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THE BILL OF ATTAINDER CLAUSE: A NEW WEAPON TO CHALLENGE THE OIL POLLUTION ACT OF 1990

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Abstract: SeaRiver Maritime, Exxon Oil Company's United States shipping subsidiary, recently challenged section 5007 of the Oil Pollution Act of 1990 as a bill of attainder. SeaRiver Maritime is the owner and operator of the former Exxon Valdez, which was renamed the SeaRiver Mediterranean following the Valdez's infamous spill in Alaska's Prince William Sound in 1989. SeaRiver Maritime argued that section 5007, which prohibits any vessel that has spilled more than one million gallons of oil into the marine environment from ever re-entering Prince William Sound, is an unconstitutional legislative punishment, and that this portion of the Oil Pollution Act was meant to apply only to the SeaRiver Mediterranean. This Comment examines the Oil Pollution Act's primary provisions and the Act's Prince William Sound provisions, which include section 5007. Further, this Comment explains the reasons for the constitutional prohibition on bills of attainder and the modern analysis to which courts subject legislation challenged under the Bill of Attainder Clause. Finally, this Comment argues that SeaRiver Maritime's claim fails both prongs of the Supreme Court's bill of attainder analysis and that section 5007 is legal and valid as enacted.

INTRODUCTION

In 1990, Congress passed the Oil Pollution Act (OPA).1 OPA consolidated the various existing federal liability provisions into one statute, providing cleanup authority, penalties, and a liability scheme for oil pollution.2 The statute resulted from a fifteen-year effort to enact comprehensive oil pollution legislation and response to a number of

* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2000–01.
oil spills in 1989 and 1990, including the infamous Exxon Valdez oil spill.\(^3\)

In addition to the enactment of OPA, the Exxon Valdez oil spill had other significant legal impacts. Exxon Corporation, Alaska, and the United States entered into a $1 billion settlement to dismiss all civil and criminal claims surrounding the spill.\(^4\) While this consent decree should have ended the litigation between the parties, Exxon's shipping subsidiary has recently brought claims in federal district courts, alleging in part, that section 5007 of OPA, is an unconstitutional bill of attainder.\(^5\)

This question is an interesting one, since the protection from bills of attainder is found in the text of the Constitution and offers a potentially powerful means of protecting individual rights against arbitrary or punitive legislative action.\(^6\) Bills of attainder have been found in laws that prevented Communists from being part of labor unions\(^7\) and in statutes that specifically mentioned individuals as subversive and unfit to work for the federal government.\(^8\) The United States Supreme Court's most comprehensive articulation of its test for bills of attainder is set out in Nixon v. Administrator of General Services.\(^9\) According to that test, when a law is challenged as a bill of attainder, it is subjected to a two-part inquiry, examining the law for both specificity and punishment.\(^10\) Since Nixon, courts have expanded upon the punishment prong of the analysis so that if a law has a legitimate nonpunitive purpose, it can survive a bill of attainder challenge.\(^11\) The importance of this element has gained a firm foothold in the federal circuit courts, where the weapons and telecommunications industries have challenged laws as violations of the Bill of At-

\(^5\) See id. at 10.
\(^11\) See, e.g., Dehainaut v. Pena, 32 F.3d 1066, 1071–72 (7th Cir. 1994).
tainder Clause. As a result, legislation so specific that it names companies and imposes a legislative burden on them can still stand on the basis that it also furthers what the court perceives to be a nonpunitive legislative purpose.

SeaRiver Maritime Financial Holdings (SeaRiver Maritime), Exxon’s U.S. shipping subsidiary, has made a bill of attainder challenge to section 5007 of OPA, which prevents any vessel that has spilled more than one million gallons of oil into the marine environment from ever re-entering Prince William Sound, Alaska. Given that OPA’s overall purpose is to set up a statutory scheme that reduces the likelihood of future oil spills and to create a liability structure that ensures that spillers will fully compensate those affected by oil spills, the challenge has little chance of success. While SeaRiver Maritime’s specific bill of attainder challenge is not presently before any tribunal, its claims bear discussion. This Comment argues that SeaRiver Maritime’s claim fails both prongs of the Supreme Court’s bill of attainder analysis and that section 5007 should be upheld.

Section I recounts the causes of the Exxon Valdez spill and the impacts of its aftermath on the environment. Section II discusses how the primary provisions of the Oil Pollution Act of 1990 drastically changed the landscape for oil pollution prevention, cleanup, and liability. Further, this Section outlines OPA’s Prince William Sound provisions, remedies directed specifically to the region most dramatically affected by the Exxon Valdez spill. Section III details the litigation surrounding the spill, focusing closely on the recent legal battles between the United States government and SeaRiver Maritime, an Exxon shipping subsidiary. Section IV explains the reasons for the constitutional prohibition on bills of attainder and the modern analysis to which courts subject legislation challenged under the Bill of Attainder Clause. Section V suggests the result to be reached should a

13 See Navegar, 192 F.3d at 1066 n.10 & 1067; BellSouth II, 162 F.3d at 688.
court hear SeaRiver Maritime’s attack on OPA as a violation of the Bill of Attainder Clause in the future.

I. THE EXXON VALDEZ OIL SPILL

The story of the Exxon Valdez begins in San Diego in 1986. Exxon Shipping Company commissioned the construction of the 987-foot tanker vessel specifically to transport crude oil from Alaska to refineries in the East Bay and in Southern California.\(^\text{17}\) The newest, best-equipped ship in Exxon’s fleet was named for Valdez, Alaska, making it the pride of the town that sits at the end of the 800-mile Alaska oil pipeline.\(^\text{18}\) Three years later, on March 24, 1989, the pride of Valdez was transformed into shock as the nation witnessed the worst oil spill in United States history when the Valdez ran aground on Bligh Reef in Prince William Sound.\(^\text{19}\) By the time it was over, the Exxon Valdez had spilled almost eleven million gallons of oil into the sea, creating a slick big enough to reach from Cape Cod to North Carolina.\(^\text{20}\)

The nation’s horror magnified as the truth about the events leading up to the oil spill came to light.\(^\text{21}\) The tanker had maneuvered around ice floes on auto-pilot, accelerating her speed as she moved out of her designated navigation route and into the in-bound shipping lanes.\(^\text{22}\) Furthermore, Captain Joseph Hazelwood had been drinking within two hours of the Valdez’s departure,\(^\text{23}\) a violation of Coast Guard regulations prohibiting officers from drinking alcohol


\(^{20}\) See id.

\(^{21}\) See For Now, at Least, Infamous Ship is Banished from Alaska, supra note 18, at 5.

\(^{22}\) DAVIDSON, supra note 18, at 13–16. High speed and the use of auto-pilot are two conditions considered inappropriate for navigating in Prince William Sound. Speed was typically reduced when ice was encountered to minimize impact with icebergs and give the crew time to make adjustments. See id. Further, auto-pilot was almost never used in the sound, since Coast Guard regulations and Exxon policy dictated that it should only be used in the open sea. See Timothy Egan, Elements of Tanker Disaster: Drinking, Fatigue, Complacency, N.Y. TIMES, May 22, 1989, at B7.

\(^{23}\) See DAVIDSON, supra note 18, at 10. Hazelwood was later acquitted of operating the ship while drunk, but a civil jury eventually found him guilty of reckless behavior. See Carey Goldberg, A Tanker Hauling Memories is Shunned: Alaska Residents Oppose Exxon’s Efforts to Bring Back the Valdez, Mar. 16, 1997, at A1.
within four hours of embarking on ship. Hazelwood had also left third mate Gregory Cousins in charge of the bridge. Cousins was not only unqualified to operate the vessel on his own, but Coast Guard procedures also dictated that two officers be present on the bridge in dangerous conditions. The Exxon Valdez’s twenty-member crew later testified that they were exhausted, having worked an average of 140 hours of overtime a month per person.

To complicate matters, the response to the accident was simply too slow. In 1981, Alyeska Pipeline Service Company, a consortium of seven oil companies including Exxon, had dismissed its round-the-clock emergency oil response team, leaving Valdez Harbor and Prince William Sound unprepared for oil spills. As a result, cleanup efforts were severely delayed, and the barge carrying 50,000 pounds of much-needed cleanup equipment did not arrive at the accident scene until fourteen hours after the grounding. There was also confusion as to whether Exxon, the state of Alaska, or the federal government was to direct the cleanup; whether chemical dispersants could be used; and what steps were to be taken to stabilize and empty the remaining crude oil from the punctured vessel. As a result, Exxon squandered the calm seas and weather during the first two days following the spill, in which the oil could have been effectively encircled with booms and scooped up by skimmers.

The consequences of the accident were horrible, but perhaps even more tragic was the accident’s preventable nature. The oil in

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24 See Egan, supra note 22, at B7.
25 See Davidson, supra note 18, at 16–17.
26 Id. Cousins did not have the necessary license to pilot the tanker in Prince William Sound. See Egan, supra note 22, at B7. The licensing is approved only after extensive experience in dangerous waters. See id.
27 See Davidson, supra note 18, at 16–17.
28 See Egan, supra note 22, at B7. Exhaustion from working overtime was a result of a downgrading in the number of crewmembers approved by the Coast Guard after oil companies argued that the new technology of the Valdez and other tankers of its class did not need larger staffing. See id. The crew, consisting of a third fewer members than on older vessels by comparison, frequently went long stretches with little or no sleep. See id.
29 See id.
30 See Keith Schneider, Under Oil’s Powerful Spell, Alaska Was Off-Guard, N.Y. Times, Apr. 2, 1989, at A1. The consortium estimated that since a spill of this magnitude could statistically occur only once every 241 years, it was no longer cost-effective to retain the team. See Egan, supra note 22, at B7.
31 See Davidson, supra note 18, at 28.
33 See Egan, supra note 22, at B7.
34 See generally id.
the water wreaked havoc on seventeen bird and animal species, only two of which have recovered to date.\textsuperscript{35} Some of these species had important commercial value.\textsuperscript{36} For example, the spill affected all levels of the fishing industry, especially the commercial fishermen, salmon hatcheries and local canneries.\textsuperscript{37} The spill had consequences for more than just commercial interests.\textsuperscript{38} Subsistence use of wild resources was an important aspect of the economy, culture, and way of life of many families within the Alaskan native communities before the spill.\textsuperscript{39} After the spill, many Alaskan natives ceased to eat species from the sea out of fear of contamination throughout the food chain.\textsuperscript{40}

Throughout the rest of 1989 and into 1990, oil spills dominated the nation’s consciousness. In June 1989, the World Prodigy spill into Narragansett Bay off the coast of Rhode Island, the President Rivera spill into the Delaware River, and the Rachel-B spill into the Houston Ship Channel all occurred in a twenty-four period.\textsuperscript{41} In June 1990, the supertanker Mega Borg exploded and burned in the Gulf of Mexico while transferring its cargo to another ship.\textsuperscript{42} This incident created a slick thirty miles wide and eight miles long off the shore of Galveston, Texas, and killed four crewmembers.\textsuperscript{43} These spills led to the conclu-

\textsuperscript{35} See Martin, \textit{supra} note 17, at A1. The bald eagle and the river otter have returned to their pre-spill numbers, but other species have been less successful in their recovery. See \textit{id}. The total number of animal and bird deaths varies according to the method used to calculate the damage: either counting the recovered bodies or calculating the discrepancies in pre-spill and post-spill counts. See \textit{id}. One source puts the death toll at: between 300,000 and 645,000 birds (including harlequin ducks, puffins, common murres, and other sea birds); between 3500 and 5500 sea otters; and 200 seals (which may be an underestimate, since dead seals do not float like birds or otters, but rather sink to the bottom). See generally \textit{The Exxon Valdez Oil Spill: What Have We Learned}, ALASKA’S WILDLIFE, Jan.-Feb. 1993, at 11–12, 20, 24–25.

