

# Could Administrative Law be Unconstitutional? By Richard Palmquist

*I am sure we won't find the United States government breaking its own laws.* Richard Bach: *Bridge Across Forever*

At the risk of being accused of “tilting at windmills,” I will discuss here what seems to be a significant gap between the requirements of the U.S. Constitution contrasted with reality in government today. Sanity is judged by how accurately we perceive reality. Is it insane to expect government agents and elected officials to understand and abide by that Constitution? Perhaps. Then again, it might be that not all people working in government are sane themselves if they show they cannot understand or be conformed to the procedure set down in that document. To agree with what is written here could make you a cell-mate of the writer in the “loony bin” of society. Or, is there hope?

Nobody would want to live in a city where streets were not paved, sewage ran in open troughs through town or “old west” six-gun law enforcement was necessary. We want an orderly society. Society depends upon the rules set down in administrative law to provide order and peace. Should the government in charge of providing order follow the procedures established by the Constitution to guide them in that job? Or, should that government have absolute power? If the Constitution places power in the jury, should juries apply power, or should bureaucrats assume power over us?

## **The central issue:**

Administrative law is: 1) an act of a legislative body, 2) describing a group of people or entities, 3) imposing a duty inflicting potential pain or penalty for non-performance, 4) without first consulting a jury for authority.

A bill of attainder is: 1) an act of a legislative body, 2) naming a described individual or group of people or entities, 3) imposing pain or penalty, 4) without first consulting a jury for authority.

Why does government behave as though administrative law is constitutional when bills of attainder are outlawed?

## **Was there ever a wall? If so, what made it fall?**

The Constitution placed a wall of protection between government and the people. The U.S. Constitution in Article One, Section Nine is titled: “Limitations on powers granted to the United States.” In Paragraph Three we read, “No bill of attainder ... shall be passed.” If this provision is understood in its full meaning, what the Founders seem to have done is to cause any law to be subject to review by “We the

People,” putting a wall of protection between government and those it serves.



At the Yorktown display in Williamsburg, Virginia, history opens our eyes to this issue. The museum plaque explains, “April 1764 – Parliament passes the Sugar Act to raise money from the colonies through import taxes. In response, Boston merchants refuse to buy English luxury goods.” Above this plaque is

displayed a quotation from James Otis, Jr., a Boston lawyer, who wrote in *The Rights of the Boston Colonies, 1764*, “Taxes are not to be laid on the people but by their consent.” Otis’ declaration, steeped in his education in English law, expresses the conviction held by the Founding Fathers. They would only tolerate a new government provided that government would be guaranteed to serve the people, rather than demanding service from the people.

As Abraham Lincoln declared, *"We the people are the rightful masters of Congress and the courts, not to overthrow the Constitution, but to overthrow men who pervert the Constitution."* The power to exert the authority of the people rests in the Juries: Grand Juries for general oversight and ordinary juries to decide individual cases.

That wall of jury protection was designed to prevent government from inflicting pain or punishment upon anyone without justifying the guilt of that person before a jury of peers. We call the United States "the land of the free," and we value our individual liberty. There are times, though, when we feel the pain of government restrictions. We may wonder how free we really are. If we go back in history and look for the recipe for personal liberty, we may understand that we are not as free as our Founding Fathers intended. Their mixing bowl of freedom rejected king rule, divided government into three parts, and balanced the powers of those parts against each other: providing for elections, enabling grand juries to watch over government, making sure nobody was convicted of a crime without trial by jury and limiting the powers of government, allowing ultimate power to remain in the states and in the people. Most political historians would stop there. Though they might agree that trials by jury offer a wall of protection against injustice, they ignore the prohibition against "bills of attainder," or take a narrow view of the meaning of that term. Are we missing one of the ingredients of freedom because we do not understand bills of attainder? Has that misunderstanding removed the wall the Founders intended to be our protection?

Perhaps you and I can bring a greater understanding of reality to the "Alice In Wonderland Queens" of our day who are intent on shouting, "Off with their heads." Nobody will dispute that our Founding Fathers intended to limit the power of government, guaranteeing that individuals are free to go about their lives so long as they do not hurt other people. By outlawing bills of attainder they gave juries the authority to have veto power over the common acts of government, to place a wall of protection between government agencies and the people. Through the years, though, brick by brick, that wall has been dismantled by the enactment of bill-of-attainder styled administrative laws.

