures just as much as they were concerned with protecting individual liberty when drafting the Bill of Attainder Clauses.

In American history, bill of attainder cases often occur during tumultuous times. Indeed, Chief Justice Marshall observed that the clauses were implemented with precisely such moments in mind, stating: “[I]t 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.”<sup>29</sup> Marshall continued: “[T]he 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.”<sup>30</sup>

No time in American history has been more volatile or violent than the Civil War, which produced the companion cases *Cummings v. Missouri*<sup>31</sup>

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24. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (dictum). As discussed *infra*, this statement has further significance because it definitively expanded the scope of the clauses beyond unindicted legislative death sentences.

25. *Cummings*, 71 U.S. (4 Wall.) at 322–25; *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866).

26. *Nixon*, 433 U.S. at 469.

27. *Brown*, 381 U.S. at 443 (quoting THE FEDERALIST NO. 47, at 373–74 (James Madison) (Hamilton ed. 1880)).

28. *Id.* at 445.

29. *Fletcher*, 10 U.S. (6 Cranch) at 137–38.

30. *Id.* at 138.

31. 71 U.S. (4 Wall.) 277 (1866).

and *Ex parte Garland*.<sup>32</sup> These cases, similar to a handful of Twentieth Century cases,<sup>33</sup> involved inquiries into an individual's loyalty to the United States. Because *Cummings* and *Garland* have proven to be watershed precedents in the Court's Bill of Attainder Clause cases,<sup>34</sup> this section examines them in closer detail.

In *Cummings*, Missouri had proposed new amendments to its Constitution in April 1865 and ultimately ratified them in June 1865.<sup>35</sup> The nation was in utter chaos in April 1865. In that month alone, General Robert E. Lee surrendered<sup>36</sup> and President Abraham Lincoln was assassinated within a week.<sup>37</sup> Fueled by the Civil War and the initial post-war turmoil, the Missouri amendments were aimed at keeping former Confederates and their sympathizers out of public life.<sup>38</sup>

But these new provisions did far more than bar participation in the political process.<sup>39</sup> They required an "Oath of Loyalty" denouncing the Confederacy and any sympathy toward it.<sup>40</sup> Anyone declining to take the

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32. 71 U.S. (4 Wall.) 333 (1866).

33. See *Peters v. Hobby*, 349 U.S. 331 (1955); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (discussed *infra* Part II.A.). See also *Brown*, 381 U.S. at 437; *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *United States v. Lovett*, 328 U.S. 303, 308–09 (1946) (discussing speech on House floor that described thirty-nine government employees as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and "affiliates of communist front organizations").

34. See *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847–48 (1984) (discussing *Cummings* and *Garland*); *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 469–76 (1977); *id.* at 538 (Burger, C.J., dissenting) ("Those two cases established more broadly that 'punishment' for purposes of bills of attainder is not limited to criminal sanctions.").

35. *Cummings*, 71 U.S. (4 Wall.) at 279.

36. April 9, 1865. MARK M. BOATNER, III, *THE CIVIL WAR DICTIONARY* 822 (rev. ed., 1988).

37. President Lincoln was shot on the evening of April 14, 1865, and ultimately expired the next morning. *Id.* at 484.

38. *Cummings*, 71 U.S. (4 Wall.) at 279.

39. *Id.* at 281.

40. *Id.* The full text of the oath:

I, [name], do solemnly swear that I am well acquainted with [the new amendments to the Missouri Constitution], adopted in [1865], 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.

*Id.* at 280–81 (emphasis added).

oath suffered severe civil disabilities.<sup>41</sup> Among the farthest reaching provisions read: “No person shall . . . 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.”<sup>42</sup> The penalty for occupying these public positions without having taken the oath not only rendered the person’s position “ipso facto . . . vacant,” but it also invoked fines “not less than five hundred dollars,” and possibly even “imprisonment in the county jail not less than six months.”<sup>43</sup> Moreover, a separate section provided for a perjury adjudication for “whoever shall take said oath falsely.”<sup>44</sup>

The petitioner was a Roman Catholic priest who “was indicted and convicted [in state court] of the crime of teaching and preaching as a priest and minister . . . 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.”<sup>45</sup> The priest subsequently lost on appeal in the Missouri Supreme Court,<sup>46</sup> but the U.S. Supreme Court ultimately reversed the conviction in a five to four decision.<sup>47</sup>

The Court applied the Article I, Section 10 provision and defined a bill of attainder as “a legislative act which inflicts punishment without a judicial trial.”<sup>48</sup> Furthermore, the Court clarified that a bill of attainder encompasses more than a legislative death sentence or declaration of a corruption of blood: “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.”<sup>49</sup> As a result, the Bill of Attainder Clauses encompass a broader class of cases where the punishment is a deprivation of pre-existing rights rather than a death sentence. Accordingly, the court held

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41. *Id.* at 281.

42. *Id.* Perhaps even more remarkable to modern sensibilities about this *state constitutional provision* is that this case did not raise any Establishment or Free Exercise Clause issue. It is thus a further reminder that the prevailing view had been that the Bill of Rights was completely inapplicable to the states, especially prior to the advent of the Fourteenth Amendment. *See supra* notes 5–6 and accompanying text.

43. *Id.*

44. *Id.*

45. *Id.* at 316.

46. *Id.*

47. *Id.* at 332.

48. *Id.* at 323.