\textsuperscript{36} See Martin, \textit{supra} note 17, at A1.

\textsuperscript{37} See \textit{id}. Cordova, a town bordering the sound, was considered the heart of the region’s once thriving fishing industry. See \textit{id}. The town’s fishing fleet is now little more than half the size it was in 1988. See \textit{id}. After the spill, three of the town’s five canneries closed. See \textit{id}. Two have since reopened, but at reduced production levels. See \textit{id}.

\textsuperscript{38} See \textit{id}.


\textsuperscript{40} See Martin, \textit{supra} note 17, at A1.


\textsuperscript{43} \textit{Id}.
sion that the unsafe transportation of oil was a national problem that required a serious remedy.44

II. THE OIL POLLUTION ACT OF 1990

A. OPA’s Primary Provisions: Liability, Prevention, and Compensation

While these accidents created a fresh public awareness of the dangers inherent in transporting oil, Congress had been searching for a consensus on oil pollution legislation since 1976.45 For almost fifteen years, Congress directed its efforts at the consolidation of oil spill response mechanisms under the various federal laws already in place.46 These federal laws included section 311 of the Federal Water Pollution Control Act (Clean Water Act or CWA),47 the Deepwater Port Act of 1974 (DPA),48 the Trans-Alaska Pipeline Authorization Act


[F]our major oil spills within a three-month period suggest that spills are still too much of an accepted cost of doing business for the oil shipping industry. At the present time, the costs of spilling and paying for its clean-up and damage is not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them. Sound public policy requires reversal of these relative costs.

Id.


(TAPAA), and the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA). This patchwork of legislation also had to coordinate with state laws, international conventions, and other federal environmental laws.

The CWA was the primary piece of legislation applicable to oil spills prior to the passage of the OPA, but the CWA historically provided only partial protection. The legislative history of OPA cited the CWA's gross inadequacy in dealing with spiller responsibility for cleanup expenses and the inability of its revolving fund to cover the costs of large spills like that of the Exxon Valdez. The DPA, TAPAA, and OCSLAA imposed greater liability and permitted wider recovery than a statute of general application like the CWA. However, they were also considered deficient because of uneven liability standards and a scope of coverage for cleanup costs and damages that applied only to the activities that each individual law covered.

Ironically, oil spill legislation was once again introduced in Congress just one week before the Valdez spill. Following the oil spills in Narragansett Bay, the Delaware River, the Houston Ship Channel, and

51 See Randle, supra note 3, at 10,119; see also Harrington, supra note 41, at 4–5; Millard, supra note 45, at 332–38.
53 See id. The legislative history noted that the CWA's section 311(k) revolving fund had never reached its authorized level of $35 million, leaving its available amount far too low to respond adequately to disasters, especially in light of the staggering cleanup costs for the Valdez accident. See id.
54 Harrington, supra note 41, at 6–7.
55 S. Rep. No. 101–94, at 3–4 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 724. The DPA pertained to the regulation of deepwater ports by the Secretary of Transportation, establishing strict liability for discharges of oil within a safety zone surrounding a deepwater port and capping such liability at the lesser of $150 per gross ton or $20 million. See Millard, supra note 45, at 336 n.33. TAPAA created the Trans-Alaska Pipeline Liability Fund, which imposed strict liability on a vessel's owners and operators for damages resulting from vessel-related discharges of oil transported through the Trans-Alaska Pipeline. See id. at 336–37. Liability under TAPAA was capped at $50 million for the pipeline fund and $100 million for owners and operators, with the owner liable for the first $14 million and the fund liable for the balance. See id. at 336. OCSLAA pertained to the regulation of oil and gas leases on the submerged lands of the Outer Continental Shelf, establishing strict liability for costs and damages limited to the greater of $300 per gross ton or $250,000. See id. at 327–38.
the Gulf of Mexico during March and June 1989, Congress was at last ready to take action and come to an agreement.\textsuperscript{57} The \textit{Exxon Valdez} tragedy provided the necessary catalyst for resolving congressional differences and the passage of a comprehensive bill.\textsuperscript{58}

The result was OPA,\textsuperscript{59} a comprehensive oil spill liability, response, and compensation statute.\textsuperscript{60} The 1990 law consolidated the various federal liability provisions into one statute, providing cleanup authority, penalties, and liability for oil pollution.\textsuperscript{61} The primary provisions of OPA begin with a “polluter pays” policy that extends liability to all responsible parties,\textsuperscript{62} increases the limits of liability for cleanup costs,\textsuperscript{63} and expands the types of damages recoverable to governments and private parties.\textsuperscript{64} The statute created a single fund to pay for oil removal and damages, replacing the funds created under DPA, TA-PAA, and OCSLAA\textsuperscript{65} with the federally maintained Oil Spill Liability Trust Fund.\textsuperscript{66} OPA also increased the role of the federal government in pollution cleanup and compensation by federalizing these operations.\textsuperscript{67} Prevention measures became a part of OPA’s federal scheme,

\textsuperscript{57} See Harrington, \textit{supra} note 41, at 7–8; Randle, \textit{supra} note 3, at 10,119.

\textsuperscript{58} Millard, \textit{supra} note 45, at 346.


\textsuperscript{61} See id.


\textsuperscript{63} See id. § 2704(a) (1994 & Supp. III 1997). The liability for removal costs and damages of a vessel varies according to its size. Vessels of more than 3000 gross registered tons (GRT) are liable for the greater of $1200 per GRT or $10 million. See id. § 2704(a)(1)(A)–(B) (1994 & Supp. III 1997). Vessels of less than 3000 GRT are capped at the greater of $1200 per ton or $2 million. See id. § 2704(a)(1)(A)–(C) (1994 & Supp. III 1997).

\textsuperscript{64} See Harrington, \textit{supra} note 41, at 11. OPA lists six categories of damages: (1) injury or destruction of natural resources; (2) loss or injury to real or personal property; (3) loss of subsistence use of natural resources; (4) net loss of taxes, royalties, rents, or fees due to a governmental entity arising from the destruction or loss of natural resources; (5) lost profits or impairment of earning capacity due to the loss or destruction of real or personal property or natural resources; and (6) net cost of providing increased or additional public services during or after removal activities. See 33 U.S.C. § 2702(b)(2)(A)–(F) (1994 & Supp. III 1997).


\textsuperscript{67} S. REP. No. 101–94, at 8 (1989), \textit{reprinted in} 1990 U.S.C.C.A.N. 722, 729. OPA requires the President to “coordinate and direct all public and private cleanup efforts wherever there is a substantial threat of a pollution hazard to the public health or welfare.” \textit{Id.}
by requiring contingency planning, double hulls, and a series of personnel licensing measures. Finally, OPA permitted states to supplement its provisions with their own liability and compensation schemes.


While the provisions concerning liability, cleanup, and prevention constitute the heart of OPA, OPA's Prince William Sound provisions are also important because they raise significant constitutional issues in the context of their effect on Exxon and its subsidiary, SeaRiver Maritime. Whereas OPA addresses oil spill liability, prevention, and cleanup on the national scale, the Prince William Sound provisions concern the regional problems and consequences of the Exxon Valdez oil spill. The impact of the Exxon Valdez accident, a spill

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68 See 33 U.S.C. § 1321(c) (1) (A)–(B) (1994). The provision addressing contingency planning was a response to the uncoordinated and overlapping nature of many oil spill contingency plans. See id. It created a new system of contingency planning, consisting of a national response unit, Coast Guard strike teams, Coast Guard district response groups, and area committees. See Randle, supra note 3, at 10,128. The new statute also revised readiness requirements by shifting responsibility for area contingency plans and individual vessel and facility response plans from the national level to the individual vessel and facility level. See id.

69 See 46 U.S.C. § 3703a (1994 & Supp. III 1997). The phasing out of non-double hulled vessels began in 1995. See id. § 3703a(c) (3) (A). By the year 2010, all vessels over 5000 gross tons with single hulls will be prohibited from operating without double hulls, and by the year 2015 all vessels over 5000 gross tons with double bottoms or double sides will be prohibited from operating without double hulls. See id. § 3703a(c) (3) (A)–(C). Proponents of double hulls contended that if the Exxon Valdez had been equipped with a double hull instead of protectively located ballast tanks, far less oil would have been released. See Randle, supra note 3, at 10,132.

70 See 46 U.S.C. § 7703(2)–(3) (1994) (providing that the licenses of crew members will be suspended for drug or alcohol abuse). This provision reflected the perception that alcohol was a primary contributor to the Exxon Valdez disaster, especially after evidence revealed that Captain Hazelwood had consumed alcohol shortly before the vessel's trip through Prince William Sound. See Davidson, supra note 18, at 9–10; Randle, supra note 3, at 10,131. Further, a federal law was put in place to prevent any individual from working more than 15 hours in any 24-hour period or more than 36 hours in any 72-hour period. See 46 U.S.C. § 8104(n) (1994) as amended by Pub. L. 101–380 § 4114(b) (1994).

71 S. REP. No. 101–94, at 6 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 727–28. Congress deliberately chose not to preempt state laws governing oil pollution liability and compensation on the basis that a state is entitled to impose a greater degree of protection for its own resources and citizens, thus allowing states to create more stringent liability schemes than the federal scheme. See id.


