clusions. Nevertheless, it is possible to state some rather definite conclusions. The consent decree appears unlikely to be successful in any great degree. The Interstate Commerce Commission has the power to solve the problem, but to date that power has not been exercised effectively. If neither the decree nor action by the Commission proves successful, divorcement appears to be the best solution. Perhaps a gradual policy would be sufficient to induce the oil companies to lower rates and eliminate repressive service regulations. On the other hand, it may be necessary for the Congress, or for the Department of Justice, to resort to the divorcement technique on a large scale. Divorcement would solve the problem, in large measure, but without further administrative regulation there is no guarantee that the pipe lines will be made completely accessible to the independent refiners. Perhaps government ownership, on a small or large scale, may prove the ultimate answer.

SPECIAL LEGISLATION DISCRIMINATING AGAINST SPECIFIED INDIVIDUALS AND GROUPS

SPECIAL legislation directed expressly against specified individuals and groups is today being employed by Congress as a repressive technique in the usual drive during emergencies against allegedly subversive elements. Measures of this type — the only instances in Congressional history, as far as can be determined — include a bill ordering Harry Bridges deported,[1] a measure requiring registration of the Communist Party and named Bund groups as foreign agents,[2] and provisions in appropriation bills forbidding salary payments to certain named individuals.[3] In the past such legislation has usually been invoked, by Parliament in England and by state legislatures in America, during times of stress and in cases which have aroused strong popular feeling. Invariably this technique has been used because the people mentioned in the special acts have not been subject to punishment under existing law and no general law could have been framed to reach them.

All but four of the state constitutions contain express restrictions against the enactment of special legislation.[4] Such restrictions were not included in the original constitutions but were incorporated later in an attempt to curb the abuse of special law making powers. The uncontrolled exercise of these powers had led in many instances to corruption in the legislative bodies,

1. *H.R. 9766,* 76th Cong., 3rd Sess. (June 13, 1940).

2. *H.R. 6269,* 77th Cong., 1st Sess. (Dec. 19, 1941).

3. PUB. L. No. 143, 77th Cong., 1st Sess. (July 1, 1941) § 1(a); *H.R. 6430,* 77th Cong., 2nd Sess. (Jan. 22, 1942).

4. Connecticut, Massachusetts, New Hampshire, Vermont. See Cloe and Marcus, *Special and Local Legislation* (1936) 24 KY. L. J. 351.

diversity of laws applicable within the states, and arbitrary discriminations both among individuals and localities. Moreover, with general laws often the exception rather than the rule, the volume of legislation had increased to such proportions as to cripple the effectiveness of the legislatures. These constitutional restrictions apply not only to special laws directed against named individuals[5] but also to laws passed for the benefit of specific persons and groups. They generally designate cases in which special laws shall not be employed and contain a cover-all provision prohibiting passage of special laws when a general law can be used.[6]

No such express restrictions are included in the Federal Constitution, and, indeed, in every session of Congress private bills are passed for the benefit of named individuals with their consent. On the other hand, passage of legislation directed against specified individuals without their consent is restricted by several constitutional provisions. Thus Article I, Section 9, provides that no bill of attainder or ex post facto law shall be passed. Although the meaning of the ex post facto clause has been the subject of some discussion,[7] it has always been held that it covers only retroactive criminal legislation.[8] It is important, therefore, in considering the constitutionality of special legislation in the light of the ex post facto prohibition to determine whether the statute is criminal. On the other hand, it is recognized that the sanction against ex post facto laws was intended to secure substantial personal rights against arbitrary and oppressive legislation;[9] consequently, a law may be invalid as ex post facto even though it does not expressly declare the penalized action to be criminal.[10] Every special act directed against an individual or group is in reality ex post facto, for it punishes actions which until the time of passage of the special act were not punishable under any existing law. Because, however, the majority of such acts are not criminal in nature, they do not fall within the constitutional prohibition.

A bill of attainder, in the modern sense of the term, is a legislative act which imposes either absolute or conditional punishment without a judicial trial. If the punishment is less than death, the act is termed a bill of pains and penalties, but within the meaning of the Constitution, bills

5. The states are now prevented from passing legislation of this kind by the equal protection clause of the Fourteenth Amendment. Cotting v. Kansas City Stock Yards Co. and the State of Kansas, 183 U. S. 79 (1901).

6. For a discussion of the types of state restrictions and their history, see BINNEY, RESTRICTIONS UPON SPECIAL AND LOCAL LEGISLATION (1894); Cloe and Marcus, *Special and Local Legislation* (1936) 24 KY. L. J. 351.