49. *Id.* (emphasis added).

that the new Missouri amendments, including the oath to champion the federal constitution, violated the Bill of Attainder Clause.<sup>50</sup>

In the companion case, *Ex parte Garland*, a similar oath<sup>51</sup> triggered the federal Bill of Attainder Clause.<sup>52</sup> The petitioner in that case was a pre-war Arkansas attorney who eventually became a member of the Confederate Senate by war's end.<sup>53</sup> After the war, President Andrew Johnson pardoned the petitioner,<sup>54</sup> who was nonetheless barred from practicing before the Supreme Court due to Congress' 1865 amendment to the Court's rules requiring the oath to be taken by anyone practicing in federal courts.<sup>55</sup>

The Court held that the oath "operates as a legislative decree of perpetual exclusion,"<sup>56</sup> and that such exclusion from professions and other vocations are "of the nature of bills of pains and penalties," which the Constitution prohibits.<sup>57</sup> The Court also noted the specific and *ex post facto* nature of Congress' actions, as this provision did not exist prior to the war.<sup>58</sup> The opinion ended with a discussion of separation of powers, chiding Congress that attorneys are officers of the court whose "admission or . . . exclusion . . . is the exercise of judicial power"<sup>59</sup> and closing with an exhortation on the President's pardoning power.<sup>60</sup>

The four-Justice dissent in both cases appears in a single opinion at the end of *Garland*.<sup>61</sup> The dissenting opinion illustrates how expansive the majority's interpretation of the clauses actually was, spending four and a half pages<sup>62</sup> describing the history of bills of attainder and how the rogue

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50. *Id.* at 329, 332.

51. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 374–77 (1866). The oath stated in pertinent part:

I . . . do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, not attempted to exercise the functions of any office whatever, under any authority or *pretended* authority in hostility to the United States . . . .

Act of July 2, 1862, ch. 128, 12 Stat. 502 (1862) (emphasis added).

52. U.S. CONST. art. I, § 9, cl. 3.

53. *Garland*, 71 U.S. (4 Wall.) at 375.

54. *Id.* at 337.

55. *Id.* at 335.

56. *Id.* at 377.

57. *Id.*

58. *Id.*

59. *Id.* at 378–79.

60. *Id.* at 380–81.

61. *Id.* at 382 (Miller, J., dissenting).

62. *Id.* at 386–90.



provisions<sup>63</sup> at issue in both cases “can in no sense be called bills of attainder.”<sup>64</sup> Yet, the dissenters advanced an extremely narrow view of the Bill of Attainder Clause, applying it to only those acts that specifically name or describe individuals<sup>65</sup> and call for the death penalty based on a “corruption of blood.”<sup>66</sup> Thus, the dissenters ignored prior dicta defining the clauses’ scope beyond such legislative death sentences<sup>67</sup> and stated that because there was no American authority on point, the English definition controlled.<sup>68</sup> Accordingly, the dissenting opinion regarded form over substance, something the majority disavowed at length.

Responding to the dissenters, the *Cummings* majority opinion elaborated how substance matters more than form in bills of attainder. The Court considered three hypothetical cases in which Missouri adopted provisions mimicking traditional bills of attainder: the first listed Cummings by name and declared him guilty;<sup>69</sup> the second, instead of Cummings, declared “all priests” guilty;<sup>70</sup> and the third declared “all priests” guilty with a proviso.<sup>71</sup> The Court said that each hypothetical case would be an obvious violation of the Bill of Attainder Clause.<sup>72</sup>

The Court then compared the hypothetical cases to the case at bar and stated the distinction was “one of form only, and not of substance”;<sup>73</sup> the only difference was that the real lawmakers indirectly inflicted punishment on Cummings by “disguis[ing]” their purpose, whereas in the hypothetical laws,

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63. *Id.* at 382. Commenting on the laws requiring the oaths and penalties, the dissent poignantly captured the troubled times: “For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.” *Id.*

64. *Id.* at 390.

65. *Id.*

66. *Id.* at 387, 389.

67. *See* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (“A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.”).

68. *Garland*, 71 U.S. (4 Wall.) at 386 (Miller, J., dissenting).

69. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1866) (“If the clauses of . . . the constitution of Missouri . . . had in terms declared that Mr. Cummings was guilty, or should be held guilty, . . . and, therefore, should be deprived of the right to preach as a priest of the Catholic Church . . . there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution.”).

70. *Id.* (“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.”).

71. *Id.* at 325 (“[I]f these clauses had declared that all such priests . . . should be so held guilty, and thus be deprived, provided they did not, by a day designated, do certain specified acts . . .”); *id.* at 324 (“[Bills of attainder] may inflict punishment absolutely, or may inflict it conditionally.”).

72. *Id.* at 325.

73. *Id.*

the legislative purpose “would be openly avowed.”<sup>74</sup> After concluding the constitutional effect in the hypothetical cases and the instant case “must be the same,”<sup>75</sup> and explaining that “[t]he Constitution deals with substance, not shadows,”<sup>76</sup> the Court further stated that the Constitution “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.”<sup>77</sup>

It is precisely because the Bill of Attainder Clause should not “be evaded by the form of the enactment”<sup>78</sup> that this note urges its application to administrative and executive entities when acting with legislative power.<sup>79</sup> However, as the next section explains, this notion has enjoyed little favor in courts that have considered bill of attainder challenges to administrative and executive action.