74 See Randle, supra note 3, at 10,133–34.
that introduced almost eleven million gallons of oil into one of America’s most pristine environments, is evident throughout the legislative history of OPA.\textsuperscript{75} Given the circumstances surrounding the accident, including an over-tired crew, a captain under the influence of alcohol, and an uncoordinated cleanup, the legislative history suggests that Congress hoped to create a direct remedy for some of the more dire consequences of the accident through the enactment of the Prince William Sound provisions.\textsuperscript{76}

First, OPA established the Prince William Sound Oil Spill Recovery Institute to conduct research and carry out education and demonstration programs.\textsuperscript{77} The purpose of these programs was to identify and develop the best available techniques, equipment, and materials for dealing with oil spills in arctic and subarctic environments, and to complement the efforts of federal and state governments in understanding the long-range effects of oil spills on Prince William Sound’s environment.\textsuperscript{78} OPA also created two programs to involve the oil industry, the government, and local communities in a partnership responsible for the environmental monitoring of the terminal facilities in Prince William Sound and Cook Inlet.\textsuperscript{79} The statute established several different associations to carry out these environmental monitoring programs, including: an Oil Terminal Facilities and Oil Tanker Operations Association, designed to monitor the operation and maintenance policies of oil terminals and crude oil tankers;\textsuperscript{80} and a Regional Citizens’ Advisory Council\textsuperscript{81} with representatives from virtually every segment of the population to provide environmental monitor-


\textsuperscript{76} See Randle, supra note 3, at 10,128, 10,131, 10,133.


\textsuperscript{78} See 33 U.S.C. § 2731(b)(1)-(2). In its original form, OPA formed this institute to study the effects of the Exxon Valdez oil spill. See id. However, the law was amended in 1996, replacing the words “Exxon Valdez oil spill” with “arctic or subarctic,” effectively broadening the scope of the institute’s purpose to a more generalized one. See Pub. L. No. 104-324, § 1102(a)(3), 110 Stat. 3964 (1996) (amending 33 U.S.C. § 2731). The Institute has 16 members who are representatives from various state agencies, federal departments, the fishing industry, Alaskan natives, the oil and gas industry, residents of communities affected by the Exxon Valdez spill, and Alaskan scientific institutes. See Oil Pollution Act of 1990, 33 U.S.C. § 2731(c)(1)(A)-(H).

\textsuperscript{79} See id. § 2732(b).

\textsuperscript{80} See id. § 2732(c).

\textsuperscript{81} See id. § 2732(d)(1).
ing,\textsuperscript{82} and to review and assess measures for oil spill prevention and response.\textsuperscript{83}

In addition to the establishment of advisory councils and scientific programs, the Prince William Sound provisions introduced measures directed at specific aspects of the \textit{Exxon Valdez} accident. Congress ordered the installation of a navigation light on Bligh Reef\textsuperscript{84} and the installation of equipment to track the movements of tanker vessels through Prince William Sound with the ability to alert tracking personnel when tankers departed from designated navigation routes.\textsuperscript{85} The provisions also directed tanker and facility response plans to provide for oil spill containment and removal equipment in nearby communities,\textsuperscript{86} the establishment of an oil spill removal organization at appropriate locations in Prince William Sound,\textsuperscript{87} and training, practice exercises, and periodic testing of equipment for oil removal, to address the lack of available equipment after the \textit{Valdez} spill.\textsuperscript{88}

Finally, the most dramatic, and perhaps most drastic, provision, section 5007 states that all tank vessels that have spilled more than one million gallons of oil into the marine environment after March 22, 1989, are prohibited from operating in Prince William Sound.\textsuperscript{89} When the bill went into conference committee, Senator Ted Stevens of Alaska inserted this particular provision, and it passed with no debate or discussion.\textsuperscript{90} At the time OPA was signed into law, no other vessel fulfilled the conditions set out in the statute, nor has any other vessel met them since, making this provision of the federal law applicable to only the former \textit{Exxon Valdez}.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{82} See id. \S 2732(e) (1)–(2).
\item \textsuperscript{84} See id. \S 2733.
\item \textsuperscript{85} See id. \S 2734.
\item \textsuperscript{86} See id. \S 2735(a) (1).
\item \textsuperscript{87} See id. \S 2735(a) (2).
\item \textsuperscript{88} See 33 U.S.C. \S 2735(a) (3)–(5).
\item \textsuperscript{89} See 33 U.S.C. \S 2737. The statute states: “[n]otwithstanding any other law, tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska.” \textit{Id.}
\item \textsuperscript{91} See Richards, \textit{supra} note 90, at B1.
\end{itemize}
President George Bush signed OPA into law on August 18, 1990. The outcome for the United States has been positive. The law’s liability and compensation scheme fundamentally changed the way the United States manages oil spill prevention and response, and is credited with reducing the risk of massive tanker spills. However, OPA’s aftereffects continue to take their toll on Exxon and its subsidiaries.

III. THE LEGAL CONSEQUENCES OF THE EXXON VALDEZ SPILL AND THE ENACTMENT OF OPA

A. Exxon Settles Its Litigation

For Exxon, the consequences of the Valdez spill included not only the passage of OPA, but also various other financial and legal ramifications. The corporation gave the Valdez a $30 million overhaul, and dispatched the vessel to the Mediterranean Sea to shuttle Middle Eastern oil to various ports. It was back in service under the name Exxon Mediterranean about the same time that OPA was signed. A few years later, the vessel was renamed again, this time becoming the SeaRiver Mediterranean in acknowledgement of its new owner, Exxon’s United States shipping subsidiary, SeaRiver Maritime Financial Holdings.

In September 1991, one year after OPA was passed, Exxon entered into a consent decree with the United States and Alaska, settling all civil and criminal matters resulting from the Valdez spill for $1 billion. A federal jury in Anchorage awarded thousands of fishermen,
natives, and property owners a larger punitive damage verdict of $5.3 billion against Exxon in 1994. The verdict was compensation for the economic losses of thousands of native villagers, fisherman, and property owners who were harmed by the spill.

B. The SeaRiver Litigation: Texas, the District of Columbia, and Alaska

Despite the consent decree, the litigation between the United States and Exxon continued. In 1996, SeaRiver Maritime brought suit in federal district court in Houston, Texas, seeking a declaratory judgment that section 5007 of OPA is unconstitutional.

SeaRiver Maritime alleged that section 5007 is an unconstitutional bill of attainder because the SeaRiver Mediterranean is the only vessel in the United States to which section 5007 applies, both now and when the statute was passed in 1990. Further, SeaRiver Maritime argued that the statute effectively bars the SeaRiver Mediterranean from participating in any trade from Alaska to other U.S. ports, thus thwarting the purpose for which the vessel was originally constructed. Among SeaRiver Maritime's claims was that OPA bars the SeaRiver Mediterranean from Prince William Sound, so that she has had no access to Port Valdez. Not only is the SeaRiver Mediterranean in fine mechanical condition after her 1990 overhaul, but her identical

Council now guides the spending of the funds from the 1991 civil settlement toward cleaning beaches and buying parcels of land in an effort to remedy the environmental damage and restore wildlife. See Goldberg, supra note 23, at 24.

101 See Martin, supra note 17, at AI; Allen, supra note 19, at AI. Exxon appealed the $5.3 billion punitive judgment, arguing that the corporation was wrongly blamed for problems far beyond the accident. Allen, supra note 19, at AI. The Ninth Circuit recently rejected Exxon's appeal that the verdict should be overturned because of irregularities during jury deliberations but did not decide the more specific issue of amount of damages. See Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Servo Co., 206 F.3d 900, 906 (9th Cir. 2000), petition for cert. denied, 69 U.S.L.W. 3087 (U.S. July 14, 2000) (No. 00-90).

102 See Allen, supra note 19, at AI.


105 See id. at 457, 459 n.8.

106 See id. at 457.

107 See Goldberg, supra note 23, at AI.
sister ship, *SeaRiver Long Beach*, currently operates in Prince William Sound.108 According to SeaRiver Maritime, prohibiting the vessel from operating in the Prince William Sound has diminished the value of the vessel and resulted in considerably lower profit margins than would be possible on the Alaska run.109 As a result, operation of the vessel in the Middle East has forced the *SeaRiver Mediterranean* to face far more competition than she would have in the American Pacific, making her much less cost efficient.110

In defense, the government asserted that venue in Houston was improper and that the District Court of Alaska was the appropriate court to hear the case.111 SeaRiver Maritime’s attempt to have its claims heard in Texas was undoubtedly a strategic maneuver to secure a friendlier jurisdiction than could be found in Alaska.112 Accordingly, the corporation argued that venue was appropriate in Houston because it resides in Houston and a substantial part of the events or omissions that gave rise to the claim occurred there.113 The district court in Texas held that SeaRiver Maritime’s decisions in Houston regarding the *SeaRiver Mediterranean* and the harm felt in Houston by the vessel’s inability to operate in Prince William Sound did not bear a sufficiently substantial connection to the events giving rise to the corporation’s claim.114 Since there was no basis for venue in Texas, the suit was dismissed without prejudice and SeaRiver Maritime was given

108 See Martin, *supra* note 17, at A1; *For Now, at Least, Infamous Ship is Banished from Alaska*, *supra* note 18, at 5.


111 *SeaRiver I*, 952 F. Supp. at 457–58. The government claimed that Alaska was the venue in which past events had occurred and future actions would take place. See *id.* at 459. Specifically, the *Valdez* implicated section 5007 by spilling 11 million gallons of oil in the District of Alaska, and this is also the place where the vessel would have to operate before section 5007 would be violated and could be enforced. See *id.* Furthermore, the government argued that the 1991 consent decree placed jurisdiction with the district court of Alaska. See *id.* at 461 n.12.


113 See *SeaRiver I*, 952 F. Supp. at 458. SeaRiver Maritime made these two arguments in an effort to satisfy the venue requirements of the federal venue statute, which provides that a civil action in which the defendant is the federal government may be brought: (1) where the defendant resides, (2) where a “substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated,” or (3) “where the plaintiff resides if no real property is involved in the action.” See 28 U.S.C. § 1391(e) (1994); *SeaRiver I*, 952 F. Supp. at 458.

the opportunity to select either the District of Columbia or Alaska as the forum in which to bring their suit.\textsuperscript{115}

SeaRiver Maritime chose to refile its claims in the District of Columbia, again challenging section 5007 on the basis that it violated the due process and double jeopardy clauses of the Fifth Amendment, constituted a bill of attainder in violation of Article I, section 9 of the Constitution, and operated as an ex post facto law in violation of Article I, section 9.\textsuperscript{116} In the interim, however, the district court in Texas reconsidered and elected to transfer the case to the District of Columbia.\textsuperscript{117} In doing so, the Texas court noted that it was not taking a position that the District of Columbia was a better forum than Alaska, but rather that it was proper venue under federal law.\textsuperscript{118} Again, the government made a motion to transfer the suit to Alaska for either improper venue\textsuperscript{119} or the doctrine of forum \textit{non conveniens}.\textsuperscript{120}

The district court in the District of Columbia decided that the factors weighing in favor of keeping the case in the District of Columbia did not outweigh the interest of the state of Alaska.\textsuperscript{121} While the District of Columbia was the forum chosen by SeaRiver Maritime and a forum where the government could defend the action without any great inconvenience, the court reasoned that there would be virtually no discovery and no issues relating to convenience of witnesses.\textsuperscript{122} Rather, the issues would most likely be decided on a motion for sum-

\textsuperscript{115} Id. at 462. In addition to opposing a change of venue, SeaRiver Maritime petitioned the court to transfer the suit to the District of Columbia as an alternative. See id. The Government opposed this motion, arguing that comity required transfer to Alaska, in accordance with the 1991 consent decree between the parties that reserved jurisdiction for further orders, direction, or relief to the District of Alaska. See id. at 461 n.12. The Texas district court initially declined to transfer the case to Alaska or the District of Columbia, giving SeaRiver Maritime the opportunity to select its own forum. See id. at 462.


