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Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause

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Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause

Andrew J. Gottman*

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Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.¹

I. Introduction

On June 2, 1997, a jury convicted Timothy J. McVeigh of eleven felony counts for the April 19, 1995 destruction of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.² The same jury sentenced McVeigh to death two weeks later.³ Shortly after the verdict, veterans' organizations

1. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

2. See Tom Kenworthy, *McVeigh Appeal Alleges Errors in Bomb Case*, WASH. POST, Jan. 17, 1998, at A1, available in 1998 WL 2462441 (noting conviction).

3. See *id.* (noting sentence). The Tenth Circuit upheld McVeigh's conviction. *United States v. McVeigh*, 153 F.3d 1166, 1222 (10th Cir. 1998).

and relatives of bombing victims voiced concern that McVeigh, a veteran of the Persian Gulf War, remained eligible for burial in a national cemetery.⁴ Congress acted quickly to relieve these concerns. Within a week, Senator Arlen Specter introduced legislation that would prevent anyone convicted of a federal capital crime from receiving veterans' benefits under Title 38 of the United States Code.⁵ According to Senator Specter, his bill was "occasioned by the conviction of Timothy McVeigh."⁶ The Senate quickly passed the legislation,⁷ and a few months later, an amended version, denying burial in a national cemetery to those convicted of a federal or state capital crime, passed both houses of Congress.⁸ President Bill Clinton signed the bill into law on November 20, 1997 as the Veterans' Benefits Denial Act of 1997 (Denial Act).⁹

4. See Peter G. Chronis, *Military Burial Ban OK'd – Senate Unanimous, Swift in McVeigh Case*, DENV. POST, June 19, 1997, at A1, available in 1997 WL 6076989 (noting both McVeigh's military status and angry response by both relatives of victims of bombing and veterans' organizations over possibility that McVeigh would be buried in national cemetery); see also 38 U.S.C. § 2402 (1997) (granting eligibility for burial in national cemeteries).

5. See S. 923, 105th Cong. (1997), reprinted in 143 CONG. REC. S5924 (daily ed. June 18, 1997) (revoking veterans' benefits from persons convicted of federal capital crimes). Senate Bill 923, as the Senate originally passed it, provided in relevant part: "Notwithstanding any other provision of law, a person who is convicted of a Federal capital offense is ineligible for benefits provided to veterans of the Armed Forces of the United States pursuant to title 38, United States Code." *Id.*

6. 143 CONG. REC. S5922 (daily ed. June 18, 1997) (statement of Sen. Specter).

7. See *id.* at S5924 (recording vote and noting passage of bill).

8. See Peter G. Chronis, *Bill Bans Felon Burial in National Cemeteries*, DENV. POST, Nov. 1, 1997, at A1, available in 1997 WL 13882052 (noting passage of House of Representatives's version of Senate Bill 923).

9. See Act of Nov. 21, 1997, Pub. L. No. 105-116, 111 Stat. 2381 (codified in part at 38 U.S.C. § 2411 (1997)) [hereinafter Denial Act]. Section 1 of the Denial Act provides in relevant part:

(a) PROHIBITION AGAINST INTERMENT OR MEMORIALIZATION IN CERTAIN FEDERAL CEMETERIES. – Chapter 24 of title 38, United States Code is amended by adding at the end the following new section:

Section 2411. Prohibition against interment or memorialization in the National Cemetery System or Arlington National Cemetery of persons committing Federal or State capital crimes

(a)(1) In the case of a person described in subsection (b), the appropriate Federal official may not –

(A) inter the remains of such person in a cemetery in the National Cemetery System or in Arlington National Cemetery; or

(B) [covers memorial services] . . .

(2) [details reporting of crimes by Attorney General or state officials] . . .

(b) A person referred to in subsection (a) is any of the following:

(1) A person who has been convicted of a Federal capital crime for which the person was sentenced to death or life imprisonment.

The Denial Act affects all applications for burial after its passage.¹⁰ Thus, although McVeigh was eligible for burial in a national cemetery when he committed his crimes, the Denial Act forfeits his rights to burial based upon the commission of those crimes. The retroactive application of a sanction creates a potential violation of the federal Ex Post Facto Clause of the United States Constitution.¹¹

The Constitution's federal and state Ex Post Facto Clauses bar legislation that imposes retroactive criminal punishment.¹² The framers of the Constitution included the Ex Post Facto Clauses in order to prevent legislatures from enacting arbitrary or vindictive retrospective legislation and to provide citizens with fair warning of prohibited conduct.¹³ One clause bars such legislation by the federal government,¹⁴ and the other prevents such legislation by the states.¹⁵ The Supreme Court has interpreted these clauses to apply only to legislation that imposes criminal punishment.¹⁶ Therefore, the clauses do not apply to civil sanctions unless the sanctions are so punitive that courts consider them criminal punishment.¹⁷

(2) A person who has been convicted of a State capital crime for which the person was sentenced to death or life imprisonment without parole.

(3) [details administrative proceedings that could be brought if suspect is not tried because of death or flight] . . .

...

(d) [definitions] . . .

...

(c) EFFECTIVE DATE. — Section 2411 of title 38, United States Code, as added by subsection (a), shall apply with respect to applications for interment or memorialization made on or after the date of the enactment of this Act. . . .

Id.

10. See Denial Act, 111 Stat. 2381, 2382 (1997) (noting in section 1(c) that act applies to applications for burial made after date of enactment of statute).

11. See U.S. CONST. art. I, § 9, cl. 3 (instructing that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress); see also U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o state shall . . . pass any Bill of Attainder [or] ex post facto Law").

12. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (limiting clauses to criminal legislation).

13. See Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 327 (1992-93) (stating that purpose of clauses is to protect against unjust laws).

14. See U.S. CONST. art. I, § 9, cl. 3 (instructing that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress).

15. See U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o state shall . . . pass any Bill of Attainder [or] ex post facto Law").

16. See *Calder*, 3 U.S. (3 Dall.) at 390 (noting that Ex Post Facto Clauses reach only laws that inflict punishment).

17. See *Flemming v. Nestor*, 363 U.S. 603, 615 (1960) (describing limited reach of Ex Post Facto Clauses to civil sanctions).

When determining whether a retrospective civil sanction is so punitive in either purpose or effect to violate the Ex Post Facto Clauses, the Supreme Court has identified both subjective and objective factors that courts must consider.¹⁸ However, courts give congressional statutes a strong presumption of constitutionality.¹⁹ This presumption makes it very difficult to establish the criminal nature of a nominally civil sanction.²⁰ In addition, the Supreme Court has established standards for determining whether a sanction is criminal that courts and legislators can easily manipulate, increasing the difficulty of establishing the punitive nature of a civil statute.²¹ This Note investigates these standards while applying them to a hypothetical challenge to the Denial Act by McVeigh.

McVeigh could allege that the Denial Act is an unconstitutional ex post facto law as applied to him. This challenge would require him to prove that the statute inflicted criminal punishment.²² Members of Congress acknowledged that the statute's purposes included denying McVeigh burial rights.²³ However, Congress also presented the remedial purpose of protecting the sanctity of the National Cemetery System.²⁴ A court would likely focus on this remedial purpose.²⁵ That focus, combined with other factors, would almost certainly convince a court that the Denial Act's sanction is remedial rather than punitive.²⁶ This Note focuses on the reasoning that a court would

18. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-84 (1963) (examining both objective factors and legislative history when deciding whether statute in question was punitive).

19. See *Flemming*, 363 U.S. at 620 (noting presumption of constitutionality).

20. See Aiken, *supra* note 13, at 333 (noting difficulty of proving unconstitutionality of civil sanctions).

21. See Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 325-26 (1996) (demonstrating ease with which Congress can rephrase criminal laws as civil laws); *infra* notes 121-22 and accompanying text (noting ease with which court can find criminal law to be civil).

22. See *Flemming*, 363 U.S. at 615 (noting successful ex post facto challenge to civil legislation requires proof of criminal nature).

23. See 143 CONG. REC. S5810 (daily ed. June 17, 1997) (statement of Sen. Specter) (noting that legislation would prevent McVeigh from receiving any benefits).

24. See S. 923 and H.R. 2040, *To Deny Burial in a Federally Funded Cemetery and Other Benefits to Veterans Convicted of Certain Capital Crimes: Hearing Before the Comm. on Veterans' Affairs, House of Representatives*, 105th Cong. 17 (1997) [hereinafter *Hearings*] (statement of Rep. Evans) (emphasizing Congress's desire to preserve sanctity of national cemeteries); see also *infra* notes 405-13 and accompanying text (discussing ease with which legislators can manufacture legislative intent).

25. See *infra* notes 121-22 and accompanying text (noting Court's acceptance of most offered legislative purposes).

26. See *infra* notes 363-72 and accompanying text (discussing potential outcome if court were to consider challenge to statute).

use to reach that conclusion and analyzes whether the reasoning continues to be the best way to evaluate civil sanctions when searching for violations of the Ex Post Facto Clauses.

This Note analyzes the ex post facto issues that the potential application of the Denial Act to McVeigh raises. Part II.A reviews the Supreme Court's ex post facto jurisprudence.²⁷ Although the clauses apply to all criminal sanctions, the only civil sanctions to which the Ex Post Facto Clauses apply are those that courts characterize as criminally punitive. Part II.B discusses the factors that the Supreme Court uses to determine whether the clauses should apply to a specific civil sanction.²⁸ Part II.C examines a misunderstanding that has developed among the federal appellate courts in applying the Supreme Court's standards to civil sanctions.²⁹ Part II concludes that the Supreme Court should clarify and consistently use triggering language for the clauses in order to resolve the misunderstanding and to promote consistent application of the Ex Post Facto Clauses.³⁰

Part III opens with a discussion of McVeigh's crime and Congress's response, the Denial Act.³¹ Part III.B applies the civil punishment standards to the Denial Act.³² This Part suggests that, under current standards, the issue might be a close one but that a court would almost certainly rule that the Denial Act imposes civil sanctions.³³ Thus, under current jurisprudence, the federal Ex Post Facto Clause does not bar the application of the Denial Act to McVeigh.³⁴ Finally, in Part IV, this Note analyzes the tests that the Court uses when determining whether a civil sanction is punitive and details the ease with which legislatures and courts can manipulate these standards.³⁵ This Note

27. See *infra* notes 37-100 and accompanying text (presenting review of ex post facto cases from 1798 to present).

28. See *infra* notes 101-84 and accompanying text (reviewing Court's methods for finding civil sanctions punitive).

29. See *infra* notes 185-202 and accompanying text (describing confusion among lower courts on application of different triggers).

30. See *infra* notes 201-02 and accompanying text (suggesting that solution to confusion would be use of single triggering word).

31. See *infra* notes 203-32 and accompanying text (reviewing Oklahoma City bombing and details of Denial Act).

32. See *infra* notes 233-372 and accompanying text (applying civil punishment test to Denial Act).

33. See *infra* notes 363-72 and accompanying text (concluding that forfeiture of burial rights is civil).

34. See *infra* notes 363-72 and accompanying text (concluding that federal Ex Post Facto Clause would not prevent application of statute to McVeigh).

35. See *infra* notes 373-425 and accompanying text (exploring manipulation of standards).

concludes by suggesting a standard for punishment that emphasizes objective, modern characteristics and eliminates easily manipulated standards.³⁶

II. *The Ex Post Facto Clauses and Civil Sanctions Jurisprudence*

A. *The Ex Post Facto Clauses*

The framers of the Constitution considered the power to create ex post facto laws to be one of the badges of a tyrannical government.³⁷ In a society that permits ex post facto, or retrospective, laws, citizens are unable to know the consequences of their actions and are subject to the possibility that the legislature will act vindictively.³⁸ The Supreme Court has stated that the purpose of the Ex Post Facto Clauses was "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. . . . The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation."³⁹ However, the Court has limited the protection of the clauses to criminal legislation,⁴⁰ placing civil legislation outside of the scope of the clauses.⁴¹ This subpart first explores the protection that the Ex Post Facto Clauses provide.⁴² It then traces the Supreme Court's development of the Ex Post Facto Clauses with an emphasis on how the Court has applied the clauses to nominally "civil" sanctions.⁴³

1. *The Scope of the Clauses*

The Ex Post Facto Clauses bar statutes that retrospectively change the definition of crimes or supplement their punishment.⁴⁴ The Supreme Court

36. See *infra* notes 426-49 and accompanying text (describing new objective standard).

37. See Aiken, *supra* note 13, at 324-25 (noting that "protection against ex post facto laws was of the highest importance to the drafters of the Constitution").

38. See *id.* at 324 ("Such laws place the citizens at the mercy of the government, unable to know the consequences of their acts and constantly subject to the possibility of legislative vindictiveness.").

39. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

40. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (limiting clauses to criminal or penal legislation).

41. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (noting that clauses only apply to penal statutes). *But cf.* Aiken, *supra* note 13, at 325-26 (noting that retrospective civil legislation can also violate policies that framers wanted to avoid).

42. See *infra* notes 44-48 and accompanying text (explaining protections of clauses).

43. See *infra* notes 49-100 and accompanying text (outlining Supreme Court's ex post facto jurisprudence).

44. See *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (noting that clauses bar laws that retroactively alter definition of crimes or increase punishment for criminal acts).

has defined an *ex post facto* law as a statute that criminalizes an act that was innocent when committed, that increases the punishment for a crime after its commission, or that deprives one charged with a crime of a defense.⁴⁵ Since the ratification of the Constitution, the Supreme Court has limited the application of the *Ex Post Facto* Clauses to statutes that inflict criminal punishment.⁴⁶ The Court has periodically broadened the scope of what is criminally punitive to include civil sanctions that have the same effect as criminal statutes.⁴⁷ More recently, however, the Court has been less willing to define a civil sanction as criminal punishment and generally has declined to apply the *Ex Post Facto* Clauses to civil sanctions.⁴⁸

2. *Calder v. Bull and the Limitation of Supreme Court Ex Post Facto Analysis*

In *Calder v. Bull*,⁴⁹ the Supreme Court considered for the first time a challenge to legislation based on the *Ex Post Facto* Clauses.⁵⁰ Using English

45. See *id.* at 42 (defining *ex post facto* laws).

46. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (limiting definition of *ex post facto* to those statutes that punish criminally); see also *Collins*, 497 U.S. at 42 (asserting that definition used "is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause"); *Bezell v. Ohio*, 269 U.S. 167, 169-70 (1925) (accepting *Calder* as exclusive definition of *Ex Post Facto* Clauses). But see *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (disparaging distinction between civil and criminal sanctions made in *Calder*).