## II. ADMINISTRATIVE AGENCIES AND THE BILL OF ATTAINDER CLAUSES

Despite substantial development of the bill of attainder doctrine,<sup>80</sup> the Supreme Court has not resolved the preliminary issue of whether the Bill of Attainder Clauses apply to executive and administrative action.<sup>81</sup> The closest it came to doing so was in the 1950s, when questions of loyalty to the United States—this time concerning Communism and not the Confederacy—returned to the fore. This part considers how modern courts have handled the question, beginning with the Supreme Court’s near-rulings in the 1950s.<sup>82</sup>

### A. Supreme Court Discussion of the Issue

In *Joint Anti-Fascist Refugee Committee v. McGrath*<sup>83</sup> and *Peters v. Hobby*,<sup>84</sup> the Court reviewed cases involving a list of organizations and

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74. *Id.*

75. *Id.*

76. *Id.*; *but cf.* *Griswold v. Connecticut*, 381 U.S. 479, 483–86 (1965) (finding due process right to privacy through “penumbras,” which is derived from the Latin word for “shadow”).

77. *Cummings*, 71 U.S. (4 Wall.) at 325.

78. *Id.*

79. The phenomenon of executive and administrative exercise of legislative power is discussed *infra* Part III.

80. See cases cited *supra* note 23.

81. *Dehainaut v. Pena*, 32 F.3d 1066, 1070–71 (7th Cir. 1994).

82. The reader should bear in mind that these cases were decided roughly thirty years prior to *Chevron*. See discussion *infra* Part III.

83. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

individuals deemed to be Communist or otherwise by a “Loyalty Review Board”<sup>85</sup> pursuant to Executive Order 9835.<sup>86</sup> The Order directed each department or agency to establish “one or more loyalty boards ‘for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee . . . on grounds relating to loyalty.’”<sup>87</sup> Thus, each agency or department was to establish its own Agency Board, and the central Loyalty Review Board was to review the findings of the various agency boards, if, and only if, they had found an individual to be disloyal.<sup>88</sup>

The Board had the authority to remove a person from office if it found reasonable grounds to believe a person was in fact “disloyal.”<sup>89</sup> In *McGrath*, the Board furnished its findings to the Attorney General, prompting a slew of organizations to challenge their classification in district court under, among others, the Bill of Attainder Clause.<sup>90</sup> Instead of reaching the merits, however, the Supreme Court remanded the case on procedural grounds.<sup>91</sup>

Justice Black wrote separately to further discuss the Constitutional issues implicated by the case.<sup>92</sup> He stated that “officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder.”<sup>93</sup> While acknowledging the lack of legislative branch activity in the case and the historical legislative context of bills of attainder, he went on to assert: “But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution.”<sup>94</sup> Although Black’s opinion does not cite *Cummings*, its language is in keeping with the principle that the substance of the “odious institution” is much more important than the form it takes<sup>95</sup>—here an administratively created blacklist rather than an act of Congress.

Three years later, in *Peters v. Hobby*, the Court took up another case involving the Loyalty Review Board created by Executive Order 9835.<sup>96</sup> The

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84. *Peters v. Hobby*, 349 U.S. 331 (1955).

85. *McGrath*, 341 U.S. at 125.

86. Exec. Order No. 9835, 3 C.F.R. Supp. 129 (1947).

87. *Peters*, 349 U.S. at 334 (quoting Exec. Order No. 9835).

88. *Id.*

89. *Id.*

90. *McGrath*, 341 U.S. at 125, 132.

91. *Id.* at 126.

92. *Id.* at 142 (Black, J., concurring).

93. *Id.* at 143–44.

94. *Id.* at 144.

95. *Id.*; *Cummings*, 71 U.S. (4 Wall.) 277, 325 (1866).

96. *Peters v. Hobby*, 349 U.S. 331, 334 (1955).

case came before the Supreme Court after petitioner had been cleared by an Agency Board twice, but was still summoned by the Loyalty Review Board—which found disloyalty after a “post-audit” of the Agency Board’s second finding of loyalty.<sup>97</sup> The Loyalty Review Board found him disloyal, despite an abundance of evidence to the contrary, and removed petitioner from his post, barring him from Federal service for three years.<sup>98</sup> Petitioner’s subsequent suit in Federal court alleged, *inter alia*, a violation of the Bill of Attainder Clause.<sup>99</sup>

The Court seemed set to apply the clause to agency and executive actions. But the Court avoided the issue on the grounds that the Loyalty Review Board’s acts were so egregious that it had actually exceeded the scope of E.O. 9835 by moving forward with the investigation of a person who had been twice cleared by the lower-level Agency Board.<sup>100</sup> The Court therefore declined to reach the Constitutional issues even though they “would obviously present serious and far-reaching problems in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of government personnel.”<sup>101</sup>

Justices Black and Douglas both concurred and filed separate opinions arguing that the constitutional issues should have been reached, including the Bill of Attainder claim. Justice Black appealed to separation of powers principles, writing: “These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here.”<sup>102</sup> Justice Black continued: “[O]f course the Constitution does not confer lawmaking power on the President.”<sup>103</sup> Similarly, Justice Douglas, joined by Justice Black, echoed Justice Black’s *McGrath* opinion and stated: “An administrative agency—the creature of Congress—certainly cannot exercise powers that Congress itself is barred from asserting.”<sup>104</sup> As it turns out, *Peters* would be the last case in which members of the Supreme Court discussed the applicability of the Bill of Attainder Clause to an administrative or executive agency, and the question has since fallen to the circuits.

