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IS AFFIRMATIVE ACTION A BILL OF ATTAINDER?

A bill of attainder is something virtually unknown to modern Americans, but our Founding Fathers considered it so important that they placed a prohibition against it in Article I of the Constitution, just ahead of the prohibition against ex post facto laws. A bill of attainder is a legislative imposition of punishment upon specified persons without the safeguards of a judicial trial.

Bills of attainder were frequently used by the British Parliament in the 16th, 17th and 18th centuries to punish those people believed to be "dangerous" to the state. Experience had taught the American colonists that legislative trials were simply devices to savage individuals or groups temporarily out of political favor. Punishment on account of the immutable characteristic of ancestry was a telltale sign of the British bill of attainder.

Technically, in British usage, a bill of attainder meant a legislative condemnation to put a named person to death, while those punishments short of death were called bills of pains and penalties. From the first, however, the U.S. Supreme Court used the term bill of attainder to cover both kinds of penalties; Chief Justice Marshall stated that "a bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

The Supreme Court developed a three-part test to identify a prohibited bill of attainder: (1) the infliction of punishment, (2) on named individuals or members of an easily ascertainable class, (3) without a judicial trial. A distinguishing mark of most U.S. bills of attainder was that identified groups or individuals were hindered in the pursuit of their occupations.

The Supreme Court in 1965 invalidated, as a bill of attainder, a federal statute which made it a criminal offense for a member of the Communist Party to serve as a labor union officer or employee. In 1946 the Supreme Court invalidated a federal statute which forbade the paying of a salary to certain named federal officials.

In 1867 the Court invalidated a federal statute which conditioned admission for a lawyer to practice before the federal courts upon his swearing that he had taken no part in the rebellion of the southern states. Also in 1867 the Court struck down a Missouri constitutional provision which forbade voting, holding office, teaching, or preaching to anyone who would not swear that he had taken no part in the southern states' rebellion.

A young lawyer named David D. Butler, writing in the Drake Law Review, has come up with a theory in which he identifies the Affirmative Action Guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) as a bill of attainder. These Guidelines, adopted January 12, 1979, permit employers to impose employment "plans" which include "goals and timetables or other appropriate employment tools which recognize the race, sex or national origin of applicants or employees."

Incidentally, the EEO Commission that approved the Affirmative Action Guildelines was composed of one black female, one white female, one Hispanic male, one black male, and one white male. The vote was 4-to-0; the white male was not present.

Apologists for quota schemes admit that hindering white males in the pursuit of their occupations is part of the definition of Affirmative Action for race or sex. Mr. Butler's research redundantly confirms that their motivation was punitive.

One EEOC Commissioner and quota advocate explained their action: "Taking blackness into account and weighing it positively when we allocate opportunities ... must mean denying opportunities to some people solely because they were born White."

Justice Harry Blackmun described the rationale in University of California v. Bakke (1978) like this: "It would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. ... In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."

Thus, the EEOC Guidelines meet the three-part test: they (1) punish (2) members of an easily ascertainable class (white males) (3) without a judicial trial. Mr. Butler urges that the constitutional prohibition on bills of attainder be invoked to invalidate the punitive treatment of white males involved in Affirmative Action on account of race and sex.