47. See *Burgess v. Salmon*, 97 U.S. 381, 385 (1878) ("[T]he *ex post facto* effect of a law cannot be evaded by giving civil form to that which is essentially criminal."); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 332 (1866) (finding civil disbarment amendment punitive and covered by *ex post facto* prohibition).

48. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 593-96 (1952) (finding that act ordering deportation of all past members of Communist Party was regulatory, not punitive, in purpose and thus not subject to *ex post facto* analysis); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (finding that deportation of aliens for previous crimes was not punitive).

49. 3 U.S. (3 Dall.) 386 (1798).

50. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394-95 (1798) (holding that *Ex Post Facto* Clauses did not apply to legislation that was not punitive). In *Calder*, the Supreme Court considered the constitutionality of a Connecticut statute that required a court of probate to grant a new hearing on a will. *Id.* at 386-87. At the new hearing, the probate court denied *Calder* rights to the estate the first probate hearing granted. *Id.* at 386. *Calder* contended that the statute ordering a new hearing was an unconstitutional *ex post facto* law. *Id.* at 387. Each Justice of the Court wrote an opinion upholding the actions of the Connecticut legislature. Today's Court considers Justice Chase's opinion to be the holding in *Calder*. Aiken, *supra* note 13, at 334. Justice Chase began his opinion by noting the limits that the Constitution places upon both the federal and state governments. *Calder*, 3 U.S. (3 Dall.) at 388-89. The Court then discussed the origins of the *ex post facto* provisions, including the framers' fear of punitive arbitrary, vindictive legislation. *Id.* at 389. The Court limited the definition of *ex post facto* laws to what it believed to be the framers' intent—those laws that make an act criminal after it was innocently done and those laws that increase a crime's punishment or change the legal rules

precedent, state constitutions, and the inferred intent of the framers,⁵¹ the Court adopted a "technical" definition of "ex post facto" and rejected the plain meaning of the phrase, which included all retrospective legislation.⁵² Thus, the Court distinguished between retrospective criminal legislation, which violates the Ex Post Facto Clauses, and retrospective remedial legislation, which does not.⁵³ The *Calder* Court declined to apply the clauses to legislation that it defined as "civil," although it left the development of a standard for distinguishing between civil and criminal legislation for another day.⁵⁴ *Calder* thus establishes that only criminally punitive laws violate the Ex Post Facto Clauses and that the Court's characterization of a statute as civil or criminal will be paramount in an ex post facto challenge.⁵⁵ Although some commentators believe that the ex post facto analysis in *Calder* is dicta,⁵⁶ the Supreme Court continues to distinguish between civil and criminal legislation in ex post facto analysis.⁵⁷

of evidence to the disadvantage of an accused, after the commission of the crime. *Id.* at 390. The Court did not believe that the framers included the clauses to secure private rights of either property or contracts. *Id.* Therefore, the Court used a technical definition of ex post facto, involving only criminal or punitive retrospective changes, to create a distinction between retrospective legislation, which is permissible, and ex post facto legislation, which is not. *Id.* at 391-92. Because the action by the Connecticut legislature in question was not punitive, the Court upheld it against the ex post facto challenge. *Id.* at 394-95; see Aiken, *supra* note 13, at 333 (noting that *Calder* was first ex post facto case to confront Court).

51. See *Calder*, 3 U.S. (3 Dall.) at 391-92 (discussing sources Justice Chase used to divine meaning of clauses).

52. See *id.* at 391 (rejecting plain meaning); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 317 (1921) (noting that Justice Chase chose technical definition for ex post facto).

53. See *Calder*, 3 U.S. (3 Dall.) at 390-92 (making distinction for purposes of application of clauses).

54. See *id.* at 392 (declining to apply Ex Post Facto Clauses to civil legislation).

55. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2090 (1997) (Breyer, J., dissenting) (noting that *Calder* limits application of clauses to punitive statutes, thus requiring determination of whether sanction in question is punitive).

56. See *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 687 (1829) (Johnson, J., appending) ("[T]he case of *Calder v. Bull* cannot claim the pre-eminence of an adjudged case upon this point, and if adjudged was certainly not sustained by reason or authorities."); Ricciardi & Sinclair, *supra* note 21, at 313-20 (discussing other grounds upon which Court could have decided *Calder*, including absence of change of *Calder*'s vested rights, separation of powers, and opinions of other Justices in pre-majority opinion era). Ricciardi and Sinclair also state that "*Calder v. Bull* then, is a very weak reed upon which to found a tradition of constitutional interpretation. Arguably, all its argument about the ex post facto provision is dictum." *Id.* at 321.

57. See *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504-05 (1995) (showing *Calder*'s continued effect on ex post facto jurisprudence of Court); *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (same); *Miller v. Florida*, 482 U.S. 423, 429 (1987) (same).

The Supreme Court revisited *Calder's* reasoning twelve years later in *Fletcher v. Peck*.⁵⁸ Using both the Contracts Clause⁵⁹ and the state Ex Post Facto Clause, the Court invalidated a statute that revoked a fraudulent land grant.⁶⁰ Chief Justice John Marshall's majority opinion did not cite *Calder*, nor did the Court mention directly the distinction that *Calder* draws between criminal and civil legislation.⁶¹ The *Fletcher* Court illuminated a potentially contradictory position that *Calder* creates by limiting the Ex Post Facto Clauses to criminal legislation.⁶² Under this position, the Constitution prevents the government from taking property for prior acts if it intended to punish the possessor of the property for those acts.⁶³ However, Congress could reach the same result merely by dressing the statute in remedial terms.⁶⁴ The distinction made in *Calder* required this differentiation based on congressional intent, but the *Fletcher* Court determined that the distinction subverted the plain meaning of "ex post facto" and contradicted the policies behind the clauses.⁶⁵

To avoid these potential problems, the *Fletcher* Court expanded the scope of the Ex Post Facto Clauses to include retrospective civil legislation that revoked vested rights.⁶⁶ This expansion implicitly rejected the *Calder* standard.⁶⁷ For a variety of reasons, however, subsequent courts have nar-

58. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (applying state Ex Post Facto Clause to civil disability). In *Fletcher*, the Supreme Court evaluated a Georgia statute that rescinded a land grant the legislature had fraudulently given years before. *Id.* at 131. The Court first invalidated the act on the basis of the "impairment of contracts" Clause. *Id.* at 136-38. The Court also characterized the rescinding statute as an ex post facto law. *Id.* at 138-39. The Court negated the semantic difference between criminal and civil sanctions. *Id.* at 138. It found that it would be "violence . . . done to the natural meanings of [the] words" ex post facto and to the policies behind the clauses to limit the clauses to punitive retrospective statutes. *Id.* The state legislature could not have passed the act if it were criminal in nature, so the Court found that the legislature could not pass the act as a civil statute. *Id.* at 139. The Court found the statute to be an ex post facto act and, thus, invalid on those grounds as well. *Id.*

59. See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

60. See *Fletcher*, 10 U.S. (6 Cranch) at 136-39 (finding act violative of both Contracts and Ex Post Facto Clauses of Constitution).

61. See *id.* at 138-39 (deciding ex post facto rationale on natural law).

62. See *id.* at 138 (noting contradiction within limiting clauses to criminal legislation).

63. *Id.*

64. See *id.* (arguing that state legislatures should not be allowed to seize property retrospectively with civil statute).

65. See *id.* (rejecting *Calder* interpretation of clauses).

66. See *id.* at 138-39 (applying clause to statute and invalidating it).

67. See Ricciardi & Sinclair, *supra* note 21, at 323 (stating that after *Fletcher*, "the scope of the ex post facto prohibition could not conclusively be assumed to be limited to criminal laws only. . . . Chief Justice Marshall had offered powerful reasons against" limiting it).

rowed *Fletcher's* effect on ex post facto jurisprudence.⁶⁸ Later ex post facto cases mention *Fletcher* only in passing, if at all.⁶⁹ The *Calder* interpretation of the Ex Post Facto Clauses returned to favor with the Supreme Court.⁷⁰

3. *Cummings v. Missouri: Broadening the Application of the Clauses*

In *Cummings v. Missouri*,⁷¹ the *Calder* distinction between civil and criminal legislation remained.⁷² The Supreme Court broadened the definition of criminally punitive legislation, however, and increased the potential reach of the Ex Post Facto Clauses.⁷³ In *Cummings*, the Court invalidated a post-Civil War Missouri constitutional amendment that rendered ineligible for certain jobs those who would not swear an oath that they had not been involved in armed rebellion against the United States.⁷⁴ The Court found that the postwar circumstances of the amendment and its purposes revealed the

68. See *id.* at 323-24 (noting that some may consider ex post facto argument in *Fletcher* dicta, that most courts focused on the Contracts Clause portion of opinion, and that by 1854, at latest, Supreme Court revived *Calder* doctrine).

69. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (citing *Fletcher* as case in which sanction imposed was criminal with civil disguise).

70. See *Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1854) (noting Ex Post Facto Clauses apply only to statutes that inflict punishment).

71. 71 U.S. (4 Wall.) 277 (1866).

72. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 329 (1866) (finding retrospective disbarment law, cast as civil, to be punitive and thus covered by Ex Post Facto Clause). In *Cummings*, the Court evaluated a post-Civil War Missouri constitutional amendment that required all persons to take a loyalty oath stating that they did not act in armed rebellion against the United States before becoming eligible to hold certain employment. *Id.* at 316-17. A preacher prosecuted for refusing to take the oath challenged its constitutionality, claiming that as applied to him, the statute violated the state Ex Post Facto Clause. *Id.* at 316-18. The Court agreed with the *Calder* Court that the Ex Post Facto Clauses only covers those enactments that punish retrospectively. *Id.* at 325-26. The Court, however, refused to limit the definition of "punishment" to the deprivation of life, liberty, or property and included in the definition the deprivation of any political or civil right. *Id.* at 322. The high tide of emotion against rebel sympathizers that arose in Missouri after the Civil War evidenced that the purpose of the constitutional amendment was to punish those who could not or would not take the oath. *Id.* The Court noted that there was no rational relationship between the oath and fitness of the excluded professions. *Id.* Finally, the Court noted that requiring a test oath presented the inference of punitive intent. *Id.* at 327. These factors led the Court to conclude that the oath was enacted to inflict punishment and its retrospective application violated the state Ex Post Facto Clause. *Id.* at 332. Later analysis convinced the Court that the oath violated the state Bill of Attainder Clause, U.S. CONST. art. I, § 10, cl. 1. *Cummings*, 71 U.S. (4 Wall.) at 327.

73. See *Ricciardi & Sinclair*, *supra* note 21, at 325 (noting potential expansion *Cummings* gave to ex post facto cases).

74. See *Cummings*, 71 U.S. (4 Wall.) at 320-32 (declaring statute punitive and unconstitutional).

legislative intent to punish Confederate sympathizers.⁷⁵ Most importantly, the lack of a rational relationship between the sanction and its intended goals permitted the inference of a punitive purpose.⁷⁶ After *Cummings*, the Court struck down a few more nominally civil sanctions on similar grounds.⁷⁷ *Cummings* and its progeny are evidence that the Supreme Court will invalidate nominally civil sanctions as violations of the Ex Post Facto Clauses.⁷⁸

4. A Return to Stricter Standards for Ex Post Facto Cases

In the twentieth century, the Supreme Court has been reluctant to find punitive intent in laws that impose retrospective civil sanctions.⁷⁹ *Harisiades v. Shaughnessy*⁸⁰ exemplifies the Court's hesitance to transform civil sanctions into criminal punishment.⁸¹ In *Harisiades*, the Court rejected an ex post facto

75. See *id.* at 328-32 (finding that timing of legislation and lack of rational relationship showed punitive nature of oath).

76. See *id.* at 320 (noting that severity of punishment combined with lack of rationale for prohibiting persons who committed certain acts from certain employment indicated punitive intent).

77. See *Burgess v. Salmon*, 97 U.S. 381, 384-85 (1878) (striking down retroactive tax increase as applied as punitive and violative of Ex Post Facto Clause); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 239 (1877) (nullifying change in answering lawsuit as disadvantageous and violative of Ex Post Facto Clause); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (invalidating statute requiring loyalty oath of attorney on same basis as oath in *Cummings*).

78. See *Burgess*, 97 U.S. at 385 (noting that criminal punishment cannot be cloaked in civil form).

79. See *Aiken*, *supra* note 13, at 325 (stating that "the dilution of the values underlying the Ex Post Facto Clause can be seen to have essentially cleared the path for such deference to the government" when determining whether statutes are criminal or civil). For an illustration of how lower courts have followed the Supreme Court's lead, see Gregory Y. Porter, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 546 (1997). "[M]ost lower courts failed to find, in the context of ex post facto challenges, that nominally civil sanctions were criminal." *Id.*

80. 342 U.S. 580 (1952).

81. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 593-96 (1952) (finding that deportation statute was not punitive and, thus, retroactive application did not violate federal Ex Post Facto Clause). In *Harisiades*, the Court evaluated a statute that ordered the deportation of alien members of the Communist Party, regardless of when the aliens were members. *Id.* at 581. Several aliens who quit the Communist Party prior to the bill's enactment challenged the law on a number of grounds, one of which was that the retroactive application of the bill to the aliens was violative of the federal Ex Post Facto Clause. *Id.* at 581-84. The Court sustained the bill on other grounds. *Id.* at 584-92. In evaluating the ex post facto argument, the Court first noted that it had been United States policy for 30 years to deport aliens who were members of violent organizations. *Id.* at 593. Thus, this case did not present an issue of fair warning, usually at issue in ex post facto claims. *Id.* Disregarding the question of retrospectivity for the sake of argument, the Court turned to the question of whether the deportation in question was a civil, rather than a criminal, procedure. *Id.* at 594. The Court found that precedent led to the

challenge to a statute that ordered the deportation of all past and present alien members of the Communist Party.⁸² When determining whether the statute in question was civil or criminal and, thus, whether the federal Ex Post Facto Clause applied, the Court determined that deportation was always a civil sanction.⁸³ The Court did not evaluate the circumstances and purposes of the deportations to determine if they were criminal penalties for which civil form was a disguise,⁸⁴ as the Court had in *Cummings*.⁸⁵ Had the Supreme Court examined the motives of Congress in enacting the legislation, it may have found animus toward the Communist Party sufficiently punitive to subject the statute to the prohibition against ex post facto laws.⁸⁶ *Harisiades* is prototypical of modern ex post facto jurisprudence, as the Court gave the challenger an opportunity to show that the clauses should apply to a nominally civil sanction, but required a showing of compelling circumstances to label the sanction criminal.⁸⁷

Most recently, in *Kansas v. Hendricks*,⁸⁸ the Supreme Court indicated that the civil/criminal distinction outlined in *Calder* remains valid.⁸⁹ The Court

inescapable conclusion that deportation is always a civil rather than a criminal procedure. *Id.* The court did not examine this particular deportation in depth. *Id.* Because of their civil nature, deportations, including the one challenged, do not receive protection under the Ex Post Facto Clauses. *Id.* at 595.

82. See *id.* at 594-96 (finding that sanction was civil and not violative of federal Ex Post Facto Clause).

83. See *id.* at 594 (detailing past cases in which Court found deportation to be civil sanction).

84. See *id.* at 595 (stating simply that deportation is always civil sanction).

85. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866) (noting indications of punitive intent from amendment's history).

86. See Aiken, *supra* note 13, at 330-31 n.35 (stating that most statutes challenged under Ex Post Facto Clauses, including statute in *Harisiades*, were "product[s] of the inflamed passions of the legislature" against certain groups, including Communists in 1950s).

87. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (placing large burden of proof on ex post facto challenge).

88. 117 S. Ct. 2072 (1997).

89. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (finding civil commitment statute imposed civil sanction and therefore was constitutional). In *Hendricks*, the Court considered a challenge to a Kansas law permitting the civil commitment of sexually violent predators upon their release from prison. *Id.* at 2077. An inmate committed under the statute for crimes committed prior to its passage challenged the statute on a variety of constitutional grounds. *Id.* at 2078. First, the Court upheld the statute on substantive due process grounds. *Id.* at 2078-81. The Court then found that a combination of factors, detailed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), including a lack of a scienter requirement in the statute, a civil label, and no clear punitive legislative intent, rendered the sanction a civil sanction, rather than a criminal penalty. *Hendricks*, 117 S. Ct. at 2082-85. Because the statute does not impose punishment, the Court found that it does not fall under the provisions of the state Ex Post Facto Clause. *Id.* at 2086. The Court also found that the statute does not have a

upheld a statute that allowed the state to commit involuntarily violent sexual predators to mental institutions.⁹⁰ The Court in *Hendricks* recognized that an ex post facto challenge to a civil sanction required determining whether the sanction was criminally punitive.⁹¹ Although the statute in *Hendricks* required the confinement of the claimant, the Court found that the statute in question did not impose criminal punishment⁹² and therefore did not raise ex post facto concerns.⁹³ The Court in *Hendricks* accepted the distinction *Calder* draws and the burden on a challenge to a civil sanction that *Harisiades* exemplifies.⁹⁴

5. Current Ex Post Facto Jurisprudence: Calder Still Reigns

Although the Court's ex post facto reasoning in *Calder* may be dicta,⁹⁵ and *Fletcher* certainly casts doubts on the validity of *Calder*'s holding,⁹⁶ courts continue to follow *Calder*'s distinction between civil sanctions and criminal punishment.⁹⁷ The Supreme Court occasionally has seemed more likely to recognize civil sanctions as violative of the Ex Post Facto Clauses,⁹⁸

retrospective effect because it permits involuntary confinement based upon the future danger to the public; the act uses past criminal behavior only for evidentiary purposes. *Id.*

90. *See id.* (noting statute's civil nature and constitutionality).

91. *See id.* at 2081 (noting that clause applies only to criminal sanctions).

92. *See id.* at 2083 (noting that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment," and that other factors point toward civil nature of sanction (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987))).

93. *See Hendricks*, 117 S. Ct. at 2086 (noting that because act was not punitive, state Ex Post Facto Clause did not apply).

94. *See id.* (finding that statute must impose criminal punishment to raise ex post facto concerns and challenger must show it compellingly). *But see Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2154 (1998) (Thomas, J., concurring) (finding limitation of Ex Post Facto Clauses to civil penalties to be unsatisfactory).

95. *See supra* note 56 and accompanying text (discussing possibility that ex post facto ruling in *Calder* might be dicta).

96. *See supra* notes 58-70 and accompanying text (discussing *Fletcher* and its contradictions with *Calder*).

97. *See, e.g., Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (using *Calder* definition of ex post facto); *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504-05 (1995) (same); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (same); *Bae v. Shalala*, 44 F.3d 489, 492 (7th Cir. 1995) ("A civil sanction . . . will implicate *ex post facto* concerns only if it can fairly be characterized as punishment."); *Latham v. Brown*, 4 Vet. App. 265, 268 (Vet. App. 1993) (finding that in order for provision to be ex post facto law, it must impose punishment), *aff'd*, 11 F.3d 1070 (Fed. Cir. 1993) (unpublished table decision); *State v. Noble*, 829 P.2d 1217, 1221 (Ariz. 1992) (examining statute to determine if it was punitive or regulatory for ex post facto purposes).

98. *See Burgess v. Salmon*, 97 U.S. 381, 385 (1878) (finding retroactive tax statute violative of Ex Post Facto Clause); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 327 (1866)

but it generally is not receptive to such claims.⁹⁹ For the Court to declare a retrospective civil sanction to be an *ex post facto* law, the challenger must show compellingly that the sanction, although labeled civil, is in reality a criminal punishment.¹⁰⁰ The next subpart details how the Court has determined whether a nominally civil sanction was criminal punishment.

B. Civil Disabilities as Punishment Barred by the Ex Post Facto Clauses

Many civil laws apply punishment because Congress intended to punish those affected and to deter others from following the same course of conduct.¹⁰¹ The Supreme Court has recognized that sometimes legislation that is nominally civil in fact imposes criminal punishment.¹⁰² However, this is not easy to prove.¹⁰³ A showing of criminal punishment requires more than a burden on citizens, however heavy the burden.¹⁰⁴ The Court has developed a set of factors that it uses in distinguishing between civil sanctions and criminal punishment.¹⁰⁵ This subpart details the test that the Court has developed and will examine the factors it has used to determine whether a nominally civil sanction is criminal punishment.

(finding that amendment requiring oath for employment in certain professions violative of *Ex Post Facto* Clause); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-39 (1810) (finding law abrogating contract violative of *Ex Post Facto* Clause).

99. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2085 (1997) (deciding that law requiring civil commitment of predatory sex offenders was not punitive); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952) (finding that law ordering deportation of alien Communist Party member was not punitive).

100. See *Burgess*, 97 U.S. at 385 ("[T]he *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."); *Ricciardi & Sinclair*, *supra* note 21, at 326 (noting that "[s]howing a civil law to be criminal in function and thus subject to the *ex post facto* prohibition was one strategy" for invalidating laws as *ex post facto*); cf. Lori N. Sabin, Note, *Doe v. Poritz: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331, 343 (1996) (noting that courts must classify offender notification laws as punishment before they are subject to *ex post facto* concerns).

101. See *Aiken*, *supra* note 13, at 336 ("The criminal domain is not the only area of American law that involves the application of punishments. Many laws that take civil form in fact serve the purpose and have the effect of punishing the offender.").

102. See *Austin v. United States*, 509 U.S. 602, 622 (1993) (finding in rem civil forfeiture proceedings to be punitive); *Shwab v. Doyle*, 258 U.S. 529, 534 (1922) (finding transfer tax to be punitive when applied to transactions completed before Congress enacted tax).

103. See *Aiken*, *supra* note 13, at 333 (noting difficulty in showing criminal punishment).

104. See *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984) (noting that because "burdens are placed on citizens by federal authority does not make those burdens punishment"); see also *Harisiades*, 342 U.S. at 594 (finding that deportation, despite severe consequences, was civil rather than criminal punishment).

105. See *United States v. Ward*, 448 U.S. 242, 249 (1980) (applying objective and subjective tests to sanctions to determine their punitive nature).

1. *Applying the Test for Criminal Punishment Across Constitutional Boundaries*

By their express terms, many constitutional provisions provide protection exclusively in the criminal context.¹⁰⁶ Other provisions of the Constitution, including the Ex Post Facto Clauses, are not self-limiting but are also relevant only in the criminal context.¹⁰⁷ Although these provisions require criminal punishment to trigger their protections, courts do not allow civil statutes to avoid these constitutional protections without determining whether the statutes are criminal punishments in civil form.¹⁰⁸ When performing this analysis, courts similarly have defined the characteristics of punishment.¹⁰⁹ The Supreme Court and lower courts have applied tests from one constitutional provision concerning punishment to different provisions without hesitation.¹¹⁰

106. See U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall be compelled in any criminal case to be a witness against himself . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; 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 defence.").

107. See *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (noting that Double Jeopardy Clause is limited to successive criminal prosecutions); *Boyd v. United States*, 116 U.S. 616, 622 (1886) (limiting Fourth Amendment to cases involving criminal punishment); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (limiting Ex Post Facto Clauses to statutes that impose retrospective criminal punishment).

108. See *Hudson*, 118 S. Ct. at 493-96 (determining whether civil sanction challenged under Double Jeopardy Clause was in effect criminal punishment).

109. See Charles Fried, *Types*, 14 CONST. COMMENTARY 55, 71-72 (1997) (discussing procedures necessary for proving violation of Ex Post Facto Clause, Double Jeopardy Clause, and criminal procedural Due Process Clause and noting that all require showing that civil sanction constituted criminal punishment); see also Aiken, *supra* note 13, at 346-49 (discussing punitive nature required for finding that statute is bill of attainder).

110. See *Hudson*, 118 S. Ct. at 500 (Souter, J., concurring) (linking Double Jeopardy Clause and Fifth and Sixth Amendments together for purposes of determining when sanction is criminal punishment); *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082-85 (1997) (using ex post facto, double jeopardy, and Fifth and Sixth Amendment cases interchangeably in determining whether civil commitment is punishment for purposes of Ex Post Facto and Double Jeopardy Clauses); *Russell v. Gregoire*, 124 F.3d 1079, 1086 n.6 (9th Cir. 1997) (noting that test for double jeopardy and ex post facto violations is same), *cert. denied*, 118 S. Ct. 1191 (1998); *Bae v. Shalala*, 44 F.3d 489, 492-93 (7th Cir. 1995) (applying ex post facto and double jeopardy cases interchangeably in determining whether denial of social security was punishment). Through the years, the courts consistently have looked for legislative intent to punish criminally, either objectively or subjectively. See *Trop v. Dulles*, 356 U.S. 86, 95-96 (1958). For example, the Supreme Court has said that it

has been called upon to decide whether or not various statutes were penal ever since 1798. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal,

Exploring the Court's standards for criminal punishment, this subpart considers cases under a wide variety of constitutional provisions because the Court treats the search for criminal punishment the same, regardless of the constitutional provision involved.¹¹¹

2. The Standards

a. *Cummings and Flemming*

The Supreme Court has ruled that a statute cannot avoid an ex post facto violation by disguising a criminal punishment in civil form.¹¹² The Court has used a number of factors to determine whether a civil sanction is really criminal punishment. For example, in *Cummings*, a number of standards were dispositive in the Court's decision that requiring a loyalty oath for employment in certain positions was effectively criminal punishment.¹¹³ First, the Court believed that the oath did not relate to the supposed purpose of the amendment—ensuring that unfit persons do not fill certain professions.¹¹⁴ The unduly severe means indicated to the Court that the purpose of the oath was to punish.¹¹⁵ The Court also examined whether the drafters of the amendment intended to direct the sanction at a group of people rather than at a regulatory goal.¹¹⁶ That the oath sanctioned only Confederate sympathizers was an indication to the Court that the drafters of the amendment intended to punish.¹¹⁷ Finally, the Court noted the peculiar historical nature of test oaths.¹¹⁸

this court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

Id. (citation omitted) (footnotes omitted).

111. *But see* *W.P. v. Poritz*, 931 F. Supp. 1199, 1208-09 (D.N.J. 1996) (warning against synthesizing test for punishment from Supreme Court precedent), *rev'd on other grounds sub nom.* *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

112. *See* *Burgess v. Salmon*, 97 U.S. 381, 385 (1878) ("[T]he *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.").

113. *See supra* notes 71-78 and accompanying text (discussing *Cummings*).

114. *See* *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) ("The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged.").

115. *See id.* (stating that no showing of necessary means indicated that purpose was punitive).

116. *See id.* (finding that drafters aimed provisions at persons, rather than at conduct, and that provision was punitive).

117. *See id.* at 322 (noting that it would be strange if some of excitement of Civil War had not transferred to constitutional provision requiring oath created in midst of that struggle).

118. *See id.* at 325 (finding that legislatures have traditionally used test oaths as punishment).

Using these factors as indicators of a punitive sanction, the *Cummings* Court invalidated the constitutional amendment.¹¹⁹

Since the Supreme Court decided *Cummings* and its progeny,¹²⁰ it seldomly has investigated legislative intent intensely to determine if a civil sanction is criminal punishment.¹²¹ Rather, the Court has accepted an articulated regulatory purpose for the civil sanction as a strong presumption for the legitimacy of the retroactive application of a sanction.¹²² For example, in *Flemming v. Nestor*,¹²³ the Supreme Court found the government's statement of a regulatory purpose for a civil sanction sufficient to overcome other indications of criminal punishment.¹²⁴ The appellant sought to avoid the forfeiture of Social Security benefits because of actions he committed prior to the enactment of the forfeiture statute.¹²⁵ He attempted to use the legislative history of the act to prove punitive congressional intent and thus to invalidate retrospective application of the law to him.¹²⁶ Beginning its analysis, the Court noted the absence of any prima facie indicia of punitive intent such as those the Court found in *Cummings*.¹²⁷ The Court then required the

119. See *id.* at 332 (holding constitutional amendment to be ex post facto and therefore void).

120. See generally *Burgess v. Salmon*, 97 U.S. 381 (1878); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

121. See, e.g., *Hudson v. United States*, 118 S. Ct. 488, 495 (1997) (performing perfunctory evaluation of legislative history); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952) (accepting that all deportations are civil disabilities without focused analysis on deportations in question); *Hawker v. New York*, 170 U.S. 189, 197-200 (1898) (finding statute nonpunitive because reasonable regulatory purpose existed for law).