### **Today's government agencies ignore or pierce the wall intended to protect us.**

The courts have determined there is a "wall of separation" between church and state. Was a wall of greater importance designed by our Founding Fathers? Did they set up a wall between legislature and people? They did not want laws to be imposed by an imperial majesty. King David was their example. They knew the story of David's thirst while fighting the Philistines (2 Samuel 23:14-17). They saw David reject his own bill of attainder. When King David's men learned he thirsted for water from a well in Bethlehem occupied by the Philistines, two courageous men went behind enemy lines to get that water for their king, risking their lives. King David, though a man of war, knew it was wrong for a king to risk the shedding of blood in order to gain a personal advantage. He was not consistent in applying that value during his years on the throne, but he knew God's view of the issue. So, when David's warriors presented the water to David, despite his thirst, he poured the water on the ground, disdaining his own wish to attain it. Like King David, the Founders wanted their new government to value human life above the proclamations of government.

The U.S. Constitution has two purposes: 1) to structure government; and 2) to limit its power. The writers knew that any government was fully able to grasp power. Though Article One, Section 8 of the US Constitution grants certain powers to Congress, there was no reason to exert energy in granting power to government. Instead, the Founders listed limits to government power. That government was to be republican, not a democracy. In a democracy the majority can oppress the minority. The Founders did not want that. Instead, they provided for the people to establish and maintain government through representatives. By definition, a republican form of government is limited by its enabling document, unlike free wheeling mob rule under democracy. Nevertheless, the fledgling government had difficulty dealing with apparent contradictions in the Constitution. The U.S. Constitution gives Congress the power to regulate commerce. While concentrating on that job, they seem to have neglected the limit to power that would have prevented that body from putting in place laws that would apply pains and penalties to individual people without first taking those individuals or groups before a jury to determine whether the pain or penalty should apply.

In pre-revolution England, bills of attainder were issued by a king whose authority had been limited by the Magna Charta. The king could no longer shout “Off with his head” and expect the executioner to act. Instead, he would cause Parliament to issue a law removing the head of a political enemy, or he would ask Parliament to pass laws applying pain or penalty upon a described individual or a group of people. A law with bite – a bite that applies to a defined person or group; a law issued and implemented by a single imperial power, like a policeman with power to convict – is a bill of attainder. They worked in “Old England,” but not on our soil.

When the average person rubs shoulders with government, he is seldom in contact with a person from the Legislative, Executive or Judicial branches. Instead, he deals with day-to-day bureaucrats, officials charged with applying and enforcing administrative law. The agency impacting the greatest number of lives is the Internal Revenue Service. If a tax auditor is asked to justify his reason for contacting you, he will cite a section of the Internal Revenue Code or one of the many regulations stemming from that administrative law. Are such laws bills of attainder? Society has long accepted such laws as appropriate, but were they authorized by the U.S. Constitution?

### **Are bills of attainder like administrative laws? (If it walks like a duck, is it a duck?)**

What is a bill of attainder? A “bill” is a “law.” To “attain” means “to get.” A bill of attainder is 1) an act of a legislature that 2) identifies members of a group targeted by the law and 3) dictates a penalty to be inflicted 4) without trial, outside the reach of a jury. So, a bill of attainder is a law designed to get something. Bills of attainder in English history were acts that removed the head of an enemy of the king, without trial. The complete definition of this kind of law includes “pains and penalties.” The U.S. Constitution outlaws bills of attainder, laws designed to “get” or “take” life or property from people. Bills of attainder in England were judicial acts under the authority of the legislature. This short-cutting of due process, this punishment without interaction with a jury, without reference to the judiciary, is the key reason our Founding Fathers outlawed this practice. They disdained the idea that a single branch of government, acting alone, could put someone at risk. Compare this with the practices of regulators who apply fees, penalties, fines and taxes without being subject to a jury, and you will understand how far we have strayed from the intent of the Founders. Nobody would argue that when we receive a service we should pay for that service. If you choose to drive on a toll road, you expect to stop at the booth and pay. If you use water provided by a local government agency you will gladly chip in to help with the expenses involved in bringing that water to you. Beyond the costs we gladly pay, though, there are pains and penalties exacted by administrative laws that have morphed into a pattern of bureaucratic oppression.