7. See Field, *Ex post facto in the Constitution* (1922) 20 MICH. L. REV. 315.

8. Calder v. Bull, 3 Dall. 385 (U. S. 1798).

9. See Beazell v. Ohio, 269 U. S. 167, 171 (1925).

10. See State v. Keith, 63 N. C. 140 (1869) (repeal of amnesty law held ex post facto as to cases covered by the law); 1 COOLEY, CONSTITUTIONAL LIMITATIONS (1927) 541 *et seq.* In other words, whether a law falls within the ex post facto clause depends on whether the punishment it imposes is of a criminal nature.

of attainder include bills of pains and penalties.[11] Dispensing with the ordinary judicial forms and precedents, these bills take from the accused all the advantages he might have in the courts of law. Thus many bills of attainder were passed with no hearings and no evidence, or only evidence unfavorable to the accused. Such bills were employed in England for the direct punishment of political offenses.[12] Although today, because of strong public disapproval, bills of attainder have fallen into disuse there, no formal prohibitions exist against their passage. In the American colonies bills of pains and penalties were used during and after the Revolution to effect the banishment of loyalists and the confiscation of their property.[13] These measures were later widely condemned. It was the memory of them and of the English acts preceding them which led the members of the Constitutional Convention to insert in the main body of the Constitution prohibitions against the use of bills of attainder by Congress or the state legislatures.[14]

Only once has the Supreme Court found an Act of Congress to be a violation of this provision.[15] That Act, growing out of the Civil War, was designed to exclude from practice in the United States Courts all persons who had taken up arms against the government or who had voluntarily given aid and encouragement to its enemies during the rebellion by requiring an oath negativing any such conduct as a condition to practice. Defining punishment as a deprivation of any rights, civil or political, the Court held the law to be a bill of attainder and therefore void. At the same time and upon the same reasoning the Court held void a clause of the Constitution of Missouri which, among other things, excluded all priests and clergymen from preaching unless they took a similar oath of loyalty.[16]

More general restrictions on all types of repressive special legislation are embodied in the due process clause and the concept of the separation of powers. The requirement of separation of powers does not prevent Congress from creating a special personal right in private bills.[17] But it does prevent Congress from adjudicating or destroying rights already in existence, for this is a part of the judicial function.[18] Likewise, the requirement of due process is now

11. *Ex parte* Garland, 4 Wall. 333 (U. S. 1866); Cummings v. Missouri, 4 Wall. 277 (U. S. 1866); see also 2 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) 216; 2 WOODESSON, LECTURES (Am. ed. 1842) 509 *et seq.*

12. Bills of attainder were widely used during the reigns of the Tudor and Stuart kings as a means of disposing of distinguished persons who could not be charged with any offense under the existing law.

13. See Thompson, *Anti-Loyalist Legislation during the Revolution* (1908) 3 ILL. L. REV. 81, 147.

14. See MADISON, DEBATES (Inter. ed. 1920) 449.

15. *Ex parte* Garland, 4 Wall. 333 (U. S. 1866).

16. Cummings v. Missouri, 4 Wall. 277 (U. S. 1866).

17. Paramino Lumber Co. v. Marshall, 309 U. S. 370 (1940).

18. See Green, *Separation of Governmental Powers*, in 4 SELECT ESSAYS ON CONSTITUTIONAL LAW (1938) 202; HORACK, CASES AND MATERIALS ON LEGISLATION (1940) 26.

held to apply to Congressional action[19] although at first it was taken to apply only to proceedings in a court of law. And while the Supreme Court has never had occasion to consider the problem directly, it has indicated, in numerous dicta, that special discriminatory legislation might offend the requirements of procedural due process.[20] Besides these constitutional restrictions against special legislation, Congress itself has expressed its disapproval of special bills by prohibiting their use in the Territories,[21] and in the instances here considered it resorted to the method only after the failure of efforts to achieve the desired results through established procedures.

Among the recent examples of repressive special legislation is the bill which directed the Attorney General to take the alien Bridges into custody and deport him.[22] At the time the bill was introduced, the regular deportation

19. Adkins v. Childrens Hospital, 261 U. S. 525 (1922). See also Murray v. Hoboken Land & Improvement Co., 18 How. 272 (U. S. 1855); Adair v. United States, 208 U. S. 161 (1908); Weeds v. United States, 255 U. S. 1909 (1921); *cf.* Wilson v. New, 243 U. S. 332, at 355, 365 (1917).