122. See *Aiken*, *supra* note 13, at 342 (noting that case law indicates that courts will accept most proffered regulatory purposes).

123. 363 U.S. 603 (1960).

124. See *Flemming v. Nestor*, 363 U.S. 603, 612-21 (1960) (deciding ex post facto claim in favor of government). In *Flemming*, the Court examined the constitutionality of a statute that revoked Social Security benefits from those deported on certain grounds. *Id.* at 604-05. An alien, deported for Communist Party membership, challenged the statute on due process and ex post facto grounds after the government revoked his benefits. *Id.* at 605. His membership in the Party, the reason for both his deportation and the revocation of his benefits, terminated years before Congress enacted the statute in question. *Id.* at 604-06. Dismissing the due process claims, the Court required the clearest proof that Congress intended the statute in question to be punitive to invalidate it on ex post facto grounds. *Id.* at 612-17. The Court rejected claims that the statute had similar attributes to the statute in *Cummings*. *Id.* It then determined from the statute's legislative history that there was no clear proof that it was criminal. *Id.* at 616-21. Thus, the legislation was beyond the scope of the Ex Post Facto Clauses. *Id.* at 621.

125. See *id.* at 605 (noting retrospective effect of act).

126. See *id.* at 617 (stating appellee sought to prove through legislative history that punitive purpose lay behind statute).

127. See *id.* at 616-17 (dismissing claims that disability lacks rational relationship with end and noting lack of "mood of country" element present in *Cummings*).

"clearest proof" of punitive intent from the statute's legislative history to establish the unconstitutionality of the statute's retrospective application.¹²⁸ It defined "clearest proof" as unmistakable evidence of congressional intent to create a criminal punishment.¹²⁹ Explaining why it required such a high level of proof, the Court noted the presumption of constitutionality that the courts afford to federal statutes and emphasized the hazards in using legislative history.¹³⁰ The Court expressed doubt that the inquiry would be of much use.¹³¹ The Court also required the appellant to show to a degree of certainty that punitive intent rather than a regulatory motive prompted Congress to pass the legislation.¹³² Applying these strict standards to the statute in *Flemming*, the Court upheld the retrospective application of the statute, finding insufficient evidence of punitive intent to overturn it as an ex post facto law.¹³³ The strict standards applied in *Flemming* greatly reduced a litigant's ability to show an ex post facto violation in a civil sanction.¹³⁴

b. Moderated Standards: The Mendoza-Martinez Factors

The Court moderated its refusal to examine closely both legislative history and objective standards in *Flemming* with its analysis in *Kennedy v. Mendoza-Martinez*.¹³⁵ When evaluating a claim that the revocation of citizen-

128. See *id.* at 617 (imposing high standard to invalidate statute with legislative history).

129. See *id.* at 619 (defining standard for punitive intent).

130. See *id.* at 617 (noting that presumption of constitutionality "forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it").

131. See *id.* ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go beyond objective manifestations it becomes a dubious affair indeed.").

132. See *id.* at 620 (requiring, along with clearest proof of punitive intent, that punitive intent clearly outweigh any regulatory intent).

133. See *id.* at 619-20 (examining legislative history of act in question and finding it remedial in purpose).

134. See Aiken, *supra* note 13, at 345 (noting negative effect of *Flemming* standards upon opportunities for successful ex post facto challenges).

135. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (finding statute revoking citizenship primarily punitive and, thus, subject to Fifth and Sixth Amendments). In *Mendoza-Martinez*, the Supreme Court heard a challenge to a statute that revoked the citizenship of draft evaders who fled the country. *Id.* at 146. Two persons who evaded the draft by leaving the country challenged the statute on due process grounds because an administrative body rather than a court revoked their citizenship. *Id.* at 152. In order to determine if the Congressionally established procedure was a denial of due process, the Court had to determine whether the statute imposed punishment. *Id.* at 164. The Court evaluated the sanction using "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character." *Id.* at 168. These tests evaluated the punitive effect of the sanction. *Id.* at 169. The Court concluded that the tests indicated that the sanction was punitive. *Id.* It relied, however, on an in-depth examination of the statute's legislative history, which strongly indicated that the statute was punitive in intent, to invalidate the statute. *Id.* at 184.

ship for draft evasion deserved the protection of the Fifth and Sixth Amendments, the Court had to determine whether the sanction was civil or criminal in nature.¹³⁶ The Court first considered the legislative history of the act.¹³⁷ It also looked at other factors, including:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned¹³⁸

The Court stated that these objective factors, in part, determine whether a statute is criminal punishment, although the factors may point in opposite directions.¹³⁹ In *Mendoza-Martinez*, the Court did not reach the objective factors.¹⁴⁰ Rather, the Court examined the legislative history of the statute in question and found that Congress clearly intended the sanction to be criminally punitive.¹⁴¹ Unlike the *Flemming* Court, the *Mendoza-Martinez* Court performed a detailed investigation of the act's legislative history.¹⁴² At least one commentator has asserted that this thorough, in-depth analysis modified the *Flemming* standards and made it easier for the Court to establish a civil sanction's criminally punitive nature.¹⁴³

However, others have interpreted *Mendoza-Martinez* less expansively. The Court specifically stated that it will apply the listed factors only if an investigation into legislative history has turned up evidence of punitive intent.¹⁴⁴ The Court also required conclusive evidence of congressional intent to punish or it would apply the factors it listed to the statute on its face.¹⁴⁵ In addition, *Mendoza-Martinez* maintains the clearest proof standard as a re-

136. See *id.* at 164 (noting that question for Court to determine was whether sanction was criminal punishment).

137. See *id.* at 169 (noting importance of legislative history in evaluating sanction as criminal punishment).

138. *Id.* at 168-69 (citations omitted).

139. See *id.* at 169 (explaining that use of factors may lead to differing conclusions).

140. See *id.* (resting decision on showing of Congress's punitive intent).

141. See *id.* at 169-70 (concluding that legislative history clearly showed primary purpose of statute was criminal punishment).

142. See *id.* at 170-84 (detailing Court's examination of legislative history).

143. See Aiken, *supra* note 13, at 346 (noting differences between *Flemming* and *Mendoza-Martinez* and ease for challenges under latter standard).

144. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (requiring some evidence of punitive intent to use factors).

145. See *id.* (noting when Court is to apply factors to statute on its face).

quirement to transform a civil sanction into a punitive one.¹⁴⁶ Finally, the sanction in *Mendoza-Martinez* was so severe that the Court would have found that the statute imposed criminal punishment under almost any form of analysis.¹⁴⁷ These limitations on *Mendoza-Martinez* support the view that although it may have increased a potential challenger's chances for transforming a civil sanction into criminal punishment, it did so only marginally.¹⁴⁸

Thus, *Mendoza-Martinez* requires courts to examine both the legislative history and the listed objective factors when determining whether a sanction is criminal or civil.¹⁴⁹ Although *Mendoza-Martinez* involved a procedural due process claim,¹⁵⁰ many courts have used the objective factors from that case to evaluate whether civil sanctions are punitive for any relevant provision of the Constitution, including the Ex Post Facto Clauses.¹⁵¹ However, not all the

146. See *id.* (noting standard that evidence of punitive form or effect must meet).

147. See Aiken, *supra* note 13, at 346 n.147 (noting severity of sanction in *Mendoza-Martinez*).

148. See *id.* (stating grounds for less expansive interpretation of *Mendoza-Martinez*). One scholar has argued that "it is doubtful whether the Court is prepared to apply [the *Mendoza-Martinez* factors] seriously." Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1358 (1991). Cheh notes that the Supreme Court has never used the *Mendoza-Martinez* factors to conclude that a sanction in question was punitive rather than remedial. *Id.*

149. See *Hudson v. United States*, 118 S. Ct. 488, 493-97 (1997) (noting that courts, when evaluating whether punishment is criminal or civil, must investigate both legislative intent and objective *Mendoza-Martinez* factors); Ronald K. Chen, *Constitutional Challenges to Megan's Law: A Year's Retrospective*, 6 B.U. PUB. INT. L.J. 57, 59-60 (1996) (noting use of both objective factors and legislative history in arguing claims that sanctions punish).

150. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963) (applying punishment test to determine whether disability is punishment for purposes of procedural due process).

151. See *Hudson*, 118 S. Ct. at 493-96 (using factors in *Mendoza-Martinez* as guideposts when determining whether statute is punitive for Double Jeopardy Clause); *Russell v. Gregoire*, 124 F.3d 1079, 1084 (9th Cir. 1997) (recognizing *Mendoza-Martinez* factors as proper analysis for determining when sanction is punitive), *cert. denied*, 118 S. Ct. 1191 (1998); *W.P. v. Poritz*, 931 F. Supp. 1199, 1209 (D.N.J. 1996) (using factors similar to *Mendoza-Martinez* when evaluating ex post facto claim), *rev'd on other grounds sub nom. E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Young v. Weston*, 898 F. Supp. 744, 752 (W.D. Wash. 1995) (using *Mendoza-Martinez* factors to evaluate ex post facto claim); *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994) (applying factors to sanction in ex post facto challenge), *appeal dismissed*, *Doe I v. Burton*, 85 F.3d 635 (9th Cir. 1996) (unpublished table decision); *State v. Myers*, 923 P.2d 1024, 1036 (Kan. 1996) (finding that recent Supreme Court precedents show Court still uses *Mendoza-Martinez* factors in evaluating ex post facto claims), *cert. denied*, *Kansas v. Myers*, 117 S. Ct. 2508 (1997); Chen, *supra* note 149, at 59 (noting that courts and claimants have adopted *Mendoza-Martinez* factors to ex post facto claims concerning sex offender registration). *But see Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1262 (3d Cir. 1996) (declining to follow *Mendoza-Martinez*); *Bae v. Shalala*, 44 F.3d 489, 496 (7th Cir. 1995) (declining to follow test set forth in *Mendoza-Martinez*). Language in *United States v.*

factors are relevant in each inquiry.¹⁵² The courts weigh some factors more heavily than others.¹⁵³ A more recent decision by the Supreme Court illustrates how courts have weighed the factors when performing this analysis.

c. Weighing the Factors: Hudson v. United States

In *United States v. Halper*,¹⁵⁴ the Supreme Court moved away from the *Mendoza-Martinez* factors and ruled that the important distinction in determining whether a constitutional protection attached was whether the sanction was remedial or punitive, instead of criminal or civil.¹⁵⁵ Eight years later, in *Hudson v. United States*,¹⁵⁶ the Court returned to the *Mendoza-Martinez* factors when evaluating a claim that the imposition of criminal proceedings after the government has levied a civil sanction violates the Double Jeopardy Clause.¹⁵⁷ Evaluating this claim, the Court had to determine whether the first

Halper, 490 U.S. 435 (1989), explains the decisions of these two courts not to follow *Mendoza-Martinez*. *Hudson* disavowed the reasoning in *Halper*. See *Hudson*, 118 S. Ct. at 493-95 (disavowing analysis of *Halper* and using *Mendoza-Martinez* factors).

152. See *Hudson*, 118 S. Ct. at 496 (neglecting two factors: rationality and proportion).

153. See *id.* (weighing lack of affirmative restraint and historical punishment above other factors); *Kansas v. Hendricks*, 117 S. Ct. 2072, 2085 (1997) (weighing lack of deterrent and retributive purposes and lack of scienter element above affirmative restraint). In fact, some commentators have observed that a court could bend the *Mendoza-Martinez* factors any way that the court wanted in order to achieve the result desired. See Ricciardi & Sinclair, *supra* note 21, at 325 (arguing that either court or legislature can rephrase criminal statute civilly and civil statute criminally); *infra* notes 402-25 and accompanying text (discussing flaws with current Supreme Court ex post facto jurisprudence); see also *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1262 (3d Cir. 1996) (finding some *Mendoza-Martinez* factors inapplicable to ex post facto litigation); *W.P. v. Poritz*, 931 F. Supp. 1199, 1209 (D.N.J. 1996) (noting that factors to be used in analysis are not identical to *Mendoza-Martinez* factors), *rev'd on other grounds sub nom. E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

154. 490 U.S. 435 (1989).

155. *United States v. Halper*, 490 U.S. 435, 447-48 (1989) (noting that distinguishing between remedial and punitive statutes determined outcome in double jeopardy cases). In *Halper*, the Court evaluated a claim that a criminal prosecution for submitting fraudulent Medicare claims followed by a civil attempt to recover the claims violated the Double Jeopardy Clause. *Id.* at 438. The Court rejected labels of "criminal" or "civil" as determinative when deciding whether the second sanction was punishment that violated the clause. *Id.* at 447. Rather, the Court focused on whether the sanction served remedial or punitive goals. *Id.* at 448. The gross disparity between the fine paid and the actual losses the government suffered indicated to the Court that the sanction was punitive and violative of the Double Jeopardy Clause. *Id.* at 452.

156. 118 S. Ct. 488 (1997).