\textsuperscript{117} See id.

\textsuperscript{118} See id.

\textsuperscript{119} See id.; see also 28 U.S.C. § 1406(a) (1994). The statute states that a "district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." See 28 U.S.C. § 1406(a).

\textsuperscript{120} See \textit{SeaRiver II}, 952 F. Supp. at 10; see also 28 U.S.C. § 1404(a) (1994). The statute states that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See 28 U.S.C. §1404(a). Under this doctrine, the court determined whether it was in the interest of justice to transfer the matter to Alaska by weighing the various interests of the parties. See \textit{SeaRiver II}, 952 F. Supp. at 11.

\textsuperscript{121} See id.

\textsuperscript{122} See id.
mary judgment, thus avoiding an evidentiary trial.\textsuperscript{123} Given these circumstances, there were simply not enough factors to outweigh Alaska’s strong interests in the suit.\textsuperscript{124} In addition, the District of Alaska had retained jurisdiction to interpret the 1991 consent decree, and there was a genuine issue as to whether SeaRiver Maritime waived its right to challenge section 5007 of OPA by signing the consent decree.\textsuperscript{125} The court held that the District of Alaska was in the best position to determine the applicability of the decree to the facts of the case.\textsuperscript{126}

Additional considerations that called for transfer to Alaska included what the district court of the District of Columbia called the state’s “extraordinary interest in the outcome of this suit” and the “immeasurable damage to the people and ecology of Alaska” inflicted by the \textit{Exxon Valdez}.\textsuperscript{127} The district court of the District of Columbia recognized the interest of Alaskan citizens to participate in the proceedings arising out of this case and transferred it to Alaska.\textsuperscript{128}

By the time the case reached Alaska, almost two years had passed since SeaRiver Maritime first filed suit in Texas.\textsuperscript{129} For the Alaska district court, the issue was not whether section 5007 of OPA was unconstitutional, but rather whether the content and intent of the consent decree (that supposedly settled all claims between the parties), would allow this challenge.\textsuperscript{130}

First, the court noted that the consent decree made clear that Exxon and the United States were settling any and all claims.\textsuperscript{131} In the consent decree, where the parties had meant to except a matter from the reach of that term, they expressly included an exception.\textsuperscript{132} Since no exception existed for constitutional claims that may have arisen out of the \textit{Exxon Valdez} accident, the court reasoned that the parties

\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{125} See SeaRiver II, 952 F. Supp. at 11.
\textsuperscript{126} See id.
\textsuperscript{127} See id.
\textsuperscript{128} See id. at 12.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See id.
were buying complete peace for all but certain very specifically enumerated matters. 133

The Alaska district court also focused on the sophistication of the parties, who were represented by a substantial number of experienced and competent lawyers and were unlikely to have signed on to the terms of the agreement "without parsing them with extraordinary care." 134 Thus, the failure to mention constitutional claims still did not protect SeaRiver Maritime from the general idea that any and all issues between the parties were settled. 135 The dispute over whether the SeaRiver Mediterranean was unconstitutionally barred from Prince William Sound was constrained by the terms of the 1991 consent decree, and SeaRiver Maritime was not permitted to litigate its claims. 136

IV. THE BILL OF ATTAINDER CLAUSE

Although the federal district court in Alaska held that the 1991 consent decree prevented the parties from litigating the constitutional issues that SeaRiver raised, the merits of SeaRiver Maritime's claims bear discussion. 137 Specifically, SeaRiver Maritime's bill of attainder challenge to OPA raises interesting questions about the legitimacy of section 5007. To address these questions, it is necessary to discuss the elements of bills of attainder, the origin and justifications for the constitutional prohibition on bills of attainder, and the Supreme Court's test for analyzing whether a legislative action constitutes a bill of attainder. Further, an overview of the recent uses of the bill of attainder challenge is instructive for describing the interpretation currently employed by the federal circuit courts.

A. Bills of Attainder

In England, a bill of attainder was a parliamentary act that sentenced a named individual or identifiable members of a group to death. 138 It was most often used to punish political activities that Parliament or the sovereign found threatening or treasonous. 139 The

133 See id. at 756–57
135 See id.
136 See id.
137 See id.
139 See Welsh, supra note 6, at 83. The attainder of death was usually accompanied by a forfeiture of the condemned person's property to the King and corruption of his blood,
United States Constitution expressly prohibits the federal government from enacting bills of attainder through the Bill of Attainder Clause (Clause).\textsuperscript{140} This constitutional directive has also come to encompass bills of pains and penalties.\textsuperscript{141} Under English law, a bill of pains and penalties was identical to a bill of attainer, except that it prescribed a punishment short of death such as: banishment, deprivation of the right to vote, exclusion of the designated individual’s sons from Parliament, or the punitive confiscation of property.\textsuperscript{142} The Supreme Court has consistently defined a bill of attainer as “law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”\textsuperscript{143}

B. Historical Justifications for Prohibiting Bills of Attainder

The Clause's prohibition on bills of attainder derives from two sources.\textsuperscript{144} The Framers' first goal was to prevent the deprivation of individual rights by the legislature.\textsuperscript{145} Their second, and more important goal was to preserve the integrity of the new government's separation of powers and system of government.\textsuperscript{146}

In forbidding bills of attainder, the Framers of the Constitution sought to prohibit the English Parliament's ancient practice of punishing specifically designated persons or groups without trial.\textsuperscript{147} In this

\textsuperscript{140} “No Bill of Attainder or ex post facto Law shall be passed.” U.S. Const. art. I, § 9, cl. 3. States are also forbidden to enact bills of attainder:

\begin{quote}
[N]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Things but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
\end{quote}

\textsuperscript{141} The Court first used this broad approach in \textit{Fletcher v. Peck}, 10 U.S. (6 Cranch) 87, 138 (1810), holding: “[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.” \textit{Id.}

\textsuperscript{142} See United States v. Brown, 381 U.S. 437, 441–42 (1965). The Supreme Court has recognized these punishments in various forms, and has also construed punishment to include the exclusion of an individual or group from participation in a specified employment or vocation. See \textit{Nixon}, 433 U.S. at 474.

\textsuperscript{143} \textit{Id.} at 468.


\textsuperscript{145} See \textit{Brown}, 381 U.S. at 444–45; \textit{Lovett}, 328 U.S. at 317–18.

\textsuperscript{146} See \textit{Brown}, 381 U.S. at 444–45; \textit{Lovett}, 328 U.S. at 317–18.

respect, the Clause serves as a bulwark against tyranny.\textsuperscript{148} As participants in a rebellion themselves, the Framers were well aware of the danger inherent in special legislative acts that took away the life, liberty, or property of particular persons merely because Parliament or the sovereign thought them guilty and deserving of punishment.\textsuperscript{149} Further, "[i]n the aftermath of the American Revolution, the Framers of the American Constitution also saw many anti-loyalist statutes enacted throughout the states, including numerous bills of attainder and pains and penalties."\textsuperscript{150} When placed in this context, it is evident that the Framers intended to safeguard the people of this country from punishment without trial in duly constituted courts.\textsuperscript{151}

The Clause, however, also has practical consequences for our system of government. Specifically, the sanction against bills of attainder serves two purposes: to ensure that the legislature is confined to rulemaking and prohibited from conducting trials and to protect the separation of powers by preventing the legislature from assuming the functions of the judiciary.\textsuperscript{152} As such, the Clause reflects the Framers' belief that Congress is not as well-suited to the task of determining guilt and levying punishment as politically independent judges and juries.\textsuperscript{153}

\textsuperscript{148} See Brown, 381 U.S. at 443.

\textsuperscript{149} See Lovett, 328 U.S. at 317–18. The Lovett Court explicitly recognized this, saying: "[w]hen our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they had envisioned. And so they prescribed bills of attainder." Id. at 318.

\textsuperscript{150} Welsh, supra note 6, at 84. The Supreme Court also recognized this history in Brown. See 381 U.S. at 442.

\textsuperscript{151} See Brown, 381 U.S. at 445; Lovett, 328 U.S. at 317; Welsh, supra note 6, at 84. The Brown court relied on the sentiments of James Madison:

\begin{quote}
Bills of attainder, \textit{ex post facto} laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social contract, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights.
\end{quote}

\textit{The Federalist No. 44} (James Madison). See Brown, 381 U.S. at 444 n.18.

\textsuperscript{152} See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.9(c), at 684 (3d ed. 1999); see also Brown, 381 U.S. at 444.

\textsuperscript{153} See Brown, 381 U.S. at 445.
In addition, in a system of government that relies on the presumption that each branch will refrain from performing the tasks of the others, the Clause serves as a barrier, erected to ensure that the legislature will not overstep the bounds of its authority and perform the functions of the other departments.154 The Clause restrains Congress from usurping judicial functions in the same way that Article III of the Constitution confines the judicial branch to the task of adjudicating concrete cases or controversies.155 The Supreme Court has stated that the Clause “was intended not as a narrow, technical ... prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”156 Thus, the dual rationale of the separation of powers or fear of over-concentration in any one branch of our government, and the feeling that the characteristics of various departments render them suitable for different jobs, is reflected in the Clause.157

C. The Supreme Court’s Analysis of Bills of Attainder

The Supreme Court has developed a test to determine when a law inflicts prohibited punishment, and thus constitutes a bill of attainder.158 The two-part inquiry examines the law for both specificity

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154 See id. at 444. Concern that the legislature would overstep its bounds is evident throughout the Federalist Papers, especially in the words of James Madison:

[1]In a representative republic, where executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

THE FEDERALIST No. 48 (James Madison).