20. See, for example, Hurtado v. California, 110 U. S. 516, at 535, 536 (1884): "Due process of law in the latter (the Fifth Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of common law. . . . But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial', so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society', and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertion of power under the forms of legislation." See also BURDICK, LAW OF THE AMERICAN CONSTITUTION (1922) 419; 2 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) 689; TAYLOR, DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS (1917) 307; 3 WILLOUGHBY, CONSTITUTIONAL LAW (1929) 1928, 1929. For the opposite view see Hall, *Due Process of Law and Class Legislation* (1909) 43 AM. L. REV. 926. For a discussion of the development of the relation between due process and equality, see MOTT, DUE PROCESS OF LAW (1926) 256 *et seq.*

21. 24 STAT. 170 (1886), 48 U. S. C. § 1471 (1934). See United States v. Stromberger, 9 Alaska 689, 696 (1940).

22. The Bridges bill, *H.R.9766*, 76th Cong., 3rd Sess. (June 13, 1940), read: "Be it enacted . . . That notwithstanding any other provision of law the Attorney General be, and is hereby authorized and directed to take into custody forthwith and deport forthwith to Australia, the country of which he is a citizen or subject, the alien, Harry Renton Bridges, whose presence in this country the Congress deems hurtful." Sponsored by the American Legion, it was passed by the House on June 13, 1940 by a vote of 330–42. See 86 CONG. REC. 8215 (1940). It then went to the Senate Com-

procedure involved a warrant of arrest from the Department of Labor and a hearing before a trial examiner to determine whether the alien came within the class deportable under the general statutes.[23] After the hearing the record and the recommendations of the trial examiner were reviewed by a board set up in the Department of Labor. The final decision as to whether a warrant of deportation should issue was made by an assistant to the Secretary of Labor and was based on the recommendations of the board. In the case of Bridges this procedure ended in a dismissal of the charges against him and the cancellation of his warrant of arrest.[24] After this unsuccessful attempt to deport him through the regular means, the bill ordering his deportation was introduced in the House.

The Bridges bill would seem to have been an unconstitutional exercise of the Congressional power over aliens. For while Congress has the power inherent in all sovereign states to order the deportation or exclusion of

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mittee on Immigration which found it unconstitutional and reported it back with an amendment. SEN. REP. No. 2031, 76th Cong., 3rd Sess. (1940). It was denounced as unconstitutional by Attorney General Robert Jackson in a letter to Senator Russell, 86 CONG. REC. APP. 4155 (1940), by Solicitor General Francis Biddle in a speech before the American Bar Association, 86 CONG. REC. APP. 4184 (1940), and by the American Bar Association, 86 CONG. REC. 11927 (1940). For the opposite view see SEN. REP. No. 2031, Part 2, 76th Cong., 3rd Sess. (1940). For a chronological review of Bridges's activities see 87 Cong. Rec. App., March 25, 1942, at A1301. A second special bill for the deportation of Bridges is now pending in the House. *H. R. 1644,* 77th Cong., 1st Sess. (Oct. 6, 1941). But there may be no need for it since second deportation proceedings, instituted against Bridges on January 2, 1942, culminated on May 28, 1942, in an order from Attorney General Biddle for his deportation. See N. Y. Times, June 5, 1942, p. 38, col. 3.

23. For a history of the United States deportation laws, and an analysis of the classes of aliens who may be deported and of the procedural requirements involved, see Klainer, *Deportation of Aliens* (1935) 15 B. U. L. REV. 663. For a critical examination of the law, see Puttkammer, *Legislation Affecting Deportation of Aliens* (1936) 3 U. OF CHI. L. REV. 229. Since the first Bridges proceedings the deportation procedure has been removed from the Department of Labor to the Department of Justice.

24. Deportation proceedings against Bridges were instituted by the Secretary of Labor on March 2, 1938 on the ground that after Bridges entered the United States he became a member of or affiliated with an organization which "advises, advocates, and teaches the overthrow by force and violence of the government of the United States" or that he became a member of or affiliated with an organization that "causes to be written, circulated, distributed, printed, published, and displayed, printed matter advising, advocating, and teaching the overthrow by force and violence of the Government of the United States." 40 STAT. 1012 (1918), 8 U. S. C. 137 (1934). Following the decision of the Supreme Court in Kessler v. Strecker, 307 U. S. 22 (1939), the warrant was amended so as to charge that Bridges both had been and was affiliated with such an organization. James M. Landis, was appointed trial examiner by the Secretary of Labor. The hearings lasted nine weeks and produced 7,724 pages of testimony and 274 exhibits. Dean Landis's findings and conclusions were 152 pages in length and to the effect that Bridges was not established by the evidence to be a member of or affiliated with an organization of the kind described.

aliens,[25] it may not exercise this power in an unconstitutional manner. And the Bridges bill would seem to contravene the due process clause and the prohibition against bills of attainder.