157. See *Hudson v. United States*, 118 S. Ct. 488, 493-96 (1997) (holding that monetary forfeiture followed by criminal prosecution did not violate Double Jeopardy Clause). In *Hudson*, the Supreme Court evaluated a claim that civil penalties, including money forfeiture and debarment, and criminal indictment for the same actions violated the Double Jeopardy Clause of the Constitution. *Id.* at 491. Petitioners, civilly fined and debarred for banking

set of civil sanctions was in effect criminal punishment.¹⁵⁸ If it was, the Double Jeopardy Clause would have barred the criminal prosecution.¹⁵⁹ Disavowing the analysis of *Halper*, the *Hudson* Court held that only criminal punishment received constitutional protection.¹⁶⁰ In order to determine whether the sanction involved was a civil remedy or a criminal punishment, the Court used the test that it developed in *Mendoza-Martinez*.¹⁶¹

The Court noted that whether a particular punishment is criminal or civil is initially a matter of statutory construction.¹⁶² However, the Court indicated that even when legislative history indicates a remedial purpose, it will use the *Mendoza-Martinez* factors to determine if the sanction was so punitive in either its purpose or effect as to transform a clearly intended civil remedy into a criminal punishment.¹⁶³ The Court established two limits to the *Mendoza-Martinez* analysis.¹⁶⁴ First, the Court will consider the objective factors in relation to the statute on its face.¹⁶⁵ The circumstances of the individual petitioner will have no bearing on the court's determination.¹⁶⁶ Second, only

statute violations, were later criminally indicted for the same activities. *Id.* at 492. They challenged the indictment as a violation of the Double Jeopardy Clause, which protects against two punishments for the same offense, claiming that the civil fines and debarment constituted punishment such that they could not be punished again. *Id.* The Court noted that it must inquire into both legislative history and objective factors to determine whether the civil statute was punitive. *Id.* at 493. However, it noted that "only the clearest proof" from the *Mendoza-Martinez* factors would be sufficient to override a legislative intent that the sanctions were civil. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)). After disavowing the analysis of *United States v. Halper*, which distinguished between remedial and punitive sanctions, the Court stated that the proper inquiry is whether the statute is civil or criminal. *Id.* at 494-95. When performing its analysis, the legislative history indicated to the Court that Congress intended the penalties to be civil in nature. *Id.* at 495. The Court found little evidence when using the objective factors to determine whether the statute was punitive in effect. *Id.* at 495-96. Thus, the Court determined that the penalties were civil in nature and that the Double Jeopardy Clause did not apply to their enforcement. *Id.* at 496; see U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb . . .").

158. See *Hudson*, 118 S. Ct. at 493 (noting that Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense").

159. See *id.* (noting what violation of Double Jeopardy Clause entails).

160. See *id.* at 495 (noting that relevant test is criminal/civil, not punitive/nonpunitive).

161. See *id.* at 493-94 (noting willingness to examine congressional intent and objective *Mendoza-Martinez* factors).

162. See *id.* at 493 (beginning analysis of whether sanction was punitive).

163. See *id.* (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)) (noting that courts must use both objective and subjective tests).

164. See *id.* (discussing application of *Mendoza-Martinez* factors).

165. See *id.* (noting limit on factors to facial examination of statute).

166. See *id.* (stating that Court will not consider individual characteristics of punishment).

the clearest evidence from the factors will transform a civil remedy into a criminal penalty.¹⁶⁷

As mentioned above, the Court in *Hudson* disavowed the reasoning of *Halper*.¹⁶⁸ The *Hudson* Court stated that *Halper* placed too much emphasis on one of the *Mendoza-Martinez* factors.¹⁶⁹ Under the *Mendoza-Martinez* analysis, no one factor is controlling.¹⁷⁰ When applying those factors to the facts of *Hudson*, the Court found that although both "the same conduct" factor¹⁷¹ and the "traditional aims" factor¹⁷² indicated punishment in form and effect, this failed to override the other factors.¹⁷³ The Court did not discuss two of the *Mendoza-Martinez* factors.¹⁷⁴

d. *The Current Status of Mendoza-Martinez*

The Court's analysis in *Hudson* altered the *Mendoza-Martinez* factors slightly. In effect, the Court merged the "historical punishment" and "affirmative restraint" tests by hinting that only imprisonment will satisfy either factor.¹⁷⁵ A sanction that does not violate one will not violate the other.¹⁷⁶ Because, after *Hudson*, two factors point toward a conclusion of civil sanction, a party seeking to use the *Mendoza-Martinez* test in a case not involving imprisonment faces a difficult task.¹⁷⁷

167. See *id.* ("[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." (quoting *Ward*, 448 U.S. at 249)).

168. See *id.* at 493-95 (disavowing reasoning of *Halper*).

169. See *id.* at 494 (noting *Halper* placed too much emphasis on whether sanction was "so grossly disproportionate to the harm caused as to constitute 'punishment'").

170. See *id.* at 495-96 (noting proper application of *Mendoza-Martinez* factors).

171. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (noting factor of "whether the behavior to which [the sanction] applies is already a crime").

172. See *id.* (stating that another factor is "whether its operation will promote the traditional aims of punishment – retribution and deterrence").

173. See *Hudson v. United States*, 118 S. Ct. 488, 496 (1997) (finding lack of punitive effect from factors).

174. See *id.* at 495-96 (lacking discussion of "alternative purpose" factor and of whether remedy seems excessive when related to alternate purpose).

175. See *id.* (noting for both "affirmative disability" and "traditional punishment" that imprisonment is necessary to meet factors); *Cox v. Commodity Futures Trading Comm'n*, 138 F.3d 268, 272-74 (7th Cir. 1998) (finding affirmative disability factor only satisfied by imprisonment).

176. See *Hudson*, 118 S. Ct. at 495 (defining "affirmative disability or restraint" as imprisonment). Imprisonment, of course, would always be recognized as historical punishment. *But cf. Kansas v. Hendricks*, 117 S. Ct. 2072, 2083 (1997) (noting that not all involuntary confinements are equivalent to imprisonment).

177. See *Hudson*, 118 S. Ct. at 496 (finding lack of punitive effect from factors after finding both imprisonment factors pointed toward civil); *Cox*, 138 F.3d at 272-74 (finding

In sum, a party seeking to prove that a civil sanction is in purpose or effect a criminal penalty must overcome a tough presumption.¹⁷⁸ One may attempt to use legislative history to show that Congress intended the sanction to be punitive.¹⁷⁹ A challenging party will have to overcome the presumption of constitutionality, however, and present the "clearest proof" of Congress's intent to punish in order to transcend the Court's uneasiness at examining legislative history.¹⁸⁰ If that fails, a party can attempt to establish that the sanction is in form and in effect criminal punishment by using the *Mendoza-Martinez* factors.¹⁸¹ The Court will require the "clearest proof" to turn a civil sanction into a criminal punishment on these grounds as well.¹⁸² When performing both of these analyses, the Court will read the statute in the light most favorable to its constitutionality.¹⁸³ The Court has made it difficult to challenge a civil sanction as criminally punitive and void under the Ex Post Facto Clauses.¹⁸⁴ This is especially true when a lower court, because it has misread Supreme Court precedent, refuses to apply any test for punitive intent to civil sanctions.

C. Circuit Confusion: A Misunderstanding of Supreme Court Precedent

In its transition from *Mendoza-Martinez* to *Halper* to *Hudson*, the Supreme Court has inconsistently identified the type of sanction that is subject to constitutional prohibitions such as the Double Jeopardy Clause and the Ex Post Facto Clause.¹⁸⁵ During the time in which *Halper* was controlling precedent, the Court focused on "punishment" as the relevant inquiry into whether certain

debarment statute civil under *Hudson* analysis); *Cole v. United States Dep't of Agric.*, 133 F.3d 803, 805-07 (11th Cir. 1998) (applying *Hudson* analysis to find monetary fine civil).

178. See Aiken, *supra* note 13, at 367 ("Retroactive civil laws . . . receive very little scrutiny by the courts.").

179. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170 (1963) (using legislative history to attempt to show punitive intent); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (same).

180. See *Flemming*, 363 U.S. at 617 (noting that Court required "clearest proof" to establish unconstitutionality with legislative history because looking into such history is hazardous matter and noting presumption of constitutionality Court gives federal statutes).

181. See *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (stating that objective factors may be used if subjective factors point toward civil sanction).

182. See *id.* (noting that *Mendoza-Martinez* factors require clearest proof).

183. See *Flemming*, 363 U.S. at 617 ("[T]he presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.").

184. See Aiken, *supra* note 13, at 367 ("By clothing a statute in civil dress it is rendered essentially immune from ex post facto scrutiny.").

185. Compare *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (noting that question involves whether sanction is "punishment") with *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (noting that question involves whether sanction is "criminal punishment").

constitutional protections applied to civil sanctions.¹⁸⁶ Before *Halper* and after *Hudson*, however, the Court focused on "criminal punishment."¹⁸⁷ However, even when the Supreme Court has focused on one term as a trigger for constitutional protections, it has used the other.¹⁸⁸ This flip-flop in terms has caused some confusion in the lower federal courts. Some lower courts have misread "criminal punishment" precedents to bar completely the application of the Ex Post Facto Clauses to sanctions labeled civil. The Supreme Court actually instructs lower courts to examine the statutes beyond Congressional labels by using the *Mendoza-Martinez* factors to determine if the civil sanctions were in effect criminal punishment.¹⁸⁹ An examination of two cases highlights how this misapplication of precedent can lead to inconsistency and unfairness.

In *United States v. Yacoubian*,¹⁹⁰ the United States Court of Appeals for the Ninth Circuit ruled that the Ex Post Facto Clauses do not apply to civil sanctions.¹⁹¹ When deciding a claim challenging retrospective application of changes to a deportation law, the court ruled that because deportation under *Harisiades* was a civil sanction, the Ex Post Facto Clauses simply do not apply.¹⁹² The court did not search the legislative history for punitive intent, nor did it determine whether any of the *Mendoza-Martinez* factors transformed the civil sanction into criminal punishment.¹⁹³ The court addressed the

186. See *United States v. Halper*, 490 U.S. 435, 447-48 (1989) (noting that distinguishing between remedial and punitive statutes determines outcome in double jeopardy cases).

187. See *Harisiades*, 342 U.S. at 594. At times, the Court has referred to the trigger by both phrases in a single opinion. See *Hudson v. United States*, 118 S. Ct. 488, 495-96 (1997) (referring to offending legislation as "punitive" and "criminal").

188. See *Trop*, 356 U.S. at 94 (describing invalid laws as those that inflict punishment); see also *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (same). When the Court uses "punishment" as the trigger in these cases and then switches to "criminal punishment" without changing the tests, it is understandable that lower courts will not apply the correct test.

189. See *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994) (refusing to apply any test to civil sanction); *Karpa v. Commissioner*, 909 F.2d 784, 786-87 (4th Cir. 1990) (noting that Ex Post Facto Clauses only apply to "criminal punishment" and do not apply to civil sanctions).

190. 24 F.3d 1 (9th Cir. 1994).

191. See *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994) (finding that Ex Post Facto Clauses only apply to criminal laws). In *Yacoubian*, the Ninth Circuit considered a challenge to statutory changes that caused the deportation of a once-undepportable felon. *Id.* at 2-3. In this case, the defendant received a judicial order barring deportation. *Id.* at 6. Congress, however, changed the provisions of the statute governing judicial orders barring deportation to allow the deportation of the defendant. *Id.* at 6-7. The defendant challenged the statutory change as an ex post facto law. *Id.* After dismissing separation of powers arguments, the court turned to the ex post facto claim. *Id.* at 9. The court found that because deportation was civil and the federal Ex Post Facto Clause does not apply to civil sanctions, the clause did not provide any protection to the defendant. *Id.* at 10. The court therefore upheld the retroactive application of the change in deportation law to the defendant. *Id.*

192. See *id.* (refusing to apply federal Ex Post Facto Clause to changes in deportation law).

193. See *id.* at 9-10 (showing court's nonapplication of any test to determine true nature of change in statute).

criminal punishment requirement in *Harisiades*, compared it to the punishment requirement in *Mendoza-Martinez*, and decided that therefore the latter test did not apply.¹⁹⁴ The fact that deportation is traditionally a civil sanction was enough for the Ninth Circuit to end its analysis.¹⁹⁵ Although the result in the case probably would have been the same if the court had applied traditional civil sanction analysis,¹⁹⁶ applying the correct test established by the Supreme Court would have been more consistent and equitable.¹⁹⁷

In contrast, in *Bae v. Shalala*,¹⁹⁸ the United States Court of Appeals for the Seventh Circuit applied proper Supreme Court precedent to determine if the civil sanction in question was punishment.¹⁹⁹ Examining both the effects of the statute and its legislative history, the court found that Congress intended the sanction to be remedial and that it was remedial in effect.²⁰⁰ Although the result was the same as that in *Yacoubian*, the claimant in *Bae* received the opportunity to have his claim evaluated fully.

If the Supreme Court used consistent language in describing what kinds of laws are void under the Ex Post Facto Clause and other similar prohibitions

194. See *id.* (applying only *Harisiades* test).

195. See *id.* (upholding change in deportation law against ex post facto challenge as civil penalty); see also *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995) (focusing solely on "civil" label legislature gave to sanction); David M. Boyers, Note, *Emotion over Reason: California's New Community Notification and Chemical Castration Laws Feel Good, but Fail "Sensible" Scrutiny*, 28 PAC. L.J. 741, 756 (1997) (discussing *Rise* and its focus on legislative intent). But see *Russell v. Gregoire*, 124 F.3d 1079, 1084 (9th Cir. 1997) (using *Mendoza-Martinez* test when deciding ex post facto claim), *cert. denied*, 118 S. Ct. 1191 (1998). The fact that the Ninth Circuit itself is unable to determine when protections apply shows even more clearly the need for consistent language.

196. See *infra* notes 402-25 and accompanying text (noting difficulty under current standards in showing civil sanction is criminal punishment).

197. See Porter, *supra* note 79, at 546 n.153 (discussing *Yacoubian* and noting that result would undoubtedly remain same if Ninth Circuit had used current Supreme Court doctrine in its decision).

198. 44 F.3d 489 (7th Cir. 1995).

199. See *Bae v. Shalala*, 44 F.3d 489, 492 (7th Cir. 1995) (applying *Halper* test to determine if civil disability was punitive in effect). In *Bae*, the Seventh Circuit considered a challenge to the Food and Drug Administration's (FDA) debarment of petitioner. *Id.* at 490. The government debarred petitioner under an act that allowed the FDA to debar permanently from the generic drug industry any person convicted of certain crimes. *Id.* at 490-91. Petitioner's conviction occurred before Congress enacted the debarment statute. *Id.* at 491. He challenged the application of the debarment statute to him as an ex post facto law. *Id.* The court noted that only civil sanctions that can be characterized as punishment will violate the Ex Post Facto Clause. *Id.* at 492. The court first applied *Halper* to the facts of the case and determined that the debarment statute had no punitive effect. *Id.* at 492-93. It then examined the legislative history of the act and determined that it did not show unmistakable evidence of punitive intent. *Id.* at 494-95. The court then ruled that the purpose of the statute was remedial and that ex post facto protection did not attach. *Id.* at 496.