What are those laws, codes and regulations that give life to the bureaucracy? They are administrative laws, rules that regulate us. Are they different from bills of attainder? An administrative law is 1) an act of a legislature or city or county government that 2) identifies the members of a group and 3) potentially penalizes them 4) without first asking a jury to determine whether the demand is appropriate. Isn’t that what a bill of attainder is? Does this mean that administrative laws, like income tax laws, are outlawed by the U.S. Constitution? If not, what did the Founders outlaw when they prohibited bills of attainder? If so, how has administrative law become an accepted practice in violation of the Constitution? Our Constitution gives Congress the right to regulate interstate commerce. How is regulation of commerce possible if Congress cannot enforce regulation by passing laws that resemble bills of attainder? In the United States, most administrative law is supervised by the executive branch of government, while some independent agencies operate under the control of Congress. Whatever the control scheme, can a jury be expected to approve all administrative actions? According to the U.S. Constitution, regulations are subject to review by juries, a process placing bricks in a wall of protection, saving ordinary people from government oppression.

If no fully informed and empowered jury has heard your case, authorities must force you to volunteer to be punished. If you do not volunteer to pay a tax, fine or penalty, the Constitution requires that a jury be involved in the enforcement and collection process. If there is no jury review, the law being enforced

appears to have the earmarks of a forbidden bill of attainder. Such laws may not be constitutional, but they are effective if the public is fooled into yielding to them.

Has your city council 1) established an ordinance that 2) would specify a punishment 3) applying to property owners who might build sheds in their backyards without first paying for a permit? Does this law allow administrative officials to punish you even though they do not first take you before a jury? If so, that city ordinance looks like a bill of attainder. Apply for the permit if you wish, but it cannot be forced upon you, if the constitution means anything, but you will more than likely obey because you fear King Government.

### **The jury was designed to be a wall to protect individual liberty. What happened to that wall?**

We are proud that our nation's founders broke from traditional government by king/dictator and chose instead a form of government established, as Lincoln observed in his Gettysburg Address, "of the people, by the people and for the people." The Constitution sets up a people-group wall of protection called the jury. Have the years eroded away that protection guaranteed by the U.S. Constitution?

The Founders did not want to trade King George for King Congress. The Founders disdained tyranny. They wanted the people living in their new nation protected from unfair actions by both a personal tyrant and group-tyrants. Individual people were to be guaranteed justice. That justice was to be applied by the people upon the people without the wave of any wand of punishment from a source other than the people. The Founders gave juries of the people that task.

The judicial branch of government was given responsibility to act only within the limits of "due process" applied to everybody accused of a crime. Those due process courts are to look to the authority of the jury to judge guilt or innocence. The people-group was to be in charge. Government officials were to serve those in-charge people-groups of voters and jurors, not to be served by them. Did the Founders give us a thicker wall of protection than the court-due-process they put in place by those words in Article I of the Constitution? Does an imperial jury system guarantee even greater protection to "the people"? Yes. That guarantee is the prohibition against bills of attainder.

### **Dig a little deeper.**

According to <http://www.techlawjournal.com/glossary/legal/attainder.htm>, a bill of attainder is "a legislative act that singles out an individual or group for punishment without a trial. The bill of attainder clause was intended ... as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply – trial by legislature." *U.S. v. Brown*, 381 U.S. 437, 440 (1965). Capable legal researcher Jon Roland writes in his treatise, *Public Safety or Bills of Attainder?* "To establish what a bill of attainder really is requires some research and reflection. [Thomas M. Saunders] has summarized the definitions in the various sources and precedents: 'A *bill of attainder* is a law, or legal device, used to outlaw people, suspend their civil rights, confiscate their property, put them to death, or [otherwise] punish them without a trial.'"

William H. Rehnquist wrote, "Such actions were regarded as odious by the framers of the Constitution because it was the traditional role of a court, judging an individual case, to impose punishment." (*The Supreme Court*, page 166.) James Madison seemed to link employees of government to the concept of bills of attainder when he wrote, "Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. ... The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become *jobs in the hands of enterprising and influential speculators*, and snares to the more-industrious and less-informed part of the community." (Emphasis mine) – James Madison, *Federalist Number 44*, 1788.

### **Professor offers evidence.**

Matthew Manweller, an instructor of political science at the University of Oregon, Eugene, has made available on the Internet a paper entitled “*Can a Reparations Package Be a Bill of attainder?*” In the paper, he defines bills of attainder in detail using his findings to argue that a Congressional act to pay money damages to any specific group is in fact a bill of attainder upon all who pay taxes. His thread of logic presents an argument that justifies viewing the federal income tax laws and other punitive administrative law as bills of attainder. If federal income tax laws are not a collection of bills of attainder, you then must find that those laws 1) are not put in place by legislative action, 2) providing for no penalty or punishment, 3) applying to no named person or group. The answer is obvious.