155 See U.S. CONST. art. III, § 2, cl. 1; see also Nixon, 433 U.S. at 469.


158 See, e.g., SBC Communications, Inc. v. Federal Communications Comm’n, 154 F.3d 226, 233 (5th Cir. 1998).
and punishment.\textsuperscript{159} Unless both elements are found, a law is not an unconstitutional bill of attainder.\textsuperscript{160}

1. Specificity

The first inquiry is whether the legislature has acted with specificity.\textsuperscript{161} Although bills of attainder were historically directed at specific individuals, this sanction also applies to those laws directed toward a whole group or readily ascertainable members of a group.\textsuperscript{162} For example, a law that punishes particularly named individuals is a bill of attainder and a violation of the Clause.\textsuperscript{163} However, a law does not have to name specific individuals to be a bill of attainder.\textsuperscript{164} If a law names a group, or even describes a group, such that it may be readily ascertained that the law is directed at that specific group, this may also constitute a bill of attainder.\textsuperscript{165}

Satisfaction of the specificity strand alone is not sufficient to find that a particular law implicates the Clause, let alone violates it.\textsuperscript{166} The proscription against bills of attainder applies to statutes only when they inflict punishment on a specified individual or group.\textsuperscript{167}

\textsuperscript{159} See id. at 233.


\textsuperscript{161} See SBC Communication, 154 F.3d at 233.

\textsuperscript{162} See United States v. Lovett, 328 U.S. 303, 315 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

\textsuperscript{163} See Lovett, 328 U.S. at 316. Lovett is one of the starkest examples of a bill of attainder. In that case, Congress passed section 304 of the Urgent Deficiency Appropriation Act of 1943, which named three government employees, labeled them as subversive, and then provided that no salary should be paid to them. See id. at 304-05, 311-12. The employees brought suit. See id. at 305-06. The Supreme Court ruled in their favor, holding that section 304 was a punishment of named individuals without a judicial trial. See id. at 315.


\textsuperscript{165} See id. at 461. In Brown, the petitioner challenged a federal law making it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. See id. at 439. The federal law prescribed a punishment of either one-year imprisonment or a $10,000 fine. See id. at 439 n.1. While the law did not refer to the petitioner by name, the law was still held to be a bill of attainder. See id. at 440. The Court refused to distinguish this law, which inflicted deprivation on members of the Communist Party, from the type of law challenged in Lovett, which listed named individuals. See id. at 461.


\textsuperscript{167} See id.
2. Punishment

The second inquiry is whether the legislative action imposes a punishment. The Court makes three necessary inquiries to make this determination. First, the Court determines whether the law imposes a punishment of the sort traditionally prohibited by the Clause. Second, the Court employs a functional test, analyzing whether the law can reasonably be said to further non-punitive goals in light of the type and severity of the burdens imposed. Third, the Court utilizes a motivational test to determine whether the legislative record evinces a congressional intent to punish. Since the proscription against bills of attainder only reaches statutes that inflict punishment on a specified individual or group, the punishment factor has become a critical element of the overall test.

a. The Test for Traditional Punishment

The Court’s first determination is whether the challenged law imposes a punishment traditionally judged to be prohibited by the Clause. Such punishment at English common law included imprisonment, banishment, and the punitive confiscation of property by the sovereign. In our own country, the list of punishments forbidden by the Clause has been expanded to include legislation that bars participation by individuals or groups in specific employment or professions.

The Court’s prohibition of bars to employment or specified vocations began with its holdings in Cummings v. Missouri and a companion case, Ex Parte Garland. Cummings involved the constitutionality

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168 See SBC Communications, Inc. v. Federal Communications Comm’n, 154 F.3d 226, 233 (5th Cir. 1998).
170 See Navegar, Inc. v. United States, 192 F.3d 1050, 1066 (D.C. Cir. 1999); ROTUNDA & NOWAK, supra note 152, at 685.
171 See Nixon, 433 U.S. at 475–78; Navegar, 192 F.3d at 1066.
172 See Nixon, 433 U.S. at 473; Navegar, 192 F.3d at 1066; BellSouth Corp. v. Federal Communications Comm’n, 162 F.3d 678, 684 (D.C. Cir. 1998) (BellSouth II).
173 See Selective Serv., 468 U.S. at 851.
174 See Navegar, 192 F.3d at 1066; ROTUNDA & NOWAK, supra note 152, at 685.
175 See Nixon, 433 U.S. at 474.
178 71 U.S. (4 Wall.) at 377.
of amendments to the Missouri Constitution of 1865, which provided that no one could engage in a number of specified professions unless he first swore that he had taken no part in the rebellion against the Union. Cummings, a priest, was disqualified from practicing as a clergyman because he could not truthfully take the oath. At issue in Garland was a federal statute that required attorneys to take a similar oath before they could practice in federal courts. The Court struck down both provisions as bills of attainder on the ground that each was a legislative punishment directed toward a specific group: clergymen and lawyers who had taken part in the rebellion and thus were prevented from truthfully taking the oath. Thus a law is a bill of attainder if it permanently deprives an individual or group through the confiscation of property, bars participation in a specified vocation or employment, imprisonment, or takes the form of any other traditional form of punishment.

b. The Functional Test

The functional test seeks to determine whether the law, when viewed in terms of the type and severity of the burdens imposed, reasonably furthers legitimate, nonpunitive legislative goals. "Even measures historically associated with punishment . . . have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing." That is, when a legislative action has legitimate, nonpunitive purposes, a court will be prevented from striking it down, even if it seemingly im-

179 71 U.S. (4 Wall.) at 279–82.
180 See id.
181 71 U.S. at 334–37.
183 See also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852–53 (1984). The permanent deprivation element of this inquiry is especially important. In Selective Service, the Court held that disqualifying male students who failed to register for the draft from receiving federal financial aid was not a bill of attainder because the statute left open the possibility of qualifying for aid. See Selective Serv., 468 U.S. at 849–46, 850–51. More specifically, the Court held that "appellees can become eligible for . . . aid at any time simply by registering late." Id. at 853.
185 Laurence H. Tribe, American Constitutional Law § 10–5, at 655 (2d ed. 1988). Tribe goes on to say that measures enacted not in order to punish but in order to prevent future harm are condemned as bills of attainder when these measures have been thought to rest on a legislative determination that particular persons have shown themselves to be blameworthy. See id; see also BellSouth Corp. v. Federal Communications Comm'n, 162 F.3d 678, 686 (D.C. Cir. 1998) (hereinafter BellSouth II).
plicates the specificity and traditional punishment aspects of the inquiry.\textsuperscript{186} Such legitimate goals have included encouraging draft registration,\textsuperscript{187} guaranteeing the availability of evidence at criminal trials,\textsuperscript{188} preserving historical records,\textsuperscript{189} and encouraging competition in formerly monopolized markets.\textsuperscript{190} Thus, it must be established that the legislature's action constitutes punishment and not merely the legitimate regulation of conduct.\textsuperscript{191}

Put differently:

\textit{the question in each case where unpleasant consequences are brought to bear on an individual for prior conduct is whether the legislative aim was to punish \ldots or whether the

\textsuperscript{186} See BellSouth II, 162 F.3d at 688.
\textsuperscript{187} See Selective Serv., 468 U.S. at 854 (finding that law that conditioned financial aid benefits on draft registration had a legitimate legislative purpose).
\textsuperscript{188} See Nixon, 433 U.S. at 477–78. Here, the Court held that a law had a legitimate legislative purpose when it directed the Administrator of General Services to take former President Nixon's personal documents and tape recordings into custody, since it was guaranteeing the availability of this evidence at criminal trials. See id. This was directly related to "congress's responsibility to the due process of law in the fair administration of criminal justice." See id. at 477.
\textsuperscript{189} See id. at 478.
\textsuperscript{190} See BellSouth II, 162 F.3d at 688–90 (holding that Congress had a legitimate non-punitive purpose in conditioning telephone company's entrance into long distance markets on opening of local markets to competition).
\textsuperscript{191} See Nixon, 433 U.S. at 476 n.40. It is important to note, however, that Brown held that the definition of punishment should not be limited to retributive actions. See United States v. Brown, 381 U.S. 437, 458 (1965). "Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive." Id. at 458. Thus, a law may be a bill of attainder even if it is enacted for preventive purposes. See id. The touchstone appears to be the class to whom the law applies. For example, the Court compared the facts of Brown to those in American Communications Ass'n v. Douds, 339 U.S. 382 (1950). See Brown, 381 U.S. at 439 n.2, 458–60. In Brown, the law prevented anyone who was presently a member of the Communist Party or who had been a member of the Party during the previous five years from serving as a union officer. See id. at 439. In comparison, in Douds, the plaintiff challenged a law that sought to prevent Communist Party membership in labor unions. See 339 U.S. at 385. However, the Douds Court held there was a decisive distinction between laws that punished for past actions and the challenged law, which made individuals subject to a possible future loss. Id. at 414. The Court reasoned that: "[h]ere the intention is to forestall dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action become eligible to sign the affidavit." Id. Thus, the law in Douds, which would fail to apply to a union member if he simply resigned from the party, was intrinsically different from the law in Brown, which retroactively punished a union member for membership in the Communist Party during the previous five years. See Brown, 381 U.S. at 439; Douds, 339 U.S. at 413–14. This introduces an inescapability element into consideration of any legislative action alleged to violate the Clause, so that there is a distinction between those laws that allow an individual to escape from a future deprivation, as opposed to those which impose a punishment on individuals for wholly past conduct. See Brown, 381 U.S. at 439; Douds, 339 U.S. at 413–14.
restriction of the individual comes about as a relevant inci­dent to a regulation of a present situation . . . .192

Courts have generally applied a balancing test to determine whether legislation is a punitive measure or the legitimate regulation of conduct.193 The Court weighs the public's needs, as interpreted by Congress, against the law's detrimental effect on the named individual or group to ascertain if it survives scrutiny under the Clause.194

For example, in Fresno Rifle and Pistol Club v. Van De Kamp, Inc.,195 gun clubs and gun manufacturers challenged a California law that classified certain assault weapons and proscribed their manufacture, sale, and possession.196 The plaintiffs claimed that the law unconstitutionally inflicted punishment within the meaning of the Clause.197 However, the Ninth Circuit held that the California legislature had a legitimate justification for passing the law, since they had found that assault weapons presented an unreasonable harm to human life.198 Thus, the law was a legitimate regulation of conduct.199

However, in other rare instances when there is no legitimate legis­lative purpose, the Supreme Court will find that the law was enacted with the purpose of punishing the individuals disadvantaged by the law.200 The Court has relied upon the prohibition against bills of attainder only five times to strike down legislation.201 Correspondingly,

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192 DeVeau v. Braisted, 363 U.S. 144, 160 (1960); see also Dehainaut v. Pena, 32 F.3d 1066, 1072 (7th Cir. 1994). In Dehainaut, President Reagan directed that air traffic controllers who participated in a 1981 strike be indefinitely barred after they ignored his order to return to work. See Dehainaut, 32 F.3d at 1068-69. The controllers sued, alleging that the directive violated the Constitution as a bill of attainder. See id. at 1070. However, the Seventh Circuit held that the directive was a non-punitive, protective measure "to protect the efficiency of the FAA's operations" and "the safe and effective performance of the nation's air traffic control system." Id. at 1072.

193 See id.


195 965 F.2d 723 (9th Cir. 1992).