The broad guarantee of personal liberty in the Fifth Amendment does not distinguish between citizens and aliens but lays down the rule that no *person* shall be deprived of life, liberty, or property without due process of law.[26] Under the Supreme Court's interpretation of due process an alien who has entered this country and become in all respects subject to its jurisdiction may not be taken into custody and deported without having an opportunity to be heard concerning his right to remain in the United States.[27] Deportation by legislative order permits of no hearing, and is, therefore, a denial of due process.[28]

Since legislative punishment is the essence of a bill of attainder,[29] the crucial question concerning the Bridges measure on this point is whether deportation is punishment. Although the Supreme Court has never decided whether deportation is punishment of a kind prohibited by the bill of attainder clause, it has made the broad statement in some of its opinions that deportation is not punishment. However, in these cases the Court's actual holding was that deportation is not such punishment as entitles the alien to a trial by jury[30] or enables him to invoke the constitutional prohibition against ex post facto laws.[31] In fact deportation is clearly punish-

25. Ng Fung Ho v. White, 259 U. S. 276 (1922); Bugajewitz v. Adams, 228 U. S. 585 (1913); Wong Wing v. United States, 163 U. S. 228 (1896); Fong Yue Ting v. United States, 149 U. S. 698 (1893); Chung Yim v. United States, 78 F. (2d) 43 (C. C. A. 8th, 1935), *cert. den.* 56 Sup. Ct. 150 (1935). See also HERSHEY, ESSENTIALS OF INTERNATIONAL LAW AND ORGANIZATION (1927) 369; HALL, INTERNATIONAL LAW (8th ed. 1924) 264, 265; 1 OPPENHEIM, INTERNATIONAL LAW (1920) 498; 1 WESTLAKE, INTERNATIONAL LAW (1904) 217.

26. Truax v. Raich, 239 U. S. 33 (1915); Wong Wing v. United States, 163 U. S. 228 (1896); Lem Moon Sing v. United States, 158 U. S. 538 (1895); Yick Wo v. Hopkins, 118 U. S. 356 (1886).

27. United States v. Jung Ah Lung, 124 U. S. 621, 632 (1888); Ungar v. Seaman, 4 F. (2d) 80 (C. C. A. 8th, 1924); McDonald v. Sui Tak Sam, 225 Fed. 710 (C. C. A. 8th, 1915); *accord,* Japanese Immigrant Case, 189 U. S. 86, 101 (1903); See United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 106 (1927); Bufalino v. Irvine, 103 F. (2d) 830, 832 (C. C. A. 10th, 1939); Richardson, *Fair Hearing in Deportation Proceedings* (1927) 20 LAW. AND BANK. 241.

28. A legislative hearing probably would not satisfy the requirement. For if Congress does not select an agency to administer its policy, a judicial investigation must be allowed. United States v. Jung Ah Lung, 124 U. S. 621 (1888). See also McDonald v. Siu Tak Sam, 225 Fed. 710 (C. C. A. 8th, 1915) (that there must be a fair and impartial hearing by some tribunal established for that purpose).

29. *Ex parte* Garland, 4 Wall. 333 (U. S. 1866).

30. Bugajewitz v. Adams, 228 U. S. 585, 591 (1913); Wong Wing v. United States, 163 U. S. 228 (1896); Fong Yue Ting v. United States, 149 U. S. 698 (1893).

31. Mahler v. Eby, 264 U. S. 32 (1924). See also 1 WILLOUGHBY, CONSTITUTIONAL LAW (1929) 325.

ment,[32] and some of the lower courts have so held.[33] It involves an arrest, a deprivation of liberty, and often a removal from home, family, and property. In the words of Mr. Justice Brandeis it deprives an alien of "all that makes life worth living."[34] Moreover, when Congress orders the deportation of a specified alien, its intention is not only to get rid of him but also to punish him for his activities while here. If deportation is punishment, an act deporting an alien without judicial trial is a bill of attainder and expressly prohibited by the Constitution.[35]

The case of *Tiaco v. Forbes*[36] has been cited as precedent for the proposition that Congress has power to order the deportation of any specific alien whose presence in this country it deems harmful. In that case the Governor General of the Philippines, acting under the general authority vested in his

32. In a strong dissent in Fong Yue Ting v. United States, 149 U. S. 698, 740 (1893) Mr. Justice Brewer made this point clear: "But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel." See also Madison's discussion of the Alien and Sedition Laws of 1798 in 4 ELLIOT'S DEBATES (1866) 555: "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for; and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and to unusual licentiousness on that element and possibly to vindictive purposes, which his immigration itself may have provoked; if a banishment of this sort be not punishment and among the severest of punishments it would be difficult to imagine a doom to which the name could be applied." See also 88 Cong. Rec., March 18, 1942, at 2697 (bill for the relief of Mrs. Cecilia Pitt whose husband committed suicide for fear he would be deported to Danzig).