Manweller explains that the courts have “established a ... test for future attainder cases.” In *United States v. Lovett* (1946), later confirmed in *U.S. v Brown*, cited above, the court determined that a bill of attainder is 1) an act of a legislature 2) inflicting punishment and 3) applying to named individuals or easily ascertainable groups who 4) have not been first brought to trial.

### **Is it disloyal for us to expect government to obey the U.S. Constitution?**

Has Congress put in place 1) codes and regulations that 2) would cause you to be charged interest or to be fined if 3) you are viewed as a member of the group called “taxpayer” without 4) applying that tax to you after trial and jury verdict? If so, Congress violates the U.S. Constitution when it asks you to pay income tax. We might protest that we want to support the government. Perhaps you do not object to paying taxes. That is a noble attitude. However, is it noble for us to ignore government violations of the U.S. Constitution? Should we expect government to be subject to the U.S. Constitution, or do you prefer living in a nation ruled by men rather than by law? Do we want government to operate within written law, or do we prefer tyranny managed by the whim of men? We need to support government – government operating within constitutional limits.

Manweller refines the definition by adding three more “prongs.” He explains that to determine whether a law is a bill of attainder, according to currently existing case law, one must determine 1) “whether the challenged statute falls within the historical meaning of legislative punishment;” 2) whether the statute, “viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes” and 3) whether the legislative record “evinces a congressional intent to punish.” (McMullen, 989 F2d 603, at 612). In summary, the three tests that must be applied are: 1) historical; 2) functional and 3) motivational.

### **Historical test.**

Ask if a law takes away property (money) or perhaps inflicts other dread consequences sometimes sought by England’s kings. If so, it passes the historical test. It may be a bill of attainder.

### **Functional test.**

Citing *Nixon v Administrator of General Services*, 433 U.S. 425, at 475, Manweller concludes that the functional test is passed “even if the bill does not impose a historical punishment.” One must ask, “is its function designed to punish in other respects.” Any Congressman will confess that the income tax does not fund government except to relieve the Federal Government from paying unnecessary interest on the federal debt to those privately owned Federal Reserve Banks. Senators and Representatives will admit that the reason for continuing the income tax is to allow Congress to do “social engineering.” An official bulletin issued by the Internal Revenue Service criticized this practice. Issued by the U.S. Department of the Treasury September 26, 2006, *A Comprehensive Strategy for Reducing the Tax Gap*, the document complains of, “...provisions created to meet social policy goals. These targeted provisions, which themselves are growing increasingly complicated, divert IRS resources from basic compliance efforts.” Congress keeps the income tax in force in order to “tweak” the economy at will, favoring some groups and punishing others, while irritating even the IRS in the process. Thus, the income tax passes the functional test. It punishes a defined group without first securing judgment by a jury as do countless other administrative laws. Are those laws bills of attainder?

### **Motivational test.**

Manweller explains that this test has to do with whether a bill is regulatory or drawn in retribution. He explains that the Brown case, cited above, declares that if there is no “regulatory purpose underlying an act, a punishment has been inflicted.” That regulatory act must not bring with it the element of pains and penalties. Does income tax law fit all three descriptions? If so, is the law a forbidden bill of attainder?

Thus, if a law 1) is a law 2) with a penalty attached 3) to an individual or group, and if the law would 1) take property (money); 2) to punish or penalize to fulfill a non-governmental (perhaps social) purpose 3) without a regulatory function being fulfilled, that law is a bill of attainder, unless 4) the issue addressed is first presented to a jury limited by due process.

“Some might argue,” Manweller observes, “that a tax imposed on all citizens of a state does not single out an easily ascertainable group and because everyone pays the tax ... they are no different from any social welfare program. Everyone pays taxes to support welfare programs, yet only a select group of citizens receives the benefits. Under this logic, if reparations packages are bills of attainder, then any selectively disbursed public good evinces a bill of attainder.”

### **Punishment defined.**

Punishment is defined at <http://www.lectlaw.com/def2/p201.htm> as, “Some pain or penalty warranted by law, inflicted on a person, for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law ... The punishments ... are fines; forfeitures; suspension or deprivation of some political or civil right.”