196 See id. at 724.

197 See id. at 725.

198 See id. at 728.

199 See id.


201 See generally United States v. Brown, 381 U.S. 437 (1966) (striking down statute that imposed sanctions on one who was a member of the Communist Party and an officer or employee of a labor union); United States v. Lovett, 328 U.S. 303 (1946) (striking down statute that cut off the salary of three named federal employees based on their membership in the Communist Party); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872) (mem.) (striking down West Virginia loyalty oath); Ex Parte Garland, 71 U.S. (4 Wall.) 366 (1866) (striking down statute that required attorneys to take oath that they had not aided the Confederacy); Cummings v. Missouri, 71 U.S. (4 Wall.) 356 (1866) (striking down amend-
there have been few times when the Court has found that legislation
was enacted with the specific purpose of punishing an individual.202

Perhaps the best example of a law enacted exclusively for a puniti­
ve purpose is seen in United States v. Brown.203 There, Congress en­
tacted the Labor Management Reporting and Disclosure Act of 1959,
making it a crime for a member of the Communist Party to serve as
an officer or employee of a labor union.204 The Supreme Court found
that the law's only purpose was to inflict deprivations on blameworthy
individuals in order to prevent their future misconduct, which was
prohibited by the Clause as an impermissible punitive objective under
the functional test for punishment.205

c. The Motivational Test

Third, the Court must determine whether the legislative record
evinces a congressional intent to punish.206 This task is accomplished
by looking directly at the legislative history of the law in question, in­
cluding the Senate and House Committee Reports and floor de­
bates.207 For example, when the legislative history specifically men­
tions an individual by name or condemns a person's behavior as
meriting the infliction of punishment, it may fairly be said that Con­
gress's intent was punitive, and not merely
regulatory.208 However, iso­
lated statements do not rise to the level of unmistakable evidence of
punitive intent that is required to strike down a law as a bill of attain­
der.209 For a law to withstand a bill of attainder challenge, it must be
clear that Congress lacked the intent to punish.210

202 See supra note 201.
203 See 381 U.S. 437 (1960).
204 See id. at 439 n.1.
205 See id. at 460-61.
207 See id. at 478-79.
208 See United States v. Lovett, 328 U.S. 303, 314 (1946). The facts in Lovett are a strong
example of the congressional intent at issue here. See id. The Court found that Congress's
intent was clear when it named three named individuals, stigmatized their reputations, and
seriously impaired their chances to earn a living. See id. at 314. But c.f. Nixon, 433 U.S. at
479.
856 n.15 (1946).
210 See id. at 856.
Intent to punish is not easily proved. For example, in *Navigar, Inc. v. United States*, a gun manufacturer alleged that a law showed the requisite legislative intent to punish based on a House Report that listed all of the semiautomatic weapons listed in the statute. Further, the manufacturer pointed out that it was repeatedly named in the floor debates as a manufacturer of banned weapons. The Ninth Circuit, however, held that these allegations fell short of the type of evidence required to show punitive legislative intent. The court reasoned that any mention of the manufacturer’s name was merely a recital of the content of the Act, and found Congress showed no intent to punish.

Even a statement that singles out specific bad acts of a party (suggesting that a legislator has found fault with that party’s actions) is not sufficient to show punitive intent. For example, in *BellSouth I*, regional Bell operating companies were prevented from entering the information services market unless they complied with certain requirements set forth in the Telecommunications Act of 1996. BellSouth was able to only show a few scattered remarks referring to the anti-competitive abuses it allegedly committed in the past. This case demonstrates that even when the legislative history shows that there was discussion of a party’s past misconduct, a corresponding punitive legislative intent is not necessarily inferred.

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211 192 F.3d 1050, 1065 (D.C. Cir. 1999).
212 See id. at 1067.
213 See id.
214 See id. at 1068.
215 See id.
216 144 F.3d 58, 62 (D.C. Cir. 1998).
217 See id. at 60–62. These requirements were imposed on joint ventures between electronic publishing companies and the regional telephone companies and included: maintaining separate books and accounts forcing the companies to have separate employees, officers, and directors, and preventing the co-ownership of property. See id. at 61–62.
218 See id. at 67.
219 See id.
D. Application Origin of the Modern Bill of Attainder Test

1. Specificity, but No Punishment: Nixon v. Administrator of General Services

An individual must satisfy both the specificity and punishment prongs of the test to make a successful bill of attainder challenge. A classic example of a challenge that failed to satisfy both prongs is Nixon v. Administrator of General Services. In this case, former President Nixon challenged a law that gave the Administrator of General Services the power to seize and sort his presidential papers and tape recordings. President Nixon sued, alleging that the law was a bill of attainder that made it a legislative judgment of guilt and inflicted punishment on an identifiable individual, himself, without a judicial trial. The specificity prong was satisfied in fact, because the law named President Nixon explicitly. The Supreme Court, however, found that the reference to President Nixon did not automatically offend the Clause. Instead, the Court held that the former President constituted a "legitimate class of one." The statute could permissibly name President Nixon because his were the only presidential materials that required attention. While the Clause serves as a protection against the legislative deprivation of personal rights, Congress is not restricted "to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." In other words, the Clause does prohibit the infliction of punishment on specifically named individuals but does not prohibit Congress from enacting legislation that has incidental negative consequences.

President Nixon also failed to satisfy the punishment prong. The Court found that the Clause prohibits legislative punishment, not burdensome consequences such as those imposed by the Act. Un-

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220 See SBC Communications, Inc. v. Federal Communications Comm’n, 154 F.3d 226, 233 (5th Cir. 1998).
222 See id. at 433–34.
223 See id. at 469.
224 See id. at 471–72.
225 See id.
226 See Nixon, 433 U.S. at 472.
227 See id.
228 See id. at 471.
229 See id.
230 See id. at 473–83.
231 See Nixon, 433 U.S. at 472–73.
der the three-part punishment analysis, President Nixon did not suffer any of the historically forbidden deprivations at the hands of Congress. Rather, any contention that the law punitively confiscated President Nixon’s property was countered by a provision in the law that permitted just compensation for any taking of personal property. Second, since Congress stressed the need to preserve these presidential papers and the public’s interest in these papers, the law had a clear, nonpunitive, legitimate purpose. Finally, neither the Committee reports nor the floor debates cast aspersions on President Nixon’s behavior, nor did they condemn his behavior as deserving punishment. Instead, they only expressed the importance of the public interest, allowing the Court to conclude that there was no congressional intent to punish President Nixon individually.

Nixon is especially instructive of the Court’s analysis. It shows that even in the face of a law in which the language refers explicitly to one individual, and seems to inflict punishment in the face of an especially difficult national event, the law may not necessarily be an unconstitutional bill of attainder, this is especially true if there is a significant public interest in the issue.

2. Recent Attacks on Legislation Using the Clause

Nixon solidified the modern Court’s approach to bills of attainder, clearly setting out the steps courts should take in analyzing legislation alleged to violate the Clause. In recent years, there have been several attempts by various industries to attack legislation that has either satisfied the specificity prong or imposed a legislative burden; all have failed to satisfy both elements of the bill of attainder test. Most notably, the telecommunications and weapons industries have attacked legislation that significantly regulates the services and goods they provide.

232 See id. at 475.
233 See id.
234 See id. at 477–78.
235 See id. at 479.
236 See Nixon, 433 U.S. at 479–81.
237 See generally id. at 471–72, 473–83.
238 See discussion supra Section IV.D.1.
239 See e.g., Navegar, Inc. v. United States, 192 F.3d 1050 (D.C. Cir. 1999); BellSouth Corp. v. Federal Communications Comm’n, 162 F.3d 678 (D.C. Cir. 1998) (BellSouth II).
240 See e.g., Navegar, 192 F.3d 1050; BellSouth II, 162 F.3d 678.
In 1998, BellSouth Corporation, a regional Bell operating company, challenged the Telecommunications Act of 1996 in the District of Columbia Circuit. The appellant challenged a specific portion of the Act that prevented it from providing long distance telephone service without first satisfying certain statutory criteria. Since the Act singled out the appellant by name, the court found that the specificity prong of the test was easily satisfied. However, the punishment prong of the bill of attainder analysis required a more searching inquiry.

The D.C. Circuit held that a line-of-business restriction keeping the appellant from entering a particular area of the industry without first satisfying certain requirements was not a traditional punishment under the test. Instead, the law's requirements were no different than the numerous regulatory measures aimed at other industries, which have not been held to inflict punishment. Rather than imposing a traditional employment bar prohibited by the Clause, the Act required only that the appellant open its local telephone markets to competition.

Not only were the requirements of the Act outside the definition of traditional punishment, but the Act had a clear, nonpunitive purpose. The requirement imposed on the appellant was part of an act that was meant to provide a competitive telecommunications market in an area particularly susceptible to monopoly power. There was no punitive or suspicious motive in enacting the legislation. The legislative history and background of the Act was clear in this regard.

Finally, even though members of Congress referred to the appellant by name, the D.C. Circuit held that BellSouth was unable to meet the unmistakable punitive intent requirement set out by the Court in

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241 See BellSouth II, 162 F.3d at 680.
242 See id. at 680–81.
243 See id. at 684.
244 See id. at 684–91.
245 See id. at 685.
246 See BellSouth II, 162 F.3d. at 685.
247 See id. at 685.
248 See id. at 688.
249 See id. at 688–90.
250 See id. at 690.
251 See BellSouth II, 162 F.3d at 688–90.
Selective Service. All of these elements considered, the Act imposed no punishment on the appellant.

In 1999, the District of Columbia Circuit Court of Appeals heard an appeal by firearm manufacturers. The manufacturer challenged the federal Violent Crime Control and Law Enforcement Act, which made it unlawful to manufacture, transfer, or possess a semiautomatic weapon. The D.C. Circuit chose not to address the issue of specificity, since the law named not only guns produced by the appellant, but also copies and duplicates of those firearms.

The D.C. Circuit held that the law at issue did not impose a punishment on the manufacturer. Specifically, there was no historical punishment imposed: any analogy made between restricting the sale of semiautomatic weapons and the barring of specific parties from employment was unsupported. Bars to employment were initially held to be punishment because they singled out individuals as disloyal or disfavored. Here, the D.C. Circuit held that these weapons were singled out because they were dangerous and disproportionately linked to crime. Not only did the law fail to constitute a traditional punishment, but the court also held that there was a legitimate, non-punitive purpose of reducing violent crimes connected with semiautomatic weapons. In addition, while the appellant’s guns were mentioned in the House Report and in floor debates, the mention of the appellant’s name did not suggest an intent to punish so much as it was a mere “recital of the content of the Act itself.” Thus, the Act lacked the punitive intent required to implicate the Clause.