200. See *id.* (summarizing court's findings of remedial intent and effect).

in the Constitution, this would eliminate the Ninth Circuit's confusion in applying the Supreme Court tests for civil sanction punishment.²⁰¹ In order to remove any confusion in lower courts' application of the standards, the Supreme Court should use "criminal punishment" to trigger Ex Post Facto Clause protection. That is the trigger that the Court used in *Hudson*, and the Court should use it consistently through its analysis of similar challenges.²⁰² It should also be made clear to lower courts that the *Mendoza-Martinez* test is relevant when deciding if a sanction is criminal punishment. Consistent use of triggering language would prevent inconsistent application of Supreme Court precedent by the lower courts and would promote consistency among the federal appellate courts.

III. A Case Study: The Veterans' Benefits Denial Act of 1997, Timothy McVeigh, and the Ex Post Facto Clause of the Constitution

A. The Crime and the Legislation

In order to apply properly the standards for criminal punishment to the case of Timothy McVeigh's burial rights, a brief examination of his crimes and Congress's legislative response is necessary. This subpart first examines McVeigh's criminal trial and the action Congress took when it discovered that McVeigh remained eligible for burial in a national cemetery. This subpart examines three different versions of the Denial Act for later use in determining whether the sanction is criminally punitive.²⁰³

At nine o'clock in the morning on April 19, 1995, a bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people and injuring more than 500.²⁰⁴ The attention of federal investigators quickly turned to Timothy McVeigh, a veteran of the Gulf War, and Terry Nichols, a friend of McVeigh's and a fellow veteran.²⁰⁵ Federal prosecutors charged McVeigh and Nichols with eleven counts each relating to the bombing, including eight counts of first degree murder of a federal official.²⁰⁶ A

201. See *supra* notes 185-200 (noting Supreme Court's use of both "punishment" and "criminal punishment" as triggers for applying Ex Post Facto Clause); see also Porter, *supra* note 79, at 547 (stating that difference between circuits' opinions is "partly semantic").

202. See *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (noting that Double Jeopardy Clause bars successive "criminal punishments").

203. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170-84 (1963) (using legislative history to declare civil sanction punitive).

204. See Chronis, *supra* note 4, at A1 (noting casualties from bombing); Kenworthy, *supra* note 2, at A8 (same).

205. See Elizabeth Gleick, *Something Big Is Going to Happen*, TIME, May 8, 1995, at 50, 50 (describing quick capture and arrest of McVeigh and Nichols).

206. See *Judgment and Order in the case of United States v. McVeigh*, 1997 WL 471692 (D. Colo. Dec. 1997) [hereinafter *Judgment*] (listing 11 counts of which jury convicted McVeigh). The 11 counts were violations of 18 U.S.C. § 2332a (1997) (conspiracy to use weapon

jury convicted McVeigh on all counts.²⁰⁷ The jury recommended a death sentence on June 13, 1997.²⁰⁸

At the time the jury convicted McVeigh, Title 38 of the United States Code provided for the forfeiture of veterans' benefits for the commission of certain crimes.²⁰⁹ However, these provisions did not cover McVeigh's convictions.²¹⁰ McVeigh's incarceration until execution rendered him ineligible for payment of any benefits during his lifetime.²¹¹ Upon death, however, McVeigh would have been eligible for burial in a national cemetery with full military honors.²¹²

Some congressmen became aware of McVeigh's continuing eligibility for burial benefits.²¹³ Noting a "gap in the law," United States Senator Arlen Specter quickly moved to revoke McVeigh's burial rights.²¹⁴ He introduced Senate Bill 923, which would have rendered anyone convicted of a federal capital crime ineligible for veterans' benefits.²¹⁵ The original Senate Bill 923 included no effective date, but the Senate clearly intended the bill to apply to McVeigh's potential application for burial in a national cemetery.²¹⁶ The United States Senate unanimously passed Senator Specter's bill the day after he introduced it.²¹⁷

Days later, United States Representative Robert Stump, Chairman of the House Committee on Veterans Affairs, introduced House Bill 2040, legislation also designed to limit burial in a national cemetery.²¹⁸ House Bill 2040

of mass destruction and use of weapon of mass destruction), 18 U.S.C. § 844(f) (1997) (destruction by explosive of federal facility), and 8 counts under 18 U.S.C. §§ 1114 and 1111 (1997) (first-degree murder of on-duty federal official). *Id.*

207. See Kenworthy, *supra* note 2, at A8 (discussing McVeigh's conviction).

208. See *id.* (noting McVeigh's sentence of death).

209. See 38 U.S.C. §§ 6103, 6104, & 6105 (1997) (providing for forfeiture of veterans' benefits for fraud, treason, and subversive activities).

210. See *id.* § 6105(a)-(b) (forfeiting benefits upon conviction of certain crimes).

211. See *id.* § 1505(a) (forfeiting benefits upon incarceration).

212. See *id.* § 2402 (describing eligibility standards for burial in national cemetery).

213. See 143 CONG. REC. S5810 (daily ed. June 17, 1997) (statement of Sen. Specter) (noting that research indicated that McVeigh remained eligible for burial in national cemetery).

214. See 143 CONG. REC. S5923 (daily ed. June 18, 1997) (statement of Sen. Specter) (speaking on behalf of legislation that would block McVeigh's burial in national cemetery).

215. See S. 923, 105th Cong. (1997), *reprinted in* 143 CONG. REC. S5924 (daily ed. June 18, 1997) (forfeiting veterans' benefits of those convicted of federal capital offenses in early version of Denial Act).

216. See 143 CONG. REC. S5923 (daily ed. June 18, 1997) (statement of Sen. Torricelli) (stating that bill would forfeit McVeigh's right to burial in national cemetery).

217. See 143 CONG. REC. S5924 (daily ed. June 18, 1997) (noting vote and passage of Senate Bill 923).

218. See H.R. 2040, 105th Cong. (1997), *reprinted in Hearings, supra* note 24, at 42-44

was more narrowly focused than Senate Bill 923 in a number of ways. First, it limited the sanction imposed to ineligibility for burial in a national cemetery.²¹⁹ This distinction has a negligible effect because incarcerated felons already forfeit most veterans' benefits while in prison.²²⁰ Burial benefits are the primary benefits that incarcerated veterans remain eligible to receive.²²¹ Second, House Bill 2040 limited the number of veterans it would render ineligible for burial benefits – only those convicted of certain crimes of mass destruction in conjunction with the murder of an on-duty federal employee.²²² At that time, McVeigh was the only veteran convicted of those two crimes in combination.²²³ House Bill 2040 would have applied to McVeigh, as it affected applications for burial made on or after the date of its enactment.²²⁴

Representative Stump urged the House Committee on Veterans Affairs to consider carefully the ramifications and the consequences of the two competing bills, and held hearings on the matter.²²⁵ After hearing testimony from interested parties, the Committee presented to the House an amended version of Senate Bill 923.²²⁶ The House passed that version, the Senate agreed to the

(revoking right to burial benefits of those convicted of certain federal crimes). House Bill 2040 provided in relevant part:

- (b)(1) The remains of a person described in paragraph (2) of this subsection shall not be buried or interred in a federally funded cemetery.
- (2) A person referred to in paragraph (1) is –
 - (A) a person who has been convicted of a crime under –
 - (i) section 1114 of title 18, and
 - (ii) section 844(f), 2332a, 2332b, 2332c, 2339A, or 2339B of such title, for which person was sentenced to death or life imprisonment without parole

Id. at 43. The bill also provided provisions for an administrative hearing in which the Secretary can bar burial if the Secretary determined the applicant for burial committed the above crimes but was not convicted because of death, flight, or insanity. *Id.* at 43-44.

219. Compare S. 923, 105th Cong. (1997), reprinted in 143 CONG. REC. S5924 (daily ed. June 18, 1997) (forfeiting all veterans' benefits) with H.R. 2040, 105th Cong. (1997), reprinted in *Hearings*, *supra* note 24, at 42-44 (forfeiting only burial rights).

220. See 38 U.S.C. § 1505(a) (1997) (forfeiting incarcerated veterans' benefits).

221. See *id.* (revoking most disability benefits).

222. See H.R. 2040, 105th Cong. (1997), reprinted in *Hearings*, *supra* note 24, at 42-44 (listing crimes of which conviction results in forfeiture).

223. See *Hearings*, *supra* note 24, at 78 (statement of Johnny Killain, attorney for the Congressional Research Service) (mentioning that only one person would suffer disqualification imposed by House Bill 2040).

224. See H.R. 2040, 105th Cong. (1997), reprinted in *Hearings*, *supra* note 24, at 42-44 (setting effective date for legislation).

225. See *Hearings*, *supra* note 24, at 54 (statement of Rep. Quinn) (remarking on wisdom of serious deliberation of issues).

226. See generally Prohibiting Interment or Memorialization in Certain Cemeteries of Persons Committing Federal Capital Crimes, H.R. REP. NO. 105-319 (1997).

amendments, and the President signed the Denial Act into law.²²⁷

The Denial Act is similar in many respects to House Bill 2040. Unlike House Bill 2040, however, the Denial Act renders ineligible perpetrators of all federal capital crimes and of all state capital murders.²²⁸ The statute allows the Secretary of Veterans Affairs or the Secretary of the Army to conduct hearings to revoke the eligibility of any person suspected of committing such a crime but not prosecuted because of death or flight.²²⁹ Finally, the statute revokes funding to any state veterans' cemetery that inter or buries a veteran who has forfeited federal burial rights under the law.²³⁰

Like House Bill 2040, the Denial Act explicitly applies to all applications for burial made after its enactment.²³¹ The Denial Act subjects McVeigh to the forfeiture provisions in the statute because his family cannot apply for burial in a national cemetery until after his death.²³² Thus, the Denial Act, although enacted two and a half years after the Oklahoma City bombing and not proposed until after McVeigh's conviction, will render McVeigh ineligible for burial in a national cemetery. This retrospective application of a sanction raises ex post facto concerns.

B. Applying the Ex Post Facto Clause

Evaluating a violation of the federal Ex Post Facto Clause requires a two-part analysis.²³³ First, the law must be retrospective as applied to the petitioner in question.²³⁴ Second, the law must be criminal punishment.²³⁵ This subpart addresses both requirements for applying the Denial Act to McVeigh.

227. See *McVeigh Can't Be Buried in National Cemetery*, DENV. POST, Nov. 22, 1997, at A9, available in 1997 WL 13884325 (describing passage and enactment of Denial Act).

228. See 38 U.S.C. § 2411 (1997) (denying burial rights for commission of most capital crimes).

229. See *id.* (establishing procedures whereby Secretary can revoke benefits under particular circumstances).

230. See 38 U.S.C. § 2408 (1998) (revoking funding for state veterans' cemeteries).

231. See Denial Act § 1(c), 111 Stat. 2381, 2382 (1997) (limiting effective date to applications for burial after enactment).

232. See 38 U.S.C. § 2402 (1997) (prescribing application process for burial in national cemetery).

233. See *Miller v. Florida*, 482 U.S. 423, 430 (1987) (noting that ex post facto laws must be both retrospective and punitive).

234. See *id.* (stating that Ex Post Facto Clauses only protect against retrospective criminal legislation); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389-90 (1798) (same).

235. See *Flemming v. Nestor*, 363 U.S. 603, 613 (1960) (noting requirement that law be punishment in order to violate Ex Post Facto Clauses).

1. Retrospective Legislation

In order to qualify as *ex post facto*, a statute must be retrospective in nature.²³⁶ The Ex Post Facto Clauses seek to provide fair notice of acts that will subject one to sanctions and to prevent vindictive criminal legislation.²³⁷ Retrospective legislation may violate these two goals, but purely prospective legislation that provides fair warning of its consequences will not.²³⁸

A law is retrospective if it changes the legal consequences of acts completed before its effective date.²³⁹ In *Harisiades*, the Supreme Court defined as retrospective those laws applied to acts committed before Congress enacted the laws without fair warning.²⁴⁰ When applied to McVeigh, the Denial Act changes the legal consequences of an act – the bombing – committed prior to its enactment. Thus, if applied to McVeigh, the act would be retrospective.

McVeigh did not receive fair warning that his conduct would forfeit his burial rights. Although certain crimes forfeit veterans' benefits, McVeigh's actions did not constitute any of those crimes.²⁴¹ It is unlikely that McVeigh paused to consider the consequences that his actions would have on his right to burial. If he had, however, he could have known that his actions would not forfeit his right to burial in a national cemetery.²⁴²

Some congressmen argued that because McVeigh has yet to apply for burial in a national cemetery, the statute has not yet changed the legal consequences of his acts.²⁴³ The forfeiture of McVeigh's burial rights does not occur until his family applies for them, well after the enactment of the statute. However, the presence of an affirmative right is not necessary for an *ex post facto* violation.²⁴⁴ Also, the time-of-application argument assumes that the *right* to burial in a national cemetery arises upon application.²⁴⁵ Veterans, however, earn their benefits at the moment of honorable discharge from the

236. See *Miller*, 482 U.S. at 430 (noting *ex post facto* laws must be retrospective).

237. See *Dufresne v. Baer*, 744 F.2d 1543, 1546 (11th Cir. 1984) (listing goals of Ex Post Facto Clauses).

238. See *Aiken*, *supra* note 13, at 329 (noting advantages of prospective legislation).

239. See *Miller v. Florida*, 482 U.S. 423, 430 (1987) (defining "retrospective").

240. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 593-95 (1952) (describing why Court did not consider statute retrospective).

241. See 38 U.S.C. § 6105 (1997) (listing crimes that forfeit veterans' benefits).

242. *Id.*

243. See *Hearings*, *supra* note 24, at 25 (statement of Rep. Buyer) (suggesting that right to burial in national cemetery arose only upon death and, therefore, application of statute to acts committed prior to its enactment would not be retrospective, as long as Congress did not apply act to burial applications submitted prior to enactment).

244. See *Weaver v. Graham*, 450 U.S. 24, 30 (1981) ("The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition . . .").

