

Lesson Template for James Madison Foundation

Article 1 is a "...constitutional bulwark in favor of personal security and private rights."

-James Madison, *Federalist no. 44*

Recommended Grade/Ability Level

- Grades 10-12

Recommended Lesson Length

- One class period of approximately 60 min.
- Up to 90 minutes with the extending and refining activity (E&R)

Central Engagement Question/Essential Question

- How does the prevention of bills of attainder in article one of the Constitution provide a necessary legal restraint on the federal and state legislative branches?
 - Separation of powers
 - Protection of the trial by jury
 - Protection of civil liberties against legislative encroachment
- How does the prohibition of bills of attainder in article one relate to some of the amendments in the Bill of Rights?

Overview (Summation)

- Bills of attainder are acts of legislation that inflict punishment on individuals or groups of individuals without a trial by jury.
- Protection against bills of attainder:
 - are a direct response to historically illegal acts of British Parliament and American colonial and state legislation
 - the right to a trial by jury,
 - prevents arbitrary punishment of citizens through legislative actions
- Bills of attainder are specifically prohibited acts of legislation as listed in article 1, section 9, clause 3 and article 1, section 10, clause 1.

Materials*

- Handout containing:
 - Summary and explanation of bills of attainder
 - Excerpts from Article I & III of the Constitution
 - Amendments 5-7
 - Excerpt of *Federalist no. 44* (James Madison)
 - Article by David Cohen w/ analysis questions (see attached)
 - http://www.philly.com/philly/opinion/20150928_Congress_violates_Constitution_with_Planned_Parenthood_vote.html
 - Student evaluation of a fictional scenario involving a possible bill of attainder
 - Students creation of their own bill of attainder scenario (E&R)

Objectives

- SWBAT define the term bill of attainder
- SWBAT identify the historical Constitutional context surrounding the legal prohibition of bills of attainder
- SWBAT explain the connection between the legal prohibition of (federal and state) bills of attainder and the following: the Constitutional principle of “separation of powers;” the right to a trial by jury
- SWBAT analyze a recent Congressional action against Planned Parenthood as a bill of attainder (using Prof. David Cohen’s criteria; see attached article)
- SWBAT evaluate a fictional legislative scenario using the three legal criteria for defining bills of attainder

Standards

- Connections to NCSS Standards for Civics and Government:
 - I. A, C
 - II. A, D
 - III. A, B, C, D
 - V. A, B, C, D

Background Information/Homework/Pre-Learning

- Students should possess a general understanding the three branches of government along with the duties of each
- Students should have a general knowledge of the contents in article one in the U.S. Constitution

For Homework:

- Students should define “bills of attainder” using the attached bi-modal organizer:
 - To complete the bi-modal organizer, students should follow the instructions on the handout (note: there is room for students to define two vocabulary terms on the sheet, you could have students define an additional term from their reading)
 - When completing the organizer, students should draw an image that represents or symbolizes the term “bills of attainder” in the appropriate box in addition to writing the definition and a sentence using the term
- Students should read, highlight and outline the “summary” section in the handout on bills of attainder
 - Provides the definition for bills of attainder
 - Provides a general historical background
 - Provides the legal criteria for determining a bill of attainder
- Before, class, students should also read the Constitutional excerpts from articles one and three in the handout

Anticipatory Activity/Bell-Ringer(~5-6 min.)

- Have students answer the following question in their notebook: How do article one and three of the U.S. Constitution specifically prevent legislative abuse?
- How do the protections granted in articles one and three connect to amendments five through seven?
- Then conduct a quick think-pair-share

Activities (~50 min.)

Homework (see above)

Bell-ringer (~5 min.):

- In class, begin w/ the bell-ringer (think-pair-share) listed above

Synthesize Fed. No. 44 (~10-15 min.):

- Have students the excerpt from James Madison's *Federalist no. 44* in reference to bills of attainder and the prevention of legislative tyranny
 - Students should draft one sentence synthesizing Madison's arguments pertaining to the Constitutional protection against bills of attainder/legislative abuses
 - This will challenge students and force them to condense the main ideas of Madison into a single sentence
 - You may want to have a few students share their synthesis statements as part of a brief whole group discussion and review

Article analysis & Discussion (~25-30 min.):

- Following the synthesis activity, have students independently read and answer the analysis questions provided for Professor David S. Cohen's article (Sept., 2015) addressing legislative action as a modern bill of attainder (see attached document; link also posted in the "materials" section)
- Conduct a whole group discussion centered on student responses to the analysis questions
 - Place special emphasis on answers to questions #4-6
 - This could also lead to a debate over interpretation of modern legislative action as a bill of attainder

Wrap-Up (~5-10 min. or ~30-35 min. w/ the E&R activity)

- Students will then use their knowledge to evaluate a fictional legislative scenario (in handout) and determine whether or not the act of legislation is considered a bill of attainder

Optional Extend & Refine Activity (~30-35 min.):

- Have students create their own legislative scenario which serves as an example of a modern bill of attainder
- Students should also create two analysis questions, then "trade" scenarios with a member of the class (if time allows)