While BellSouth II and Navegar dealt with the punishment aspect of the Clause, the specificity inquiry was addressed in a recent Illinois
case. In *Cathy's Tap, Inc. v. Village of Mapleton*, the town council enacted ordinances that prohibited nude dancing in conjunction with the sale of liquor. At the time the ordinance was passed, the Mapleton Board acknowledged that there were currently only two liquor licenses in the town. The plaintiff, a local adult establishment that served alcohol, lost its liquor license as a result of the ordinance. However, even though the plaintiff’s establishment had one of only two licenses and was the only adult establishment in the village, the district court held that the ordinance did not rise to the level of specificity required to violate the Clause. Thus, while the ordinance applied only to one clearly identifiable business, it did not meet the initial threshold requirement for being a bill of attainder.

These examples of recent challenges based on the Clause are helpful to understand how the *Nixon* test for bills of attainder has evolved in the thirty-three years since its articulation. While the requirements of specificity and punishment remain essentially the same, the inquiry into Congress’s nonpunitive, legitimate legislative purpose is becoming much more important to upholding legislative actions and the specificity element seems to have been relaxed.

V. DOES SECTION 5007 OF OPA CONSTITUTE A BILL OF ATTAINDER?

SeaRiver Maritime has not yet appealed the Alaska District Court’s July 1998 ruling that the terms of the 1991 consent decree constrain the company from challenging section 5007 as a bill of attainder. If SeaRiver Maritime does decide to appeal this ruling to the Ninth Circuit, the corporation’s claim could be heard at some time in the future. Thus, the merits of this claim deserve discussion, especially in light of the recent uses of the Clause in attacking various forms of legislation that inflict undesirable burdens on different industries.

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265 *Id.* at 878–79.

266 *Id.* at 878.

267 *Id.* at 878–79.

268 See *id.* at 881.

269 See *id.*

270 See *id.*; see also BellSouth Corp. v. Federal Communications Comm’n, 162 F.3d 678, 686–90.

271 See discussion *supra* Section III.B.

272 See generally BellSouth Corp. v. Federal Communications Comm’n, 162 F.3d 678 (D.C. Cir. 1998) (*BellSouth II*); SBC Communications, Inc. v. Federal Communications
A. Specificity

As a threshold matter, a court will inquire whether Congress acted with specificity in enacting section 5007. As a threshold matter, a court will inquire whether Congress acted with specificity in enacting section 5007.273 A law is constitutionally impermissible if it singles out specific individuals or businesses, a group, or readily ascertainable members of a group.274 As noted in Brown, a law does not have to name the group or individual explicitly, but can violate the Clause merely by describing certain people specifically.275 Even if a law refers to an individual by name, however, the Court held that former President Nixon constituted a legitimate class of one because his were the only materials that demanded immediate attention.277 As a result, it was permissible for Congress to pass a law that applied to him alone.278

Cathy’s Tap dealt with a similar situation.279 Even though the Mapleton Board acknowledged that there were currently only two liquor licenses in the town, and the plaintiff lost its liquor license as a result of the ordinance, the district court held that the ordinance did not rise to the level of specificity required to violate the Clause.280 Similar to the Supreme Court’s holding in Nixon, the threshold specificity requirement for bills of attainder was still not satisfied even though the local ordinance in Cathy’s Tap applied only to one clearly identifiable business.281

In theory, section 5007 could be perceived as specifically directed at the Valdez spill. The statute applies to spills occurring after March 22, 1989, the day before the actual Exxon Valdez spill, effectively allowing the statute to apply to the SeaRiver Mediterranean.282 Further, the law applies to any vessel that has spilled more than one million gallons of oil into the marine environment, a class into which only the SeaRiver Mediterranean falls since the vessel spilled eleven million gal-
lons of oil into Prince William Sound. However, despite what seem to be sufficient instances of specificity, there is little chance that a court will find section 5007 to be a bill of attainder.

Rather, given the circumstances leading up to the enactment of OPA, it is clear that section 5007 applies to any vessel that spills one million gallons of oil into the marine environment after March 22, 1989. That is, other vessels may later be barred from Prince William Sound if they also spill an excess of the amount prescribed in the statute. At some point in the future, another vessel could potentially spill more than one million gallons of oil such that it will also be barred from Prince William Sound. However, section 5007 presently applies to only one vessel, so that the SeaRiver Mediterranean is "a legitimate class of one." Therefore, section 5007 fails to implicate the Clause because it is a generally applicable rule that applies to all tanker vessels that spill the specified amount of oil.

Further, section 5007, like the statute at issue in Nixon, does not rise to the level of specificity required under the Clause. There, the Court was unwilling to find a bill of attainder even where legislation singled out former President Nixon by name. At most, section 5007 creates an inference that it prevents only the SeaRiver Mediterranean from returning to Prince William Sound, when it is in fact prohibiting any vessel that spills a specified amount of oil after a certain date from

283 See id.
285 Specifically, the Exxon Valdez spill, the three spills in the Houston Ship Channel, Delaware River, and Narragansett Bay in June 1989, the spill in California, and Congress's fifteen-year attempt to enact oil pollution legislation, could be defined, in totality, as the instances leading to the passing of OPA. See discussion supra Section I.
286 See Nixon, 433 U.S. at 472; Fresno Rifle and Pistol Club v. Van De Kamp, 965 F.2d 723, 728 (9th Cir. 1992).
287 See Fresno Rifle, 965 F.2d at 728.
289 See Nixon, 433 U.S. at 472.
290 But see United States v. Brown, 381 U.S. 437, 450 (1965). In Brown, the law at issue implicated the Clause because it failed to set out a generally applicable rule that was applied to all persons, Communist or not, who were likely to initiate political strikes, which was the alleged evil Congress sought to remedy. See id. But see Cathy's Tap, Inc. v. Village of Mapleton, 665 F. Supp. 2d 874, 881 (C.D. Ill. 1999). Section 5007 is intrinsically different, as it applies to any vessel that spills a certain amount of oil after a certain date, thus having a direct connection to the purpose of the statute, which was to drastically change the prevention and cleanup of oil spills. See generally 33 U.S.C. §§ 2701–2737 (1994 & Supp. III 1997) and discussion supra Section II.B.
292 See id.
reentering the Sound.\textsuperscript{293} Thus, section 5007 “casts a wider net” by leaving room for other vessels to fall within the statutory prohibition.\textsuperscript{294} An otherwise valid law such as section 5007 is not transformed into a bill of attainder merely because it regulates conduct on the part of a designated class of individuals.\textsuperscript{295} While the Clause serves an important function in confining the legislature to rulemaking, it “does not ... limit [C]ongress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.”\textsuperscript{296} Under this analysis, SeaRiver Maritime’s reputed assertion that it is protected from any legislation that imposes a burden upon the corporation is unfounded.\textsuperscript{297}

Thus, section 5007 does not meet the threshold level of specificity required to implicate the Clause.\textsuperscript{298} However, even if legislative specification is shown, a court must also find that section 5007 imposes a burden that could be deemed punishment under the Clause.\textsuperscript{299}

B. Punishment

Once a court determines that a law is directed at a specified individual, it will then inquire whether the legislative action imposes a punishment.\textsuperscript{300} Both the specificity and punishment elements must be satisfied in order for a court to find that legislation is a bill of attainder.\textsuperscript{301} Whether a law constitutes punishment is a three-part inquiry, analyzing whether the legislation imposes a traditional punishment,

\textsuperscript{293} See 33 U.S.C. § 2737.
\textsuperscript{294} Nixon, 433 U.S. at 472. Further, in Navegar, the Violent Crime Control and Law Enforcement Act, which regulated assault weapons, was held not to be a bill of attainder. See 192 F.3d at 1068. There, the court held that the specificity prohibition of the Clause was not implicated because it named not only the guns made by the plaintiffs, but also 14 other firearms and three broad categories of pistols, rifles, and shotguns. See id. at 1066 n.10. The court held that this was evidence that Congress was not singling out the plaintiffs, but aiming to prohibit an entire class of weapons. See id.
\textsuperscript{295} See Nixon, 433 U.S. at 470–71; Fresno Rifle and Pistol Club v. Van De Kamp, 965 F.2d 723, 727 (9th Cir. 1992).
\textsuperscript{296} Nixon, 433 U.S. at 471.
\textsuperscript{297} See id.
\textsuperscript{298} See id.; Fresno Rifle, 965 F.2d at 727.
\textsuperscript{299} See SBC Communications, Inc. v. Federal Communications Comm’n, 154 F.3d 226, 233 (5th Cir. 1998).
\textsuperscript{300} See id.
\textsuperscript{301} See id. at 234.
whether it has some other nonpunitive function, and whether the mo-
tivation of the legislature was to punish the specified individual.302

1. Traditional Punishment Test

A law will be an unconstitutional bill of attainder if it imposes a
punishment traditionally prohibited by the Clause.303 SeaRiver Marit-
time alleges that it is a punishment for the SeaRiver Mediterranea
n to be permanently barred from entering Prince William Sound because
the vessel was built specifically for the California-Alaska route.304 Thus,
section 5007 prevents the vessel from operating in the place for which
it was constructed.305 While SeaRiver Maritime would like a court to
believe that this incidental consequence falls within the traditional
test for punishment, the connection between the effect of the statute
and traditional punishment is tenuous.306

The SeaRiver Mediterranean currently operates in the Mediterra-
nean Sea.307 SeaRiver Maritime alleges that it is much less profitable
to operate the tanker in Europe than it would be if it were permitted
to operate the vessel in Alaska.308 Barring the SeaRiver Mediterranea
n from Prince William Sound, however, does not fit within the tradi-
tional punishments of the Clause,309 which typically include: impris-
onment, banishment, punitive confiscation of property, and prohi-
bition of designated individuals or groups from participation in a
specified employment or vocation.310 In Fresno Rifle, gun manufactur-
ers and shooting clubs claimed that a law that identified the weapons
they manufactured as “assault weapons” was a bill of attainder.311
However, the Ninth Circuit concluded that this was not an impermis-
sible punishment traditionally prohibited by the Clause.312 Instead,

(1984); Nixon, 433 U.S. at 473, 475–78; discussion infra Section IV.C.2.
303 See Nixon, 433 U.S. at 474–75; ROTUNDA & NOWAK, supra note 152, at 685.