245. See *Hearings*, *supra* note 24, at 25 (statement of Rep. Buyer) (stating that change in rights would occur at death).

Armed Services.²⁴⁶ Prior to the enactment of the statute, McVeigh earned the right to burial in a national cemetery.²⁴⁷ As a result of the Denial Act, he lost that right.²⁴⁸ Moreover, even if veterans do not earn their benefits at discharge, courts have ruled that when a statute sanctions an act that predates the enactment of the statute, that statute is retrospective even though the disqualification may be prospective.²⁴⁹ For example, in *Cummings*, the Supreme Court found the application of a loyalty oath to those seeking to become ministers to be retroactive in relation to those acts committed prior to the enactment of the oath requirement.²⁵⁰ Although the oath technically did not affect an individual until the individual sought to become a member of the clergy, by barring that possibility based upon conduct prior to the enactment of the statute, Missouri had retrospectively changed the legal consequences of the actions that potential ministers had taken.²⁵¹ Similarly, the Denial Act has changed the legal consequences of McVeigh's actions, and although the results of the change may not appear for some time, the application of the statute to McVeigh is retrospective.

2. Punishment

The other requirement for a violation of the Ex Post Facto Clause is that the law is punitive in either purpose or effect.²⁵² In the past, the Supreme Court has declined to lay down a precise formula for deciding whether certain sanctions constitute punishment.²⁵³ Rather, when determining whether a retrospective sanction imposes a criminal punishment, the Supreme Court has

246. See *id.* at 27 (statement of Rick Surratt, representative of Disabled American Veterans) (noting when veterans earn benefits).

247. See 38 U.S.C. § 2402 (1991) (describing eligibility for burial in national cemetery as including all war-time veterans).

248. See 38 U.S.C. § 2411 (1998) (revoking burial rights of veterans convicted of most capital crimes).

249. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866) (noting sanction could be retrospective if right it was based upon was barred on basis of pre-enactment conduct).

250. See *id.* (noting retrospectivity of sanction).

251. See *id.* (finding constitutional provision retroactive and violative of Ex Post Facto Clause); see also *Flemming v. Nestor*, 363 U.S. 603, 611-21 (1960) (deciding implicitly that denial of Social Security benefits, nonvested interest of petitioners, could be retrospective by moving to punishment analysis).

252. See *supra* notes 101-84 and accompanying text (discussing "punitive" standard that challenger must show to advance successful ex post facto claims); see also *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (noting that Ex Post Facto Clauses forbid "the application of any new punitive measure to a crime already consummated").

253. See *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (noting that Court has previously declined to articulate single formula for identifying those legislative changes that produce sufficient change on substantive crimes or punishments to fall within constitutional prohibition for ex post facto laws).

sought to discern congressional intent for enacting the sanction and the effect that the sanction has on those affected.²⁵⁴ The question presented is the simply phrased, but extremely complex, question of whether Congress intended the legislation to punish, or whether the sanction operates to punish an individual for past activity.²⁵⁵

This section seeks to apply traditional punishment standards to the facts surrounding the application of the Denial Act to McVeigh in order to determine whether the courts would consider the application to be an *ex post facto* violation of the Constitution. The framework for this analysis is similar to the framework in *Hudson*.²⁵⁶ First, this section examines the legislative history of the Denial Act to determine whether Congress intended to provide a civil or criminally punitive sanction.²⁵⁷ Second, this section analyzes the Denial Act in an attempt to discover if the sanction that the act imposes on McVeigh is so punitive in form and in effect as to transform it into criminal punishment despite Congress's intent to the contrary.²⁵⁸ When performing this analysis, this section emphasizes the strong judicial presumption that congressional action is constitutional and the burdens the Supreme Court has placed on proving criminally punitive intent or purpose.²⁵⁹

a. Congress's Intent: An Examination of Legislative History

As noted earlier, only the "clearest proof" of legislative intent to punish is sufficient to establish the unconstitutionality of a statute on the basis of legislative history.²⁶⁰ Both the presumption of constitutionality that courts give to enactments of Congress and the courts' antipathy for examining legislative history make most judicial inquiries into legislative history cursory at best.²⁶¹ An examination of the legislative history of the Denial Act does not produce the clearest proof of legislative intent necessary to support the assertion that Congress intended to punish.

254. See *Flemming*, 363 U.S. at 613-14 (examining legislative history and objective results).

255. See *id.* at 614 (citing *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960)) (explaining differences between regulatory civil sanctions and punishment).

256. See *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (examining legislative history and objective factors when determining whether Court will consider civil sanction punitive for purposes of Double Jeopardy Clause).

257. See *id.* at 495 (examining legislative history).

258. See *id.* (citing *United States v. Ursery*, 116 S. Ct. 2135, 2148 (1996)) (applying objective factors test to civil sanction to determine if civil or punitive).

259. See *supra* notes 101-84 and accompanying text (discussing hurdles that challenges must overcome to show legislation to be punitive).

260. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (establishing standard for proving punitive intent by use of legislative history).

261. See *id.* (noting judicial inquiries into congressional motives are "at best a hazardous matter" and "dubious affair indeed").

(1) *Textual Clues*

Often, Congress identifies sanctions as either criminal or civil in the text of legislation.²⁶² Courts have relied upon such statements as clear evidence of congressional intent.²⁶³ The Denial Act includes no such statement of congressional intent. Thus, a court must examine the structure and the history of the legislation to determine whether Congress intended the loss of burial privileges to be civil or criminal in nature.²⁶⁴

In the Denial Act, Congress gave the Secretary of Veterans Affairs the power to bar burial of those persons who are not brought to trial for a capital crime because of flight to avoid prosecution or death.²⁶⁵ Congress gave this power to an administrative agency, not to the judicial branch.²⁶⁶ The Supreme Court has found that granting the authority to revoke a privilege to an administrative agency is *prima facie* evidence that Congress intended to create a civil sanction.²⁶⁷ If Congress had intended otherwise, it would have provided the procedural protections inherent in an imposition of criminal punishment.²⁶⁸ The statute's placement within Title 38 of the United States Code, along with other civil sanctions that revoke veterans' benefits, rather than in Title 18 with other criminal punishments, further suggests that Congress intended for courts to consider these sanctions civil rather than criminal.²⁶⁹

262. See *Hudson v. United States*, 118 S. Ct. 488, 495 (1997) (using statement in text of 12 U.S.C. §§ 93(b)(1) and 504(a) that sanction was civil as evidence of congressional intent); Porter, *supra* note 79, at 550 (noting that "Congress usually expresses in the language of the statute whether a sanction is 'civil' or 'criminal'").

263. See *Hudson*, 118 S. Ct. at 495 (using congressional statement as dispositive of intent).

264. See *Austin v. United States*, 509 U.S. 602, 620-21 (1993) (using committee reports to determine congressional intent); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170 (1963) (using history of prior bills to determine congressional intent).

265. See 38 U.S.C. § 2411(b)(1)(3) (1997) (rendering ineligible for burial any person Secretary finds to have committed capital crimes).

266. See *id.* § 2411 (stating Secretary's power to revoke benefits after administrative hearing).

267. See *Hudson*, 118 S. Ct. at 495 (finding sanction civil because Congress gave enforcement power to banking agency); *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938) ("That Congress provided a distinctly civil procedure for [the imposition of the sanction] indicates clearly that it intended a civil, not a criminal, sanction."); *Cox v. Commodity Futures Trading Comm'n*, 138 F.3d 268, 272-74 (7th Cir. 1998) (finding sanction civil because Congress gave enforcement power to agency).

268. See *Hudson v. United States*, 118 S. Ct. 488, 495 (1997) (noting that sanctions without certain protections can be constitutional only if court considers them to be civil); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (holding that only judicial trial can impose quintessential criminal punishments).

269. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (finding that placement of sex offender statute in civil probate code rather than in criminal code was relevant when determining whether statute was civil or criminal). *But see* *Rowe v. Burton*, 884 F. Supp. 1372, 1377

This inference, however, cannot end the inquiry into congressional intent.²⁷⁰ To stop here would be relying on a circular argument; the sanction is civil because it has no criminal textual indications, and it has no criminal textual indications because it is civil.²⁷¹ Rather, the prior history of the Denial Act and Congress's remarks upon its passing should trigger further investigations into congressional intent.²⁷²

Prior versions of what eventually became the Denial Act hint at congressional intent. The first major bill on the subject, Senate Bill 923, includes no textual hints as to whether the Senate intended the sanction to be criminally punitive or remedial.²⁷³ The text of House Bill 2040, however, contains some clues. The authors of House Bill 2040 limited applicable crimes almost exclusively to the crimes committed by McVeigh.²⁷⁴ The authors omitted other equally heinous crimes.²⁷⁵ The Supreme Court has identified evidence that Congress's purpose was to reach the person sanctioned rather than the conduct that triggered the sanction as proof that Congress intended to punish.²⁷⁶ By limiting forfeiture of burial rights to the crimes McVeigh committed and omitting other serious capital crimes, the House of Representatives may have revealed its desire to punish McVeigh.²⁷⁷

(D. Alaska 1994) (determining that placement of sanction in criminal code was not dispositive of criminal intent but legislature could have placed statute there to facilitate indexing), *appeal dismissed*, Doe I v. Burton, 85 F.3d 635 (9th Cir. 1996) (unpublished table decision).

270. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-70 (1963) (going beyond civil/criminal inquiry into investigation of legislative history).

271. See *Ricciardi & Sinclair*, *supra* note 21, at 325 (noting ease with which Congress could otherwise make sanction civil). *But see Hudson*, 118 S. Ct. at 495 (ending inquiry after textual inference of civil sanction); *Hendricks*, 117 S. Ct. at 2082 (same).

272. See *Mendoza-Martinez*, 372 U.S. at 169-70 (going beyond textual inquiry into investigation of legislative history); *Flemming v. Nestor*, 363 U.S. 603, 618-21 (1960) (investigating beyond textual inquiries into investigation of congressional statements); *Manocchio v. Kusserow*, 961 F.2d 1539, 1541-42 (11th Cir. 1992) (investigating legislative history).

273. See S. 923, 105th Cong. (1997), *reprinted in* 143 CONG. REC. S5924 (daily ed. June 18, 1997) (stating succinctly that those who commit federal capital crimes forfeit veterans' benefits).

274. Compare H.R. 2040, 105th Cong. (1997) (limiting forfeiture to those who commit limited number of crimes) with *Judgment*, *supra* note 206, at 1 (listing crimes for which jury convicted McVeigh).

275. See 18 U.S.C. § 1751 (1997) (punishing assassination of President); 18 U.S.C. § 1091 (1997) (punishing genocide). Original House Bill 2040 included neither crime.

276. See *Flemming*, 363 U.S. at 616 (noting that purpose "to reach the person, not the calling" could establish punitive intent (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866))). *But see infra* notes 430-31 and accompanying text (noting problems with distinction).

277. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (finding punitive those sanctions legislatures aimed at individuals).

(2) *Statements of Congressmen*

The statements of legislators in support of the various bills that would have created new bars for burial in a national cemetery provide evidence of congressional intent in both directions.²⁷⁸ Numerous senators stated that their purpose in supporting Senate Bill 923 was to prevent McVeigh from being buried in a national cemetery.²⁷⁹ For example, Senator Robert Torricelli stated that the Senate, by passing Senate Bill 923, would revoke McVeigh's right to burial in the sacred ground of a national cemetery.²⁸⁰ He also stated that it would be a travesty of justice to bury "an enemy of the United States" in a national cemetery.²⁸¹ Senator Ben Campbell explained that the nation was outraged over the possibility that McVeigh remained eligible for burial in a national cemetery and urged the Senate to act to prevent his burial.²⁸² These and similar statements constitute evidence that the Senate intended to punish McVeigh.²⁸³

Many members of the House of Representatives also made statements indicating their desire to impose this forfeiture upon McVeigh in order to punish him. At a hearing held less than a month after McVeigh's conviction, one congressman pointed to the damage that the bombing caused and argued that it was not appropriate to allow McVeigh to be buried in a national cemetery.²⁸⁴ Another said that he was at the hearing to make sure that McVeigh

278. See *Flemming v. Nestor*, 363 U.S. 603, 618 (1960) (using legislators' statements in conducting analysis).

279. See 143 CONG. REC. S5922-23 (daily ed. June 18, 1997) (statement of Sen. Specter) (stating that gap in law allows McVeigh to receive veterans' benefits and that it would be unseemly to bury McVeigh in veterans' cemetery).

280. See *id.* at S5923 (statement of Sen. Torricelli) ("Today, by the actions of the U.S. Senate, he can also have forfeited his right to be buried and have the honor of being in the sacred ground of a national cemetery of the United States.").

281. See Government Press Release, *Torricelli Seeks to Stop Hero's Burial for McVeigh*, 1997 WL 4434042, at *1 (giving reasons for introducing legislation similar to Senate Bill 923). The press release also stated that Congress must change the law "to ensure that McVeigh's most heinous of crimes will exclude him from a hero's burial." *Id.*

282. See 143 CONG. REC. S5923-24 (daily ed. June 18, 1997) (statement of Sen. Campbell) ("Our Nation remains outraged at that terrorist act and the individual [McVeigh] who was convicted of committing it. We now are further outraged at the thought of that person being eligible for burial in a military cemetery beside our fallen brothers and sisters."). Senator Campbell also stated that he cosponsored "S. 923 to be absolutely certain that any individual convicted of a crime as heinous as the Oklahoma City bombing will never be buried among our Nation's heroes." *Id.* at S5924. Likewise, another senator stated that it would be a "desecration" to bury McVeigh in a national cemetery. *Id.* at S5923 (statement of Sen. Nickles).

283. See *Flemming*, 363 U.S. at 616 (noting that purpose "to reach the person, not the calling" could establish punitive intent (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866))).