33. Wallis v. Tecchio, 65 F. (2d) 250 (C.C.A. 5th, 1933). See also United States *ex rel.* Klonis v. Davis, 13 F. (2d) (C. C. A. 2d, 1926) 630.

34. Ng Fung Ho v. White, 259 U. S. 276, 284 (1922).

35. As has been explained, p. 1359 *supra*, a bill of attainder is a legislative act which inflicts punishment without a judicial trial. In deporting an alien a judicial trial is, of course, not required even in the regular procedure unless the alien has a real claim to citizenship. See note 27 *supra*. It might, therefore, be argued in the light of the definition of bills of attainder that legislative deportation is not a violation of the constitutional prohibition against them. In the regular proceeding, however, the alien is entitled to a fair hearing and a judicial review on the question of whether a fair hearing was accorded him. See note 27 *supra*.

36. 228 U. S. 549 (1913). This case has been cited by the Supreme Court in a deportation case only once. Mr. Chief Justice Taft used it in Mahler v. Eby, 264 U. S. 32 (1924) to support his contention that Congress can delegate its power over aliens to "executive" agencies.

office, had ordered twelve specified aliens deported. The Philippine Legislature later ratified the act. In a suit for damages brought by the aliens against the Governor General, the Supreme Court, affirming the dismissal of the actions, construed the deportation as "having been ordered by the Governor General in pursuance of a statute of the Philippine Legislature directing it."[37] The opinion held that Congress has the power, inherent in sovereignty, to deport aliens, and concluded that the Philippine Government could do what unquestionably Congress might. While the Court discussed briefly the Congressional power to deport aliens and the basis for this power, it did not examine the validity of its exercise in this fashion. In every one of the cases relied on, the constitutionality of general legislation regarding aliens was being upheld; and in none of them was the question of constitutional limitations on special legislation considered. From the proposition that Congress can deport aliens no inference is to be drawn that it can exercise its power without regard for the limitations set by the Constitution on the exercise of all Congressional powers.

Finally, even if Congress could deport a named alien by legislative act, such a move would be unwise because inconsistent with the international policy of the nation. This country has always insisted on proper procedures in the deportation of aliens.[38] A reversal of this attitude would be reflected by other nations and inevitably be detrimental to American nationals abroad.

A second recent example of repressive special legislation is to be found in the exclusion of David Lasser and Goodwin Watson from the benefits of certain appropriation bills. The former was employed as personal assistant to the head of the Works Project Administration; the latter, as chief analyst for the Federal Communications Commission. Both had incurred the enmity of individual Senators and Representatives. As head of the Workers Alliance,[39] Lasser had appeared before various committees of the Senate and the House and offended their members by charging both Congress and the Works Project Administration with graft and corruption.[40] Watson had been branded by the Dies Committee as having been affiliated with a "Communist

37. *Id.* at 556.

38. See letter from Mr. Olney, Secretary of State, to Mr. Young, United States Minister to Guatemala, dated January 30, 1896, quoted in 4 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 102 *et seq.*; letter from Mr. Gresham, Secretary of State, to Mr. Smythe, United States Minister to Haiti, dated November 5, 1894, quoted *id.* at 82 *et seq.*; letter from Mr. Bayard, Secretary of State, to Mr. Lathrop, United States Minister to Russia, dated July 1, 1887, quoted *id.* at 80; letter from Mr. Evarts, Secretary of State, to Mr. Foster, United States Minister to Mexico, dated July 10, 1879, quoted *id.* at 76 *et seq.*

39. The Workers' Alliance was the one big union of Works Project Administration workers. When the Dies Committee declared that it was dominated by Communists, Lasser left it and took his supporters, who constituted a large majority of the members, with him.

40. See 87 Cong. Rec., June 20, 1941, at 5492. This was Lasser's only offense. He was attacked by Congressmen for personal reasons.

front" organization.[41] When the responsible heads of the departments to which these men were attached refused to dismiss them at the request of Congress, legislative reprisals were adopted. A few months before in an effort to get rid of David J. Saposs, who was chief economist for the National Labor Relations Board, Congress had forbidden the Board to maintain that office. The maneuver, however, proved ineffectual; the Board merely changed the name of the office and went on as before.[42] In the light of this experience Congress determined to deal with Lasser and Watson by name and provided in the appropriation bills for their respective departments that no part of the funds were to be used to pay their compensation.[43] Representative Boren characterized the action as "exactly the same thing we did in the case of Harry Bridges."[44]

In considering exclusions from the benefits of appropriation bills the primary question is whether under the separation of powers doctrine[45] Congressional power exists to enact such measures. Since Congress has the power of appropriation, it can grant or deny an appropriation, just as it can enact or refuse to enact a law; and the only check on this power is public opinion.[46] Congress can withhold an appropriation for an entire department;

41. For an indication of the value of the Dies' records, see 88 Cong. Rec. App., February 27, 1942, at A830; 88 Cong. Rec. App., February 25, 1942, at A792. See also the letter of Vice President Wallace in the New York Times, March 30, 1940, p. 1, col. 2, under the headline "36 Wallace Aides Accused as Reds".