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97. *Id.* at 336.

98. *Id.* at 337.

99. *Id.* at 337–38.

100. *Id.*

101. *Id.*

102. *Id.* at 350 (Black, J., concurring).

103. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952)).

104. *Id.* at 352 (Douglas, J., concurring).

### B. *The Circuits' Treatment of the Issue*

In the absence of controlling precedent, the circuits have come up with their own approaches to the issue. Only the Ninth Circuit, back in 1966, has clearly stated an answer (“no”) to the preliminary question of whether the clause can apply to activity undertaken by an administrative or executive entity before proceeding to the merits.<sup>105</sup> Other circuits have been less eager to definitively rule on the preliminary issue, instead finding ways to avoid deciding it.<sup>106</sup> Both approaches—establishing the per se rule or declining to answer the question—undermine and ignore the substance-over-form rationale expressed in *Cummings*, and fail to account for the reality that legislative power is commonly exercised by administrative and executive agencies. As indicated by Justices Black and Douglas in *McGrath* and *Peters*, executive and administrative agencies are just as capable of contravening the clauses as Congress and state legislatures. This section takes a closer look at the Ninth and Seventh Circuits’ approaches to the question, because they represent how the other circuits have handled the preliminary issue.

The Ninth Circuit’s per se rule clearly disregards the rationale in *Cummings* and the concurring opinions in *McGrath* and *Peters*. In *Marshall v. Sawyer*, the court was asked to review a Nevada gaming commission’s regulatory scheme pursuant to the Nevada Gaming Control Act.<sup>107</sup> An agency regulation pursuant to the Act provided that “catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive police records . . . may be deemed . . . unsuitable manners of operation.”<sup>108</sup> Thus, a casino found to serve such “unsavory” patrons could be subject to losing its gaming license. Per the regulation, an agency compiled a “black book” containing “the name, photograph, description and other identifying data of eleven men considered . . . to be persons within the classes referred to in [the regulation].”<sup>109</sup> In addition, the agency engaged in random undercover inspections of state-licensed establishments to ensure compliance.<sup>110</sup> Each

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105. *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966).

106. *See Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) (finding punishment element lacking and declining to decide whether the clause applies to executive agencies); *Walmer v. U.S. Dep’t of Def.*, 52 F.3d 851, 855–56 (10th Cir. 1995) (reviewing for abuse of discretion and affirming denial of preliminary injunction on ripeness grounds); *Dehainaut v. Pena*, 32 F.3d 1066, 1070–71 (7th Cir. 1994) (finding punishment element lacking and declining to answer preliminary question).

107. *Marshall*, 365 F.2d at 107.

108. *Id.*

109. *Id.*

110. *Id.* at 108 n.3.

licensed establishment had a copy of the black book and made efforts to keep the listed men out of their casinos.<sup>111</sup>

Because the petitioner was among those listed in the book,<sup>112</sup> he was denied service and escorted out of various establishments.<sup>113</sup> As a result, he challenged the constitutionality of the scheme under the Bill of Attainder Clause and other provisions in federal court, requesting an injunction and damages under Section 1983 of the Civil Rights Act.<sup>114</sup>

Regarding the bill of attainder challenge, the Ninth Circuit held: “Assuming, without deciding, that the black book and accompanying letter are, in other respects, in the nature of bills of attainder, the fact that they were not legislative acts deprives them of status of bills of attainder in the constitutional sense.”<sup>115</sup> Furthermore, the court openly disregarded Justice Black’s opinion in *McGrath*, stating it was not “authority for thus expanding what appellant himself concedes to be the traditional role of bill of attainder.”<sup>116</sup>

Clearly, this approach also ignores the discussion in *Cummings* that traditional bills of attainder are not the only “things” prohibited by the clauses, and that bills of attainder are often disguised by form.<sup>117</sup> Moreover, it ignores the modern separation of powers framework, wherein the executive branch and other administrative agencies have been recognized by a mountain of authority to act with legislative power pursuant to delegation

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111. *Id.* at 107–08.

112. *Id.* at 109 (due to his “extensive police record”).

Indeed, Marshall’s record as relayed by the court was extensive and reads like a Hollywood character description, including six convictions under several names: Joe Russo, Frank Roberto, Marshal Cafano, Joseph Rinaldi, and George Marshall. *Id.* In addition to having been “questioned at least a dozen times in connection with . . . crimes, including murder”; *id.*, Marshall had a Chicago reputation of “using muscle techniques, such as threats, extortions, bombings, and murder.” *Id.* According to the court, the Chicago Crime Commission had recorded *eighteen arrests* and his “reputation of being a bank robber, expeddler of alcohol, and a current bookmaker.” *Id.*

Furthermore, the court cited a California report on organized crime that relayed Marshall’s participation in “booking illegal bets on horse races in Chicago,” leaving perhaps the most intriguing facts in a footnote: Marshall’s original name was Marchello Caifano and was born in New York City; he was a “top Lieutenant in Tony Accardo’s Syndicate, the successor of the old Capone gang,” a “suspected underworld muscle and triggerman,” “high up in the numbers racket,” and was apparently someone you wanted on your side when facing a bookmaking debt: “In December 1957, when Cohen and Fred Sica attempted to muscle a gambler into paying a bookmaking debt, the victim phoned Caifano in Chicago. The matter was quickly settled.” *Id.* at 109 n.4.