305 See id.
307 See Martin, supra note 17, at A1.
309 See Fresno Rifle and Pistol Club v. Van De Kamp, 965 F.2d 723, 727–28 (9th Cir.
F.2d at 728.
311 See Fresno Rifle, 965 F.2d at 724–25.
312 See id. at 728; see also Nixon, 433 U.S. at 477–78.
the court held that the law at issue was merely indirect economic punishment and failed to amount to punitive confiscation.\footnote{Fresno Rifle, 965 F.2d at 728.}

The same thing can be said of the SeaRiver Mediterranean. As in Fresno Rifle, the critical question is whether the kind of "economic punishment" inflicted on the corporation is the sort prohibited by the Constitution.\footnote{See id.} A court would surely conclude that barring the vessel from Prince William Sound is not such a punishment.\footnote{See id.} The corporation is free to continue operating the SeaRiver Mediterranean in other venues besides Prince William Sound and has done so since the vessel's $30 million overhaul in 1990.\footnote{See Sedendo, supra note 97, at 3.} Further, the corporation has other vessels operating both in Prince William Sound and in other parts of the world.\footnote{See For Now, at Least, Infamous Ship is Banished from Alaska, supra note 18, at 5.} While the corporation may be experiencing some cognizable economic consequences, they are indirect and in no way amount to punitive confiscation.\footnote{See Fresno Rifle, 965 F.2d at 728.}

Further, line-of-business restrictions on corporations have been held to pose no bill of attainder concerns.\footnote{See BellSouth Corp. v. Federal Communications Comm'n, 162 F.3d 686, 686 (D.C. Cir. 1998) (BellSouth II); BellSouth Corp. v. Federal Communications Comm'n, 144 F.3d 58, 64–65 (D.C. Cir. 1998) (BellSouth I).} For example, in BellSouth II, a statute required local operating companies to open their local telephone markets to competition to avoid the creation of monopolies.\footnote{See BellSouth II, 162 F.3d at 685.} The local operating companies argued that this restriction on their business operations was analogous to the employment bars held by the Supreme Court to be bills of attainder.\footnote{See id.} The court found no bill of attainder concerns even though the law violated the specificity prong of the test.\footnote{See id. at 684–86.} The SeaRiver Mediterranean finds itself in a similar situation: just as the local telephone companies are barred from entering certain markets until they fulfill the specified requirements, the vessel is barred from Prince William Sound because it meets a specific legislative requirement.\footnote{See id.}

Since the two situations are factually analogous, SeaRiver Maritime's challenge to OPA will most likely receive the same treatment by a court. As in BellSouth II, there is a very loose and unsupported anal-

\footnotesize{\begin{itemize}
\item \textit{Fresno Rifle}, 965 F.2d at 728.
\item \textit{See id.}
\item \textit{See id.}
\item \textit{See Sedendo, supra note 97, at 3.}
\item \textit{See For Now, at Least, Infamous Ship is Banished from Alaska, supra note 18, at 5.}
\item \textit{See Fresno Rifle, 965 F.2d at 728.}
\item \textit{See BellSouth Corp. v. Federal Communications Comm'n, 162 F.3d 686, 686 (D.C. Cir. 1998) (BellSouth II); BellSouth Corp. v. Federal Communications Comm'n, 144 F.3d 58, 64–65 (D.C. Cir. 1998) (BellSouth I).}
\item \textit{See BellSouth II, 162 F.3d at 685.}
\item \textit{See id.}
\item \textit{See id. at 684–86.}
\item \textit{See id.}
\end{itemize}}
ogy between the traditional employment disbarments forbidden by the Clause and section 5007 of OPA.324

Placing section 5007 among the burdens historically forbidden as attainder seems especially dubious because the statute does not bar the *SeaRiver Mediterranean* from operating ever again, but simply from reentering Prince William Sound.325 SeaRiver Maritime is free to continue operating the vessel in the Middle East or, if the corporation so chooses, in any other waters of the United States.326

2. Functional Test

A court must also ensure that the “nonpunitive aims of an apparently prophylactic measure are sufficiently clear and convincing” before finding that a law does not constitute a bill of attainder.327 More specifically, if there is an adequate nexus between the restriction imposed and some legitimate, nonpunitive governmental purpose, a law will not offend the Clause.328

While section 5007 could be said to place a burden on SeaRiver Maritime, a burdensome regulation cannot always be equated with punishment.329 The purpose of section 5007 is not to punish the current owners of the vessel.330 Instead, section 5007 is an attempt to devise a much-needed scheme of protection and prevention to ensure that Prince William Sound is never again faced with the type of crisis created by the *Exxon Valdez* oil spill.331

This contention is supported by two important considerations. First, SeaRiver Maritime’s claim of punitive purpose is somewhat undermined by section 5007’s placement in a law that generally notes its attempts to change the way the United States deals with oil pollution.332 On the whole, the legislative aim in enacting OPA was to dramatically change the schemes in place for liability, prevention, and

324 See *BellSouth II*, 162 F.3d at 686; *BellSouth I*, 144 F.3d at 64–65.
325 See *BellSouth I*, 144 F.3d at 65.
326 See id.
327 *BellSouth II*, 162 F.3d at 686 (quoting *TRIBE, supra* note 185, at 655).
328 See *BellSouth II*, 162 F.3d at 688; Dehainaut v. Pena, 32 F.3d 1066, 1072 (7th Cir. 1994).
330 See *DeVeau*, 363 U.S. at 160; *Navegar*, 192 F.3d at 1067.
331 See *Navegar*, 192 F.3d at 1067.
332 See *Navegar*, 192 F.3d at 1067; *Fresno Rifle*, 965 F.2d at 728.
cleanup of oil spills.\textsuperscript{333} Furthermore, section 5007 is placed in a portion of the Act that specifically aims to remedy the consequences of the worst oil spill in the United States' history by implementing specific preventive measures for Prince William Sound, such as the Bligh Reef light\textsuperscript{334} and an improved tanker-traffic navigation system.\textsuperscript{335} When placed in the context of OPA generally and the Prince William Sound provisions specifically, it becomes clear that section 5007 is not a punitive, but rather a protective measure.\textsuperscript{336}

Second, the consequences of the \textit{Exxon Valdez} spill were serious and have had lasting effects for both the environment and the people of Prince William Sound.\textsuperscript{337} It is entirely conceivable that Congress perceived that vessels with a history of serious oil spills pose a considerable risk of aggravating the already drastic conditions in Prince William Sound, and should thus be barred from the Sound to prevent that risk from being realized.\textsuperscript{338} Except in the most dire of circumstances,\textsuperscript{339} a spill of the \textit{Exxon Valdez}'s magnitude would indicate carelessness on the part of the oil industry.\textsuperscript{340} That is, the \textit{Exxon Valdez} spill resulted not from just one mistake, but from a series of bad decisions and habits.\textsuperscript{341} Congress could have reasonably believed that it was too much of a risk to subject Prince William Sound to the chance that the \textit{SeaRiver Mediterranean}, or any other vessel that creates a massive spill, could spill again.\textsuperscript{342} After all, if industry carelessness led to the dis-
charge of eleven million gallons, industry carelessness could also lead to the same pattern of bad decision making and result in the same vessel spilling again. Read against the background of the events in 1989 and 1990, there is little chance that anyone could suggest that the risk of another major oil spill was so feeble that section 5007's bar was a smoke screen for some invidious purpose. Rather, protecting against the risk of future spills is a legitimate and non-punitive purpose, and thus fulfills the second aspect of the punishment test.

3. Congress's Motivation in Enacting Section 5007

The final step in the test of punishment requires a court to determine whether the legislative record evinces an intent to punish. Congress's motivation in enacting section 5007 of OPA can be described as nothing other than preventive. If a legislative action is to be found a bill of attainder, there must be an unmistakable legislative intent to punish the specified individual. Isolated statements about a particular individual or those that express distaste for a particular behavior are not sufficient to show punitive intent.

While the legislative history discusses the Exxon Valdez accident, acknowledges it as the largest spill in United States history, and cites its significant impact on the commercial and environmental interests in Prince William Sound, there is no evidence of any punitive intent. The mention of the Exxon Valdez accident and its consequences in the congressional reports does not suggest the intent to punish but rather was a recital of the immediate events leading up to the enactment of OPA. Further, the legislative history also alludes to the other oil spills in 1989 and 1990 that were a cause of concern for both Congress and the Nation.

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<td>See Navegar, Inc. v. United States, 192 F.3d 1050, 1068 (D.C. Cir. 1999).</td>
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As discussed in Selective Service, even statements by Congressmen that expressed indignation at the decision of individuals not to register in the draft did not constitute a punitive legislative intent. Rather, these isolated statements lacked the punitive purpose required to strike a law as a bill of attainder. In the same manner, references to the spill by the SeaRiver Mediterranean's previous owner and Exxon's responsibility for that spill do not provide the kind of "smoking gun' evidence of congressional vindictiveness" required to establish that section 5007 is a bill of attainder. Instead, section 5007 is best classified as a measure intended to protect Prince William Sound from any further environmental damage.

Part of the difficulty lies in that there is no discussion of section 5007 in the legislative history. Alaska Senator Ted Stevens inserted section 5007 into the Conference Report. However, the Conference Report's failure to discuss section 5007 does not automatically imply the statute as a bill of attainder. Rather, it suggests just the opposite and bolsters the claim that it is not a bill of attainder because there is no explicit attempt to punish. In addition, reading section 5007 in the context of OPA, which is not one of punishment, but one of prevention and improvement on the statutory scheme that existed in 1990, could cure the lack of legislative history.

**Conclusion**

When SeaRiver Maritime's possible claims are put through this analysis, it is clear that it will not satisfy the criteria for bills of attainder. Not only does section 5007 lack the specificity required to violate the Clause, but it also fails to impose a punishment. The specificity element is not met because section 5007 applies not only to the

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352 See Selective Serv., 468 U.S. at 856 n.15.
353 See id.
354 BellSouth Corp. v. Federal Communications Comm'n, 144 F.3d 58 67 (D.C. Cir. 1998) (BellSouth I); see also BellSouth Corp. v. Federal Communication Comm'n, 162 F.3d 678, 690 (D.C. Cir. 1998) (BellSouth II); SBC Communications, Inc. v. Federal Communications Comm'n, 154 F.3d 226, 243 (5th Cir. 1998).
355 See BellSouth I, 144 F.3d at 67; see also BellSouth II, 162 F.3d at 690; SBC Communications, 154 F.3d at 243.
357 See Richards, supra note 90, at B1.
360 See Navegar, Inc. v. United States, 192 F.3d 1050, 1068 (D.C. Cir. 1999).
SeaRiver Mediterranean, but also to any vessel that may spill the specified amount of oil in the future. In addition, section 5007 does not implicate a punishment element. Banning a vessel from a specific geographic region is not the sort of traditional punishment forbidden by the Clause. Also, there is a serious and legitimate nonpunitive purpose in preventing any vessel that has spilled a significant amount of oil from endangering a region that has already suffered serious environmental and economic damage from the worst oil spill in U.S. history. Further, the legislative record evinces no intent to punish either the vessel or Exxon, the owner of the vessel at the time OPA became law. Given all of these factors, a court would probably not consider section 5007 of OPA to be a bill of attainder. Thus, section 5007 should stand, and any vessel that spills one million gallons of oil into the marine environment, including the SeaRiver Mediterranean, should not be permitted to have access to Prince William Sound.