42. See CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION (1941) 675. This kind of "ripper" legislation is not effective since it is at the mercy of the appointing power of the executive. See *id.* at 454; Stoner, *Legislating the Incumbent out of Office* (1914) 12 MICH. L. REV. 293; (1937) 86 U. OF PA. L. REV. 105.

43. The proviso naming David Lasser was included in the Emergency Relief Appropriation Act, PUB. L. No. 143, 77th Cong., 1st Sess. (July 1, 1941) §1(a). The one naming Watson was included in the Independent Offices Bill *H. R. 6430*, 77th Cong., 2nd Sess. (Jan. 22, 1942). It passed the House but was struck out by the Senate Committee on Appropriations.

44. 87 Cong Rec., June 12, 1941, at 5228. For an indication of Congressional intention to pass similar laws in the future, see 88 Cong. Rec., Jan. 22, 1942, at 584; 88 Cong. Rec., Feb. 16, 1942, at 1331. Congress can, of course, employ more subtle techniques than this. By the mere threat of withholding an entire appropriation it might gain control over appointments within an agency. See 2 INT. JURID. ASS'N. BULL. (1942) 1.

45. See Mugler v. Kansas, 123 U. S. 623, 662 (1887); Green, *Separation of Governmental Powers*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 202; Larson, *Has the President an Inherent Power of Removal of his Non-Executive Appointees?* (1940) 16 TENN. L. REV. 259; Lowenstein, *A Study in Comparative Constitutional Law* (1938) 5 U. OF CHI. L. REV. 566, 577; MADISON, 1 ANNALS OF CONGRESS 581 (1789): "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial Powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices."

46. See Taylor v. Beckham, 178 U. S. 548 (1900) at 577; MANSFIELD, THE COMPTROLLER GENERAL (1939) at 78.

but to say it can provide that a specific individual in the employ of a department shall not participate in an appropriation for it involves very different considerations. In the latter instance it would appear that Congress while nominally exercising the granted power of appropriation actually intends to effect the removal of the designated individual from office and is therefore really exercising the power to remove.[47] And in the great majority of cases the power to appoint, and consequently the power to remove, falls within the executive rather than the legislative function.

No reference to a power to remove from office is to be found in the Constitution except for the provision for removal by impeachment.[48] It is, nevertheless, well settled that the power to remove is an incident of the power to appoint since in the long run control over removal is control over appointment.[49] With reference to the power of appointment the Constitution provides that the President

> "shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[50]

The Supreme Court has not defined precisely the relative powers of the President and Congress under this clause. It has decided, however, that Congress has no power to limit the discretion of the President in removals of officers from positions classified as "purely executive", since an exercise of that power would constitute a direct encroachment on the executive power of the President.[51] From this it follows *a fortiori* that Congress has no power to make removals from such offices; for if the President is to be held responsible for the conduct of such officers, not only must he have unfettered power of removal, but he must also be free from the exercise of the removal power by outside authority. It would seem equally clear that Congress has no constitutional power to remove officers from any other positions.[52] Though

47. See United States v. Butler, 297 U. S. 1 (1936); 37 OPS. ATT'Y GEN. 56 (1933); Warren, *Presidential Declarations of Independence* (1930) 10 B. U. L. REV. 1.

48. U. S. CONST., Art. II, § 4.

49. Myers v. United States, 272 U. S. 52 (1926).

50. U. S. CONST., Art. II, § 2.

51. Myers v. United States, 272 U. S. 52, (1926).

52. There is nothing in Humphrey's Ex'r (Rathbun) v. United States, 295 U. S. 602 (1936) to question this. All that case holds is that Congress can impose reasonable regulations on the President's power to remove appointees of a certain class, as yet undefined but including members of the Federal Trade Commission. From the holding that the President has no arbitrary power to remove such appointees, no inference can be drawn that Congress has such power.

it has power to *vest* appointments of inferior officers in the President, the Courts of Law, or the heads of departments, it does not itself have the power to appoint and remove.[53] The same argument seems to apply to the cases of Lasser and Watson, who might be designated as employees rather than officers.[54] For Congress by statute vests the power to appoint and remove employees in certain officers of the Government; and unless it otherwise provides in the statute, it should not, without wholly changing the law, be able subsequently to interfere with the exercise of that power by the specified officers. For very practical reasons the power to remove should in all cases be left to the governmental authority which has administrative control, since this authority is normally the best judge of the qualifications of its employees.