Assessments (all or some of the following)

- Bi-modal vocabulary card (bi-modal organizer)
- Homework - outline of summary in handout
- Synthesis of Madison quote from *Federalist no. 44*
- Analysis questions from prof. Cohen's article
- Analysis of fictional scenario
- Participation in discussion about the fictional scenario & prof. Cohen's article
- Optional student created scenarios w/ analysis questions

Additional Resources

- ACORN v. United States (2009) – amicus curiae
 - See also: Denial of a writ of certiorari for Acorn v. U.S. case
- <http://www.heritage.org/constitution#!/articles/1/essays/62/bill-of-attainder>
- <http://www.constitution.org/col/psrboa.htm>
- https://www.law.cornell.edu/anncon/html/art1frag89_user.html
- <http://www.history.org/foundation/journal/spring02/attainder.cfm>

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-James Madison, *Federalist no. 44*

Summary & Context for Prohibiting "Bills of Attainder:"

Bills of attainder are defined as legislative acts or laws,

directed against a designated person [or group], pronouncing him guilty of an alleged crime without trial or conviction according to the recognized rules of procedure, and passing a sentence of death and attainder upon him...if an act inflicts a milder degree of punishment than death it is called a "bill of pains and penalties," but both are included in the prohibition in the Federal Constitution.¹

In other words, bills of attainder are acts of legislative overreach or tyranny at the state or federal level. In legal terms, individuals and groups are not considered "guilty" or subject to punishment for a suspected crime, unless a jury finds them guilty in a trial. The legislative branch does not have the legal right to punish citizens. Historically, framers of the Constitution were mindful of acts of British Parliament that targeted influential nobles and sentenced them to death or infringed upon their property rights. Thus, the framers guarded against legislative abuses by legally prohibiting bills of attainder in the United States. The Constitution specifically prevents the legislative branch acting as a "judge" and protects citizens in the following places: article 1, section 9, clause 3; article 1, section 10, clause 1; article 3, section 2; the sixth and seventh amendments.

The Constitutional ban on bills of attainder is not typically examined in conjunction with the "separation of powers" principle or the protection of individual rights. Prohibiting bills of attainder is often considered an "outdated" or "obscure" Constitutional protection against legislative abuse, but this is a dangerous point of view. Historically there were at least five separate occasions where bills of attainder threatened the rights and liberties of American citizens. More recently, legal Professor David Cohen at Drexel University argued that the defunding of Planned Parenthood clearly represents a modern example of "legislative punishment," or a bill of attainder.²

Furthermore, bills of attainder have to meet three criteria: "the law has 'to determine guilt and inflict punishment,' it must 'act upon an identifiable individual,' and it must do so 'without the provision of protections of a judicial trial.'"³ The three criteria listed here served as a foundation for professor Cohen's argument on the bill of attainder aimed at Planned Parenthood in 2015. Like professor Cohen, Americans must have a firm grasp of their rights listed in the Constitution, so they can act as guardians of their rights for themselves and hold Congress accountable. James Madison warned, "that one legislative interference is but the first link of a long chain of repetitions..."⁴ Defending our Constitutional rights is the duty of all Americans.

¹ The Law Dictionary, "What is a Bill of Attainder?," TheLawDictionary.org, <http://thelawdictionary.org/bill-of->

² David S. Cohen, "Congress Violates Constitution with Planned Parenthood Vote," Philly.com, http://www.philly.com/philly/opinion/20150928_Congress_violates_Constitution_with_Planned_Parenthood_vote.html

³ Cohen, "Congress Violates Constitution."

⁴ James Madison. "Federalist No. 44," in *The Federalist: The Gideon Edition*, ed. George W. Cary and James McClellan (Indianapolis, IN: Liberty Fund, Inc., 2001), 232

How do the Articles in the U.S. Constitution Protect Against Bills of Attainder?

Article 1, Section 9, Clause 3:

No Bill of Attainder or ex post facto Law shall be passed.

Article 1, Section 10, Clause 1 (excerpt):

No State shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article 3, Section 2, Clause 1 (excerpt):

The judicial power shall extend to all cases, in law and equity, arising under this Constitution...

Article 3, Section 2, Clause 3:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

How do Amendments in the Bill of Rights Protect Against Bills of Attainder?

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 7:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Additional Background on Bills of Attainder:

“Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, 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...the sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding.”⁵ --James Madison, *Federalist 44*

Close Reading and Critical Thinking Questions for Prof. Cohen’s Article, “Congress Violates Constitution with Planned Parenthood Vote”

1. How did professor Cohen define “bills of attainder?”
2. Are bills of attainder only outlawed at the federal level?
3. What are the three legal criteria for identifying bills of attainder?
4. According to professor Cohen, what “punishments” did Congress inflict on Planned Parenthood?
5. According to professor Cohen, how did Congress create a “bill of attainder” targeting Planned Parenthood?
6. Do you agree with professor Cohen’s argument? Explain citing evidence for your claims.

⁵ Madison, “Federalist No. 44,” 232.