### **Can we be forced to pay income tax?**

Manweller concludes: “For Congress to extract any tax for past abuses becomes constitutionally suspect.” He has a narrow focus. He believes it is unjust for a taxpayer today to be forced to pay for social crimes committed by the grandfathers of those taxpayers in the past. Yet, his reasoning applies to us today. Why should any individual protected by the guarantees in the U.S. Constitution be obligated to endure pain or suffer a punishment for failing to observe a “law” with no regulatory purpose aside from social engineering, a law not first put in place by a jury of his peers? What power does Congress have to inflict upon any of us the attainder contained in the income tax laws? To enforce his conviction, Manweller cites Fletcher v. Peck: “...The legislature is then prohibited from passing a law by which a man’s estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable for punishment.” (10US 87, at 138).

### **What were the Founders trying to do for us when they outlawed bills of attainder?**

The writers of the U.S. Constitution were building a wall of protection between individuals and the government, seeking to empower the group that established the nation: “We the People.” Lincoln, if he had lived, might have seen it this way:

### **Were there no bills of attainder, government would be:**

***Of the people:*** "Voted into office by the people in elections counted honestly."

***By the people:*** "Controlled by Grand Jury oversight."

***For the people:*** "Bowling to trial juries that shield individuals from oppression."

If this is what the Founders intended, my question is: at what point did "the People" surrender this shield to administrative bureaucrats? When did the wall fall? Was the Constitution amended to remove Article One, Section Nine, Paragraph Three? Not in my copy! To the contrary, the prohibition is repeated, to

apply to all states in Article One, Section 10, Paragraph One. When did juries become more of a threat to the people-group than a haven of protection?

Legal experts will disagree. It is to expose those disagreements and consider each one with an open mind that I have written this paper. Please submit to me your disagreements. Or, those arguments lacking, join me in confronting any bureaucrat you meet, asking how that agency seeks authority over you through legislative action designed to punish you. Ask where you can find in any law or court case that bureaucratic behavior can be justified -- that bills of attainder have become constitutional. The "We the People" group was not to manage government, but it was to watch over it and determine that no individual was oppressed by government or treated unfairly by any government officer or agent. Individuals were to be immune from injustice with the immunity defined by ordinary people not employed within government. Those "For the People" juries were to provide a wall of separation between individuals and laws of Congress.

Admittedly, that first Congress, charged both to regulate and not to apply pains and penalties lived under a conundrum. How could they both expect regulations to be observed and to be required to present each issue to a jury? I have not researched those early years of Congressional activity, so I do not know when the contradiction exposed in this paper developed. I am hoping my readers will enlighten me. No matter the instruction I receive, however, the contradiction remains. Administrative laws have the marks of bills of attainder. Do they violate the U.S. Constitution? We must try to solve this problem. Are congressional acts, state legislation, county and city ordinances constitutionally required to include jury review as part of the procedure mandated by administrative laws that regulate commerce?

### **Does this make sense?**

The theory I present here makes sense to me. What does not make sense is that nobody writing on the subject of the U.S. Constitution and law has popularized this opinion. Of course, that means it is possible I have made a mistake in my research or in my reasoning. If so, I confess that my contact with reality is insufficient and that perhaps I belong in the "loony bin." I cannot be faulted, though, for making public this writing for the purpose of finding my errors. I suspect it is our government that is out of touch with reality. Doesn't government have as much obligation to "full disclosure" as does a bank lender? Though all comers are welcome, especially if you are an attorney, you are cordially invited to set me straight, explaining where I am wrong. Here are my core questions: "Is government out of tune with reality, unable to read and abide by the U.S. Constitution, or are capable readers of that document unrealistic for expecting government to display integrity?"

On the other hand, if I am not wrong, may we see a flood of objections to bureaucratic oppression, and the filing of Title 42 complaints in Federal Court designed to rebuild that wall of protection: the authority of the jury. If you enter a court with the expectation that the judge intends to honor his oath to protect the Constitution as written and if you challenge the judge to place his intent on the record, you might become amazed at how court procedure could work in your favor. Procedure means everything to a judge. Work into your argument the fact that any judge should be eager to follow the procedure demanded by the constitution in outlawing of bills of attainder, if that judge seeks to be faithful to the founding document.

In words reminding us of Patrick Henry, "Give me my constitutionally guaranteed liberty, or tell me why not."

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