Moreover, even if Congress had the power to remove, the Fifth Amendment and the prohibition against bills of attainder would probably prevent its exercise in such arbitrary fashion; for these objections to deportation of a specific individual by legislative act seem to apply also to removal from office by the same method. In the two leading cases on bills of attainder exclusion from any of the professions or any of the ordinary vocations of life was held to be punishment.[55] The legislative taking of a man's job is not simply a removal from the specific position. It is in effect a legislative declara-

53. See Myers v. United States, 272 U. S. 52, at 161 (1926): "The Court also has recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But *the Court never has held, nor reasonably could hold,* although it is argued to the contrary on behalf of appellant, *that the exception clause enables Congress to draw to itself,* or to either branch of it, *the power to remove or the right to participate in the exercise of that power.* To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers." (Italics added). See also Springer v. Government of the Philippine Islands, 277 U. S. 189, 202 (1928); Ekiu v. United States, 142 U. S. 651, 663 (1892); United States v. Ferreira, 13 How. 39 (U. S. 1851); State court holdings under analogous provisions of state constitutions: People v. Tremaine, 252 N. Y. 27, 42, 168 N. E. 817, 822 (1929); State *ex rel.* Tolerton v. Gordon, 236 Mo. 142, 169, 139 S. W. 403, 410 (1911); State *ex rel.* Worrell v. Carr, 129 Ind. 44, 28 N. E. 88 (1891). See also CORWIN, THE PRESIDENT (1940) 95; CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941) 575; ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 408; 3 WILLOUGHBY, CONSTITUTIONAL LAW (1929) 1510, 1512, 1524. For the opposite view, see Comment (1929) 42 HARV. L. REV. 426. For a discussion of the powers conferred upon the legislature by state constitutions see Dawley, *The Governor's Constitutional Powers of Appointment and Removal* (1938) 22 MINN. L. REV. 451; Mechem, *Power to Appoint to Office* (1903) 1 MICH. L. REV. 531.

54. A distinction is made for some purposes between government officers and employees. Whether it is to be made for the purpose of applying the Constitutional provisions concerning the appointment power is not clear, but those provisions may be so comprehensive as to include all appointees.

55. *Ex parte* Garland, 4 Wall. 333 (U. S. 1866); Cummings v. Missouri, 4 Wall. 277 (U. S. 1866). See Barker v. State, 3 Cowen 686 (N. Y. 1824).

tion that he is unfit for any federal office and, hence, an exclusion from that field of economic endeavor.

It might further be argued that the legislative removal of a specific individual from office is a violation of the due process clause of the Fifth Amendment. The cases are in great confusion on the question of property rights in jobs. While it is established that due process offers no justification for a permanent sinecure in any federal administrative office,[56] no inference is to be drawn from this that the incumbent of public office is not protected from arbitrary removal; and, indeed, where the procedural aspects of due process are involved, the courts occasionally assert that he has something "in the nature" of a "property" right in his job.[57]

Special legislation has also been employed in the attacks which Congressmen have levelled at specific organizations. Attempts have been made to "outlaw" the Communist Party, the German-American Bund, and the Kyffhäuser Bund,[58] to exclude their candidates from the ballot,[59] to make membership in them unlawful,[60] to disqualify members from both public[61] and private employment,[62] and to deport alien members.[63] The majority of these bills have been lost in Senate and House committees. One, however, was passed by both the legislative bodies and then recently vetoed by the President. This bill declared the Communist Party, the German-American Bund, and the Kyffhäuser Bund to be foreign agents and required them to register and file a list of their members.[64]

56. Note (1935) 99 A.L.R. 336.

57. Fugate v. Weston, 156 Va. 107, 157 S. E. 736 (1931); State *ex rel.* Rodd v. Verage, 177 Wis. 295, 187 N.W. 830 (1922); Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913); State *ex rel.* Childs v. Wadhams, 64 Minn. 318, 324, 67 N.W. 64, 67 (1896). See Dawley, *The Governor's Constitutional Powers of Appointment and Removal* (1938) 22 MINN. L. REV. 451, 474; Jennings, *Removal from Public Office in Minnesota* (1936) 20 MINN. L. REV. 721, 728. The President is, of course, under no limitations in his removals from "purely executive" offices. Myers v. United States, 272 U. S. 52 (1926). It may further be noted that legislative removal defeats the purpose of the Civil Service System which is supposed to give government employees reasonable security by assuring them freedom from removal except on notice and for cause. See 37 STAT. 555, 5 U. S. C. § 652 (1934); Westwood, *The "Right" of an Employee of the United States Against Arbitrary Discharge* (1938) 7 GEO. WASH. L. REV. 212. Moreover, if these employees are made subservient to the Congress as well as to their immediate superiors and the President, their effectiveness may be considerably hampered. For elaboration, see REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937) 7; HART, TENURE OF OFFICE UNDER THE CONSTITUTION; HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936) 398; (1942) 2 INT. JURID. ASS'N BULL. 1; (1936) 30 ILL. L. REV. 1037.