113. *Id.* at 108.

114. *Id.* at 107 n.1, 111.

115. *Id.* at 111.

116. *Id.*

117. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

from a legislature.<sup>118</sup> A better resolution of the *Marshall* case would have recognized the lawmaking capacity of the agency and resolved the claim on the merits. Regrettably, this case was the first to rule on the issue, causing other circuits to be more reluctant to deviate from this formalistic approach and proceed beyond the preliminary question.<sup>119</sup> Incidentally, no circuit has ruled contrary to the *Marshall* case.

The Seventh Circuit came the closest to ruling opposite to *Marshall*, and in accord with the substance-over-form principle articulated by the Supreme Court over a century earlier in *Cummings*. In *Dehainaut v. Pena*, it took the question head on: “Thus, our first inquiry is whether the very nature of the action challenged here—an executive agency’s interpretation of a presidential directive—places it outside the reach of the ban on bills of attainder.”<sup>120</sup> The district court below adhered to a *Marshall*-like rule, finding that the Bill of Attainder Clause did not apply because the regulatory scheme was “executive action.”<sup>121</sup> On appeal, instead of simply affirming the district court’s finding that the clause does not apply or hiding behind a lack of case law, the Seventh Circuit decided not to end the inquiry there: “[a]lthough the district court may be correct . . . an argument can be made for analyzing each case functionally rather than structurally.”<sup>122</sup>

The court noted that it treats a regulation as “tantamount to a statute” for Ex Post Facto Clause purposes,<sup>123</sup> and stated: “[I]t is a conceivable step to also view an agency policy interpreting the language of a presidential directive issued pursuant to statutory authority as the functional equivalent of a legislative enactment for bill of attainder purposes.”<sup>124</sup>

The court then considered the regulation as if it were a statute but found that it did not need to ultimately decide the preliminary issue because the underlying claim would fail on the merits: “We need not decide today

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118. See discussion *infra* Part III.

119. See *Walmer*, 52 F.3d at 855 (citing *Marshall* and stating “[b]ecause this is a novel contention that has not been adopted in this Circuit, we agree that the district court correctly determined that Plaintiff had not established a likelihood of success on the merits of her bill of attainder challenge”); *Korte v. Office of Pers. Mgmt.*, 797 F.2d 967, 972 (Fed. Cir. 1986) (stating that the petitioner “cited no authority, and we are aware of none, holding that the clause applies to the executive branch”).

120. *Dehainaut v. Pena*, 32 F.3d 1066, 1070 (7th Cir. 1994).

121. *Id.*

122. *Id.* at 1070–71 (citing *McGrath*, 341 U.S. at 143 (Black, J., concurring)); *cf. Walmer*, 52 F.3d at 855–56; *Korte*, 797 F.2d at 972; *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966).

123. *Dehainaut*, 32 F.3d at 1071 (“[W]e [have] stated that an administrative rule adopted pursuant to Congressionally delegated authority must be viewed as tantamount to a statute for the purpose of determining whether it runs afoul of the *ex post facto* clause, a constitutional provision that, like the ban on bills of attainder, protects settled expectations against subsequent shifts in political winds.”) (citing *Rodriguez v. U.S. Parole Comm’n*, 594 F.2d 170, 174 (7th Cir. 1979)).

124. *Id.*

whether we ought to take such a step because assuming, without deciding, that the clause applies to this case, we find that [the Office of Personnel Management's] action is not 'punishment' as that term has been defined in the context of bills of attainder."<sup>125</sup>

To its credit, the Seventh Circuit at least gave credence to the notion that regulations can be considered "tantamount to statutes."<sup>126</sup> This note advocates that this would be the correct approach and that bill of attainder challenges should proceed to the merits rather than getting hung up on the preliminary question.

However, merely entertaining the idea in dicta is not the same as deciding the preliminary question. Thus, the Seventh Circuit should have ruled that the preliminary question is no obstacle to proceeding to the merits, regardless of subsequent success on the merits. Such a decision would have been more in keeping with the principles in the *Cummings* case and the modern governmental reality that legislative power is exercised outside of Congress, as explained below. Instead, it left the question unanswered—as other circuits have since done<sup>127</sup>—and the law largely remains unclear as to whether bill of attainder protections accompany grants of legislative power.

As it stands now, it seems "the inhibition *can* be evaded by the form of the enactment,"<sup>128</sup> so long as it is not Congress doing the enacting. Because "it is far from novel to acknowledge that independent [and other] agencies do indeed exercise legislative powers,"<sup>129</sup> the next section looks at the Supreme Court's broad recognition of this exercise of power in order to criticize the circuits' disingenuous results that render the clauses "vain and futile."<sup>130</sup>

### III. ADMINISTRATIVE AND EXECUTIVE AGENCIES: EXTENSIONS OF LEGISLATIVE POWER

Following the principles articulated above, this section will show that the circuits have erred by failing to apply bill of attainder protections to administrative and executive agencies precisely because of the voluminous

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125. *Id.*

126. *Id.*

127. *See Scheerer v. U.S. Attorney Gen.*, 513 F.3d 1244, 1253 n.9 (11th Cir. 2008) ("Even assuming the clause applies, however, it is clear that the amended regulation is not invalid on these grounds. . . . It does not single out any individual or group and does not impose punishment of any kind."); *Paradissiotis v. Rubin*, 171 F.3d 983, 989 (5th Cir. 1999) ("Even if we were inclined to apply the bill of attainder clause to [the regulatory list in question], however, the regulatory list would not be invalid [due to lack of punishment]").

128. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866) (emphasis added).

129. *Bowsher v. Synar*, 478 U.S. 714, 752 (1986) (Stevens, J., concurring).

130. *Cummings*, 71 U.S. (4 Wall.) at 325.



authority recognizing that agencies exercise, in substance, legislative power—at least in the class of cases given “force of law” deference under the Supreme Court’s *Chevron-Mead* analysis.

Although it is true that the Constitution vests “all legislative power” in Congress,<sup>131</sup> modern governance features a much more complex understanding of the separation of powers than was present at the advent of the Republic.<sup>132</sup> It is widely acknowledged that Congress now delegates a significant amount of lawmaking power to executive<sup>133</sup> and other administrative agencies,<sup>134</sup> deferring to an agency’s expertise in a particular field in order to promote efficient policy outcomes.<sup>135</sup> Often, these administrative rules represent the real substance of legislative action because the statute provides only the most minimal standards for an agency to follow while the administrative action is found to enjoy “the force of law.”<sup>136</sup>

#### A. *Intelligible Principle Test: Can Congress Delegate Too Much?*

Yet, “from the beginning it was not so,”<sup>137</sup> at least in theory: “That [C]ongress cannot delegate legislative power to the [P]resident is a principle

131. U.S. CONST. art. I, § 1.

132. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citing *Opp Cotton Mills, Inc. v. Adm’r, Wage & Hour Div. of Dep’t of Labor*, 312 U.S. 126, 145 (1941) (“In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.”)).

133. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (considering congressional delegation to the Environmental Protection Agency (EPA) to define statutory term and promulgate rules according to EPA’s construction of term); see also *Am. Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 558–59 (D.C. Cir. 1983) (“A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.” Otherwise, the rule is merely “an interpretation.”).

134. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628–31 (1935) (describing Federal Trade Commission as an agency created to exercise “quasi legislative” and “quasi-judicial” functions, and is therefore outside the executive branch); *Mistretta*, 488 U.S. at 368, 371 (recognizing sentencing commission as an “independent commission in the Judicial Branch of the United States” via 28 U.S.C. § 991(a) (1982) and not finding excessive delegation); cf. *id.* at 427 (Scalia, J., dissenting) (calling recognition of the independent commission within the Judicial Branch the creation of another branch entirely or a “junior-varsity Congress”); *accord FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (dubbing agencies “a veritable fourth branch of the Government”).

135. See *Chevron*, 467 U.S. at 843–44 (discussing Congress’ explicit or implicit gaps left open in legislation for agency to fill, which “necessarily requires the formulation of policy and making of rules” by the agency).

136. Compare *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001) (finding no delegation to Customs to “issue classification rulings with the force of law”), with *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (finding Internal Revenue rule to carry force of law), and *Swallows Holding, Ltd. v. Comm’r*, 515 F.3d 162, 168–70 (3d Cir. 2008) (finding general grant of power to Secretary of Treasury to promulgate rules with force of law).

137. *Matthew* 19:8 (New American Bible).

universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”<sup>138</sup> Despite robust formulation of the “non-delegation” principle, the Court has allowed Congress to “obtain[] the assistance of its coordinate Branches,” so long as Congress provides “an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.”<sup>139</sup> Generally, this “intelligible principle” test is the only Constitutional limit on Congress’ delegation capability.<sup>140</sup> Statutes have failed this “intelligible principle” test only twice.<sup>141</sup> Thus, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>142</sup> Indeed, the Court once noted: “Congress *simply cannot do its job* absent an ability to delegate power under broad general directives.”<sup>143</sup> As a result of this attitude, even the most minimal statutory guidance has been upheld.<sup>144</sup>

Skeptics, including Justice Antonin Scalia, assert that the intelligible principle test has permitted delegation in so many situations that the non-delegation doctrine is virtually nonexistent.<sup>145</sup> In addition, Justice Clarence Thomas has doubted the intelligible principle’s ability to “prevent all cessions of legislative power,” stating that perhaps “there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the [agency’s] decision to be called anything other than ‘legislative.’”<sup>146</sup> Similarly, former Justice John Paul Stevens, the author of opinions upholding broad grants of power under the “intelligible

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138. *Field v. Clark*, 143 U.S. 649, 692 (1892).

139. *Mistretta*, 488 U.S. at 371–72 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

140. *Whitman v. Am.Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

141. *See id.* at 474 (majority opinion) (noting statutes failed test in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

142. *Id.* at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

143. *Mistretta*, 488 U.S. at 372 (emphasis added).

144. *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219 (1989) (citing *Lichter v. United States*, 334 U.S. 742, 778–86 (1948) (upholding delegation of authority to War Department to recover “excessive profits” earned on military contracts); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding delegation of authority to the Price Administrator to fix prices of commodities that “will be generally fair and equitable and will effectuate the purposes” of the congressional enactment); *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 600–01 (1944) (upholding delegation to Federal Power Commission to determine “just and reasonable” rates); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation to FCC to regulate broadcast licensing as “public interest, convenience, or necessity” require)).

145. *See Mistretta*, 488 U.S. at 413–27 (Scalia, J., dissenting).

146. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (“[T]he Constitution does not speak of ‘intelligible principles.’ Rather, it speaks in much simpler terms: ‘All legislative Powers . . . shall be vested in a Congress.’”).

principle” test,<sup>147</sup> later seemed to admit the impotence of the “intelligible principle” highlighted by the dissent in one of those cases: “the Commission may have made the type of ‘basic policy decision’ that Justice Scalia reminded us is the province of the Legislature.”<sup>148</sup>

Still, the Court has generally been quite comfortable with broad delegations of legislative power to the executive branch and other agencies.<sup>149</sup> Accordingly, bill of attainder protections should reflect the same realism that has accompanied the Court’s retreat from a more robust application of the non-delegation doctrine, and likewise recognize that the executive branch and administrative agencies are effectively engaged in an exercise of legislative power. Otherwise, Congress would be permitted to delegate power it does not possess<sup>150</sup> and avoid the clause’s inhibition<sup>151</sup>—especially in those cases which agencies are given broad discretion to act with the force of law pursuant to often-nebulous statutory provisions.

#### B. *Force of Law: Chevron and Mead*

The result of the Court’s adoption of an extremely lax “non-delegation” standard is to place a great deal of substantively legislative power in the Executive Branch and other administrative agencies when charged with interpreting and enforcing a statute. Accordingly, far more resources are exhausted over the question of whether an agency has exceeded the scope of its delegated authority pursuant to statute than on determining whether Congress has violated the non-delegation doctrine. This is the question that predominates in the class of cases treated under the Court’s hallmark decisions *Chevron*<sup>152</sup> and *Mead*.<sup>153</sup> A brief discussion of these cases is necessary to highlight how agencies act with the force of law in order to evaluate the applicability of the Bill of Attainder Clause to this kind of

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147. *E.g., Mistretta*, 488 U.S. at 372.

148. *Dillon v. United States*, 130 S. Ct. 2683, 2702 (2010) (Stevens, J., dissenting) (quoting *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting)).

149. *See Whitman*, 531 U.S. at 474–75 (listing cases where “intelligible principle” was detected); *id.* at 490 (Stevens, J., concurring) (stating that Constitution does not “purport to limit the authority of either recipient of [enumerated] power [i.e., Congress or Executive Branch] to delegate authority to others”); *see also* *Bowsher v. Synar*, 478 U.S. 714, 752 (1986) (Stevens, J., concurring) (asserting “it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers”); *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (“[L]egislative power can be exercised by independent agencies and Executive departments.”).

150. *Cf. Bowsher*, 478 U.S. at 726 (“[I]t follows that Congress cannot grant to an officer under its control what it does not possess.”).

151. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

152. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

153. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

executive and administrative action—and to distinguish these cases from other forms of administrative or executive activity.

In *Chevron*, the Court laid out its famous test for whether to defer to an agency's construction of a statute,<sup>154</sup> which came to be known as “*Chevron* deference.”<sup>155</sup> If a statute clearly expresses Congress' intentions on how to resolve a particular issue, a court is to apply Congress' intentions without looking to an agency's construction.<sup>156</sup> But if a statute “is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”<sup>157</sup> The Court parsed this further into “express delegation”—when Congress “explicitly left a gap for the agency to fill”—and implicit delegation—when it is less clear whether such a gap exists.<sup>158</sup> If there was an express delegation, “[s]uch *legislative* regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>159</sup> If an implicit delegation occurred, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>160</sup>

A quarter-century later, the Court added a wrinkle to the *Chevron* deference analysis in *Mead*. In that case, the Court held that *Chevron* deference applies only when “it appears that Congress delegated authority to the agency generally to make rules *carrying the force of law*, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>161</sup>

If this authority was not delegated, or the agency was not exercising its authority in that capacity, an agency's interpretation still may be entitled to another form of deference, so-called *Skidmore* deference.<sup>162</sup> The amount of deference due an agency under *Skidmore* varies on a case-by-case basis,<sup>163</sup>

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154. *Chevron*, 467 U.S. at 844.

155. See, e.g., *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (using term “*Chevron* deference”); see also Jerome Nelson, *The Chevron Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY L.J. 59 (1988).

156. *Chevron*, 467 U.S. at 843.

157. *Id.* at 843.

158. *Id.* at 843 (emphasis added).

159. *Id.* at 844.

160. *Id.*

161. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (emphasis added).

162. *Id.* at 234–35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)); *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (describing *Skidmore* deference: “the [agency's] interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade’”).

163. *Mead*, 533 U.S. at 250 (Scalia, J., dissenting) (criticizing the indeterminateness of *Skidmore* deference).

depending on a variety of factors that a court may use when weighing an agency's "power to persuade."<sup>164</sup> Under *Skidmore* the Court engages in its own construction of the statute that is not meaningfully limited by an executive or administrative interpretation.<sup>165</sup> In doing so, the Court's operating principle is that the legislative act itself must provide the grounds for resolution of the question presented, not an agency's answer.<sup>166</sup> Therefore, cases under the *Skidmore* category are distinguishable from the "force of law" cases under *Chevron* and *Mead* where the Court's hands are more tied by the agency's policy judgment.