Evaluate this Fictional Scenario:

In 1920, professors at a prestigious public university in New York were denied their right to a state-funded pension because of suspected ties to socialist organizations. Members of the New York state legislature investigated a small group of professors and found potential ties to radical socialist groups. Specifically, a small Congressional committee examined course syllabi and the personal relationships of multiple professors, which convinced legislators of direct ties to socialist groups and the teaching of Marxist ideology in classes. Members of the state legislature feared that these particular professors were teaching material antithetical to American values. In response to the committee's findings, the Congress of New York revoked state-funded pensions for all professors employed at that particular university. The professors of the New York University pursued legal action to regain their state-funded pensions because they were never convicted of a crime.

Ultimate question(s) – Does the legislation have punitive intent? In your opinion, is it unreasonably general or unfairly targeting a particular group/individual? Use the three legal criteria for bills of attainder to guide your analysis.

Create your own scenario!

- Use the scenario above to create your own example of a possible bill of attainder and attach at least two questions for analysis questions at the end. Be prepared to share!

Bibliography

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Name: _____ Period: _____ Week: _____

Word / Part of speech

Drawing or Symbol for the Word

Definition

Sentence _____

Word / Part of speech

Drawing or Symbol for the Word

Definition

Sentence _____

Congress violates Constitution with Planned Parenthood vote



Posted: Monday, September 28, 2015, 1:08 AM

By David S. Cohen

The first day of teaching constitutional law, I inevitably find myself asking the question: "Does anyone know what a bill of attainder is?"

Despite having been assigned the entire Constitution to read and having online dictionaries readily at their fingertips, my students rarely know the answer.

In the wake of the recent House vote to defund Planned Parenthood, and with several state legislatures considering the same, it has become quite clear that state and federal legislators don't know the answer to the question either.

A bill of attainder is a law that inflicts punishment upon a particular individual without a judicial trial. In other words, a bill of attainder is, as the Supreme Court has termed it, a "trial by legislature" rather than by court.

The Constitution prohibits both Congress and state legislatures from enacting bills of attainder for two important reasons that go to the heart of our democracy. One, laws that target individuals threaten civil liberties because legislatures do not afford individuals the protections of a trial. Two, bills of attainder conflict with basic notions of separation of powers. Generally speaking, the judiciary is responsible for trying, convicting, and punishing individuals; legislatures are responsible for more broad-based policy.

Though no one is talking about it, this most recent dust-up over federal funding for Planned Parenthood is very clearly an example of an unconstitutional bill of attainder: Congress is singling out Planned Parenthood and punishing the organization for allegedly improper and illegal actions.

More specifically, a bill of attainder has to meet three legal requirements: The law has to "determine guilt and inflict punishment," it must act "upon an identifiable individual," and it must do so "without provision of the protections of a judicial trial." All these requirements are met here.

First, removing Planned Parenthood's federal funding, over half a billion dollars that help it provide cancer screenings, gynecological care, contraceptive counseling, and more, is a clear instance of punishment. The Republican-controlled House voted to remove the funding based on deceptive videos from the Center for Medical Progress that purport to show that Planned Parenthood sells aborted fetal body parts and alters abortion procedures to facilitate those sales.

Putting aside the fact that the videos show nothing of the sort, if it were somehow true that Planned Parenthood engaged in these actions, the organization would have violated federal laws and regulations. The proper way to respond to these alleged illegal actions, then, would be to hold a hearing at which Planned Parenthood could present its case. That's what our Constitution requires.

Instead, Congress has already tried and convicted Planned Parenthood for these alleged crimes. And as a result, Congress is punishing Planned Parenthood by taking away funding. After all, that's how you punish a corporation: You hit it in the pocketbook.

Providing even more proof that this is punishment, Congress is removing funding from the part of Planned Parenthood that has nothing to do with the allegations. Federal law already prohibits federal money from going toward abortion care, so Planned Parenthood receives no federal money for its abortion services. Thus, Congress is,

based on allegations of improprieties in Planned Parenthood's abortion care, removing funding from the organization's other medical services. Attacking this other unrelated part of the organization is punitive, plain and simple.

The other requirements of a bill of attainder are more easily explained. The law targets an individual, as it defunds Planned Parenthood alone. Though the Supreme Court has not explicitly ruled on the matter, lower courts have found that corporations are protected by the guarantee against bills of attainder. And with the Supreme Court happy to find that corporations are protected by the First Amendment in the infamous *Citizens United* case, it is hard to imagine it finding otherwise with bills of attainder.

Finally, this punishment inflicted upon Planned Parenthood has most certainly occurred without any judicial trial. No court or administrative agency has found that Planned Parenthood has violated the law and punished it accordingly. In fact, at least five states have investigated Planned Parenthood's involvement in fetal-tissue donation programs and have cleared it of any wrongdoing.

The framers knew the dangers that bills of attainder pose to individual liberty and separation of powers and wrote the protection against them into the first article of the Constitution. Unfortunately, it appears that members of Congress, like my students on day one of their constitutional law course, do not know about this basic constitutional protection.

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