58. *S.1385,* 77th Cong., 1st Sess. (April 25, 1941).

59. H. Con. Res. 5, 77th Cong., 1st Sess. (Jan. 8, 1941).

60. *H.R.3455,* 77th Cong., 1st Sess. (Feb. 18, 1941).

61. Pub. Res. No. 88, 76th Cong., 3rd Sess. (June 26, 1940).

62. *S.1970,* 76th Cong., 3rd Sess. (May 27, 1940).

63. *H. R. 1811,* 77th Cong., 1st Sess. (Jan. 10, 1941).

64. *H.R.6269,* 77th Cong., 1st Sess. (Dec. 19, 1941). Vetoed by the President, Feb. 9, 1942.

The Registration of Foreign Agents Act, as amended by the Senate, defined foreign agents generally[65] and required them to register and file a list of their officers and employees under penalty for failure to do so of a fine of not more than $10,000 or of imprisonment for not more than five years or both. About a year after the passage of this Act Representative Dies decided that under the terms of the Act it was the Attorney General's duty to proceed against the Communist Party and the Bunds for failure to comply with it. When the Government did not do so the House at the instigation of Dies and with eighty-two of its members present undertook to amend the Act, so that there would be no discretion on the part of the Department of Justice in interpreting it.

Unless it was to be justified under the war powers, the amendment would seem to have been, in the light of what we have already seen, a bill of attainder and therefore unconstitutional. Under the general law no one may be punished for not registering unless it is proven upon trial that he is in fact a foreign agent, but under the amendment such proof was dispensed with as to the named organizations. The amendment conclusively established that those organizations were in fact foreign agents and imposed criminal penalties upon them unless they registered and furnished the information required by the law. In addition, the amendment would seem to fall within the Constitutional prohibition against ex post facto laws, for presumably it was to be enacted because of past acts of the parties named which, when committed, were not punishable under the general law.[66] That the punishment was to be administered only upon failure to do some act in the future would not save the measure, for it is settled that bills of attainder and ex post facto laws may inflict punishment either absolutely or conditionally.[67] Moreover, the amendment would seem to have been a violation of the due process clause of the Fifth Amendment since it created an irrebuttable presumption of guilt.[68]

On broad grounds of policy numerous factors militate against any use at all by Congress of repressive special legislation. In the past such legislation has furnished many of the worst examples of the miscarriage of justice.[69] This is not surprising in view of the susceptibility of the members of the legislature to popular influence and the fact that designedly the legislature reflects the short term wishes of the people. Elementary considerations of justice require that each individual be governed by laws known to him in advance and applicable to all other individuals similarly situated. In addition, by occupying themselves with unimportant details of special legislation, legis-

65. See 87 Cong. Rec., Dec. 19, 1941, at 10289.

66. Calder v. Bull, 3 Dall. 386 (U. S. 1798).

67. *Ex parte* Garland, 4 Wall. 333 (U. S. 1866); Cummings v. Missouri, 71 U. S. 277 (1866).

68. Western and Atlantic R.R. v. Henderson, 279 U. S. 639 (1929).

69. See Pound, *Justice According to Law* (1914) 14 COL. L. REV. 1, 7-11.

lative bodies tend to limit their effectiveness in laying down general rules on matters of policy.[70] For these reasons writers on constitutional theory have postulated the fundamental principle that every one has a right to be governed by general rules.[71]

Special legislation as recently revived is but another addition to a growing list of repressive techniques aimed at allegedly subversive individuals and groups. Legislative committees have engaged in Red hunts; criminal syndicalism statutes have been passed and enforced; denaturalization proceedings have been instituted against naturalized citizens accused of radical activities; and left-wing parties have been excluded from the ballot.[72] Like these other methods, special laws constitute a direct attack on personal liberties. In considering them the courts should, therefore, keep a watchful eye on the rights of individuals and liberally construe the constitutional provisions for their protection.

70. See for example 1 MARYLAND CONSTITUTIONAL CONVENTION (1864) 877.
71. 2 COOLEY, CONSTITUTIONAL LIMITATIONS (1927) 809.
72. See (1942) 51 YALE L. J. 1215, n. 1, 2, 3.