In order to determine whether the authority to "make rules carrying the force of law" has been delegated, *Mead* offers some suggestions: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rule-making, or by some other indication of a comparable congressional intent."<sup>167</sup>

The Court's heightened deference in these cases is a particular judicial affirmation of the fact that the executive branch and other administrative agencies act with the force of law, and courts interpret an agency's regulations as if Congress itself wrote those provisions. Significantly, the Court's creation of a two-track approach in terms of judicial deference accorded the Executive Branch and administrative agencies represents a frank acknowledgment that the Legislative Branch intends executive and administrative agencies to define the substance of legislation via broad delegations.<sup>168</sup> By the same token, in the *Chevron-Mead* cases, where agencies are empowered to act with the force of law, protections such as the Bill of Attainder Clause should apply to the agency action in full force and

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164. *Skidmore*, 323 U.S. at 140.

165. *See id.* at 139 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions.").

166. *Id.* at 137 ("Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts.").

167. *Mead*, 533 U.S. at 227.

168. *E.g.*, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."). Indeed, the Bill of Attainder Clause may provide a means to attack regulations under this prong. Nevertheless, a regulation losing deference under *Chevron* because it is arbitrary or capricious is an issue distinct from a bill of attainder claim brought against an agency pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (2011), under which the theory would be that a regulation inflicted punishment on a specified person or group without a judicial trial. *See Selective Servs. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984) (discussing elements of a bill of attainder Civil Rights Act claim).

effect to prevent a congressional end-run around the clause, as Justice Douglas alluded to in *Peters*.<sup>169</sup>

As a result, the Court's decisions in the non-delegation area, and its review of executive and administrative actions under *Chevron* and *Mead*, must be seen as a pragmatic adaptation of the classic separation of powers doctrine to the reality of the Modern Administrative State. In a very real sense, the Court's approach in these cases rests upon its recognition that Congress can and does delegate legislative power to other branches of government. It follows that certain restrictions on legislative power, namely the Bill of Attainder Clause, must apply to the class of executive and administrative actions treated by the judiciary as having the force of law in order to ensure that the legislative branch cannot circumvent an important limitation on its powers.

Therefore, in an age when legislative power is frequently and substantially exercised outside of legislatures, the circuit decisions confining the applicability of bill of attainder protections to legislatures are not only contrary to the essence of the clauses as expressed in *Cummings*, but they also render the clauses meaningless in light of the reality of the modern administrative state, wherein legislative power is delegated away from Congress.

#### CONCLUSION

Because it is clear that administrative agencies and the executive branch exercise legislative power, it is further clear that rules promulgated by these entities are a modern "disguise" that bills of attainder can wear as warned about by the *Cummings* Court. As a result, courts should reject the claim that the Bill of Attainder Clauses are limited to formal legislation passed by Congress or a state legislature. Instead, the judiciary should build on its recognition that agencies act with legislative power and are treated as having the force of law. Just as the Seventh Circuit has treated rules "adopted pursuant to congressionally delegated authority" as "tantamount to a statute for the purposes of determining whether it runs afoul of the Ex Post Facto Clause,"<sup>170</sup> the same should be true for the Bill of Attainder Clauses.

Such an approach recognizes that modern agencies act with the force of law,<sup>171</sup> and have become, in many ways, "a sort of junior-varsity

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169. *Peters v. Hobby*, 349 U.S. 331, 352 (1955) (Douglas, J., concurring).

170. *Dehainaut v. Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994) (citing *Rodriguez v. U.S. Parole Comm'n*, 594 F.2d 170, 174 (7th Cir. 1979)).

171. *See Mead*, 533 U.S. at 226–27; discussed *supra* Part III.B.

Congress.”<sup>172</sup> Furthermore, it accounts for the Framers’ awareness that “the Executive Department is the branch most likely to forget the bounds of its authority”<sup>173</sup>—which is the reason “all legislative Powers herein” were vested in Congress in the first place.<sup>174</sup> It also realistically considers Congress’ common practice of delineating highly abstract and general guidelines to other parts of the government when it delegates,<sup>175</sup> thereby empowering those entities with the broadest discretion to make policy.<sup>176</sup>

Finally, it is conceivable that, while a delegation of legislative power may be proper, the recipient of that power can run afoul of the *Chevron* “arbitrary, capricious, or manifestly contrary to the statute” standard.<sup>177</sup> While flunking this prong of *Chevron* would invalidate a disputed rule, such an outcome should neither preclude nor be necessary to bring a bill of attainder cause of action under the Civil Rights Act, assuming a plaintiff can establish damages.<sup>178</sup> Indeed, such an inquiry should be necessary if the proper facts raise the issue.<sup>179</sup>

In sum, because executive and administrative agencies exercise legislative power, and the Bill of Attainder Clause is a protection against the abuse of legislative power, courts should consider the merits of bill of attainder claims against certain executive and administrative action without clinging to a form-over-substance rule<sup>180</sup> that renders the clause “vain and futile.”<sup>181</sup>

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172. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

173. *United States v. Brown*, 381 U.S. 437, 443 (1965); *see also* Alford, *supra* note 9, at 1210 (arguing that the reason the Framers did not expressly prohibit the executive branch from attainder practices was that they “may have believed that such an explicit command was unnecessary.”).

174. U.S. CONST. art I, § 1.

175. *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218–19 (1989).

176. *See Dillon v. United States*, 130 S. Ct. 2683, 2707 (2010) (Stevens, J., dissenting); *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

177. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

178. 42 U.S.C. § 1983 (2011).

179. *See supra* note 168 and accompanying text.

180. *See Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966).

181. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).