284. See *Hearings*, *supra* note 24, at 6 (statement of Rep. Knollenberg) (noting that "[t]he

forfeited the right to burial in a national cemetery.²⁸⁵ A witness at the hearing joked that congressmen mentioned McVeigh, his crime, and his conviction so often that McVeigh attended the hearing in spirit.²⁸⁶ Statements by representatives of veterans' service organizations opposing the extension of the bill to other crimes also indicate the bill's punitive purpose.²⁸⁷ From these statements, it is clear that some members of Congress aimed the legislation at McVeigh and intended to punish him.²⁸⁸

Other contemporaneous statements, however, indicate that Congress had a regulatory purpose in mind when enacting the Denial Act. These statements indicate an intent to preserve the sanctity of the National Cemetery System.²⁸⁹ A few legislators focused on the effect that burial of a mass murderer in a national cemetery would have on the families of veterans buried nearby.²⁹⁰

most heinous domestic terrorist act ever committed ripped apart the insides of our country" and questioning whether McVeigh should be buried in national cemetery).

285. See *id.* at 47 (statement of Rep. Bachus) ("We are here today to make sure he [McVeigh] also forfeits the honor of being buried alongside our fallen heroes."). Representative Bachus also stated that McVeigh's actions showed that he was neither a good soldier nor a good citizen and should forfeit his right to burial. *Id.* at 48.

286. See *id.* at 25 (statement of Johnny Killain, attorney for Congressional Research Service) (noting that McVeigh was present in spirit).

287. See *id.* at 83 (statement of Rick Surratt, spokesman of Disabled American Veterans) (calling forfeiture of burial rights punishment and arguing that Congress should not punish veterans convicted of capital crimes any more than others); see also *Flemming v. Nestor*, 363 U.S. 603, 632-33 (1960) (Douglas, J., dissenting) (noting that statements seeking to limit preferential force of sanctions indicate punitive intent).

288. See *Flemming*, 363 U.S. at 633 (Douglas, J., dissenting) ("The aim and purpose are clear — to take away from a person by legislative *fiat* property which he has accumulated because he has acted in a certain way or embraced a certain ideology.").

289. See *Hearings*, *supra* note 24, at 17 (statement of Rep. Evans) ("[T]he congressional intent is to preserve the sanctity of veterans' cemeteries."). Representative Bob Filner reinforced Representative Evans's statement when he stated that the aim of the hearings was to "determine if this bill [H.R. 2040] would preserve the dignity of the hallowed grounds that our nation has set aside as final resting places for America's veterans." *Id.* at 60. Representative Filner stated that Congress's goal was not to punish. *Id.* Both Representative Evans's and Representative Filner's statements are suspect, however, for reasons discussed later. See *supra* notes 405-13 and accompanying text (discussing problems with manufacturing legislative history); see also 143 CONG. REC. H9839 (daily ed. Oct. 31, 1997) (statement of Rep. Bachus) ("The bill [S. 923] is not to punish; the bill is to protect our veterans. It is to respect our veterans. It is meant to protect them. It is not punitive."); 143 CONG. REC. S5923 (daily ed. June 18, 1997) (statement of Sen. Torricelli) (expressing incredulity that graves next to fallen heroes could be filled by someone who committed capital offenses against United States government and noting potential difficulty in explaining that eventuality to veterans' families).

290. See *Hearings*, *supra* note 24, at 61 (statement of Rep. Chenoweth) ("For those who gave lives of service to our nation, and for their families and loved ones, it is vital that we preserve the sanctity of national cemeteries."); *id.* at 58 (statement of Rep. Doyle) ("I thank the Chairman for introducing legislation that would maintain veterans cemeteries as a place of honor, where families and all Americans can go to celebrate the positive contributions our

Many congressmen stated that although McVeigh brought to light a loophole in the law, he merely highlighted a troubling problem – the paucity of crimes the conviction of which rendered one ineligible for veterans' benefits.²⁹¹ Some believed that they were fixing a problem that went beyond the factual situation that McVeigh presented to the more general question of eligibility for veterans' benefits based upon postdischarge conduct.²⁹²

After examining the statements of supporters of the legislation, one cannot say with any degree of certainty whether Congress intended the revocation as a civil sanction or as a criminal punishment. Reasonable minds interpreting the statements and the rest of the legislative history could differ as to whether the intent of the sanction was regulatory or punitive.²⁹³ When two equally likely alternatives face the Court, one alternative rendering the legislation unconstitutional and the other rendering the legislation constitutional, the presumption of constitutionality the Court gives to congressional enactments compels it to find the legislation constitutional.²⁹⁴ Consequently, the state-

veterans have made to the prosperity and future of our nation."); 143 CONG. REC. H9838 (daily ed. Oct. 31, 1997) (statement of Rep. Skelton) (querying into reactions of family if government buried veteran next to convicted mass murderer in national cemetery).

291. See *Hearings*, *supra* note 24, at 1 (statement of Rep. Stump) ("This hearing is not simply about Timothy McVeigh. This hearing is about restricting burial rights in national cemeteries and entitlement to other VA benefits when a veteran commits a serious crime."); *id.* at 63 (statement of Rep. Bilirakis) ("The question before us today is whether or not the commission of other capital offenses by veterans should affect their eligibility for burial . . .").

292. See *id.* at 3 (statement of Rep. Bachus) ("This is bigger than Timothy McVeigh, and this should not be discussed as a bill which addresses Timothy McVeigh, because it does not."). Representative Bachus stated that he introduced legislation on the subject as a response to the actions of Henry Hays who received full military honors after the State of Alabama executed him in June of 1997 for the murder of a young boy. *Id.* Representative Bachus introduced his legislation shortly after a jury sentenced McVeigh to death. See Peter G. Chronis, *Military Burial Ban Faces House Hearings*, DENV. POST, June 24, 1997, at A2, available in 1997 WL 6077633 (noting introduction of Rep. Bachus's amendment).

293. Compare 143 CONG. REC. S5922-23 (daily ed. June 18, 1997) (statement of Sen. Specter) (aiming bill squarely at McVeigh) with 143 CONG. REC. H9839 (daily ed. Oct. 31, 1997) (statement of Rep. Bachus) (aiming bill at preserving sanctity of national cemeteries).

294. See *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (holding that if valid regulatory purpose for statute exists, evidence of punitive intent will not invalidate); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void." (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810))). For example, a federal court of appeals ruled that although there was some evidence of punitive intent, the court did not need to invalidate the statute. See *Jensen v. Heckler*, 766 F.2d 383, 386 (8th Cir. 1985). "Where, as here, the rational connection to nonpunitive ends remains a rationale for enacting this provision, a court should not reject all those alternatives . . . save that one which might require invalidation of the statute." *Id.* (citations and internal quotations omitted); see *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir. 1997) ("Indeed, even if the legislature's nonpunitive purpose was merely ancillary to another overriding or primary purpose of the statute, a court may conclude that the statute is not punitive."), *cert. denied*, 118 S. Ct. 1191 (1998); *Bae v.*

ments of a few legislators expressing a punitive intent will be insufficient for the clearest proof required to show punitive intent.²⁹⁵

b. Objective Standards

After examining Congress's intent and finding that the sanction in question is civil, a court would next examine the sanction to see if it is so punitive in form or effect to render it criminal despite Congress's intent.²⁹⁶ That inquiry generally involves using the seven factors listed in *Mendoza-Martinez*.²⁹⁷ It can also involve other factors, such as the mood and feelings of the country at the time of the statute's enactment.²⁹⁸ Although other cases may provide comparisons, the Supreme Court has stated that it will decide each Ex Post Facto Clause case on its own highly particularized context.²⁹⁹ The results of applying these factors must provide the clearest proof of punitive form and effect in order to override congressional intent and transform the sanction.³⁰⁰ Courts will examine the statute and its sanction on their faces.³⁰¹ Within these strict requirements, this subsection applies the guide-

Shalala, 44 F.3d 489, 494 (7th Cir. 1995) (finding that isolated statements of some congressmen do not constitute unmistakable evidence of legislative intent needed to indicate punitive intent); *Wiley v. Bowen*, 824 F.2d 1120, 1122 (D.C. Cir. 1987) ("In judging the constitutionality of the statute, however, we cannot lightly attribute to the Congress as a whole the impermissible motives of a few of its members.").

295. See *Graham v. Bowen*, 648 F. Supp. 298, 302 (S.D. Tex. 1986) ("The comments of a few members of congress do not taint the resulting statute. . . . The country is left to judge what they enacted, not what they said about it."); cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170-86 (1963) (using statements of dozens of legislators over 100 years to establish punitive intent of sanction).

296. See *United States v. Huss*, 7 F.3d 1444, 1447-48 (9th Cir. 1993) ("[The] legislature may not insulate itself from an ex post facto challenge simply by asserting that a statute's purpose is to regulate rather than punish prior conduct. The overall design and effect of the statute must bear out the non-punitive intent."); *Chen*, *supra* note 149, at 61 ("Total reliance on the purported subjective purpose of a legislature in defining constitutional protections would render those protections nugatory in most practical cases."); see also *Hudson v. United States*, 118 S. Ct. 488, 495-96 (1997) (examining effect and form of sanction after examining congressional intent); *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (examining effect and form of sanction despite finding congressional intent to be civil).

297. See *Hudson*, 118 S. Ct. at 493 ("In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez* . . . provide useful guideposts . . ." (citation omitted)).

298. See *Ward*, 448 U.S. at 249 (stating that list of factors is neither exhaustive nor dispositive); *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (citing *Cummings* when determining whether sanction was penalty disguised as civil sanction).

299. See *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) ("It is thus apparent that, though the governing criterion may be readily stated, each case has turned on its own highly particularized context.").

300. See *Hudson*, 118 S. Ct. at 493 (requiring clearest proof of punitive form and effect).

301. See *id.* (directing courts to examine statute on its face); *Weaver v. Graham*, 450 U.S. 24, 33 (1981) (noting that ex post facto inquiry "looks to the challenged provision, and not

posts from *Mendoza-Martinez* as well as other factors that the Supreme Court has used to determine whether a sanction is criminally punitive in either form or effect to the sanction that the Denial Act imposes.

(1) *The Mendoza-Martinez Factors*

The first *Mendoza-Martinez* factor courts examine is whether the sanction involves an affirmative disability or restraint.³⁰² The Denial Act bars McVeigh from burial in a national cemetery. A court could consider this an affirmative restraint, as he is restrained from doing something that he could have done prior to the statute's enactment. The Supreme Court, however, has limited the sanctions that meet this requirement to imprisonment.³⁰³ The disability or restraint that McVeigh faces is "certainly nothing approaching the 'infamous punishment' of imprisonment."³⁰⁴

Second, courts examine whether history has traditionally considered the sanction imposed to be punishment.³⁰⁵ History has not regarded the sanction imposed upon McVeigh, the revocation of a privilege voluntarily granted, as criminal punishment.³⁰⁶ However, Congress traditionally has reserved the denial of burial rights to those who have committed the most serious crimes.³⁰⁷ The Supreme Court has found similar reservations to be indicative of punitive

to . . . its effect on the particular individual"). This requirement has more effect in cases in which the sanction given is variable, such as a forfeiture sanction in which the amount forfeited in each case could vary depending on the circumstances. See *Hudson*, 118 S. Ct. at 492 (noting that amount of money varied based on violation of statute). That is not the case with the Denial Act because each person suffers the same sanction, regardless of the circumstances.

302. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (noting whether sanction provides affirmative restraint is indicia of punishment).

303. See *Hudson v. United States*, 118 S. Ct. 488, 496 (1997) ("[T]he sanctions imposed do not involve an 'affirmative disability or restraint,' as that term is normally understood."); see also *Cole v. United States Dep't of Agric.*, 133 F.3d 803, 805-07 (11th Cir. 1998) (limiting affirmative restraints to imprisonment). The Court does not consider all imprisonments, even if they are affirmative restraints, to be punishment. See *United States v. Salerno*, 481 U.S. 739, 749 (1987) (finding that courts do not consider detention prior to trial punishment).

304. See *Hudson*, 118 S. Ct. at 496 (quoting *Flemming*, 363 U.S. at 617) (comparing, in disparaging manner, monetary forfeiture with imprisonment).

305. See *Mendoza-Martinez*, 372 U.S. at 168 (noting Court uses traditional punishment factor to determine if sanction is criminal punishment).

306. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (noting that sanction is mere denial of noncontractual governmental benefit and, thus, nonpunitive); *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2 (1938) (finding that sanctions such as revocation of gratuitous benefits are characteristically free of punitive element); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (noting Court traditionally has not considered deportation to be punishment); *United States v. Landers*, 92 U.S. 77, 79-80 (1875) (finding statute imposing forfeiture of pay for desertion was not traditional punishment).

307. See 38 U.S.C. § 6105 (1997) (listing crimes commission of which results in forfeiture of veterans benefits, including burial rights).

effect.³⁰⁸ Like the denial of Social Security benefits in *Flemming*, however, it is unlikely that a court would find the denial of burial rights to be historical punishment.³⁰⁹

Third, a statute that requires scienter to impose the sanction in question creates an inference that it is punitive in form and effect.³¹⁰ The Denial Act itself does not include an element of scienter or intent.³¹¹ However, all state or federal capital crimes include scienter.³¹² Thus, conviction of the underlying offense that triggers the sanction requires intent. Therefore, a finding of scienter is necessary to impose the sanction.³¹³ The fact that Congress focuses the sanction on certain acts intentionally done is an indication of the punitive form of the sanction.³¹⁴

Fourth, if the law already punishes conduct subject to the sanctions in question as a crime, this provides further evidence of criminal punish-

308. See *United States v. Lovett*, 328 U.S. 303, 316 (1946) (finding that sanction was punitive because "Congress has only invoked [the sanction] for special types of odious and dangerous crimes").

309. See *Flemming*, 363 U.S. at 617 (finding revocation of Social Security benefits not traditionally punishment). But see *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) ("The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.").

310. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (noting that "whether [the sanction] comes into play only on a finding of scienter" is indication of punitive intent); *Ward v. Coleman*, 598 F.2d 1187, 1193 (10th Cir. 1979) (noting that lack of scienter element in statute in question was strong indicator of regulatory nature), *rev'd sub nom.* *United States v. Ward*, 448 U.S. 242 (1980).

311. See 38 U.S.C. § 2411 (imposing forfeiture on all veterans convicted of capital crime, regardless of intent).

312. See James R. Acker & C.S. Lanier, *The Dimensions of Capital Murder*, 29 CRIM. L. BULL. 379, 391 (1993) (noting that no state or federal capital crimes lack element of scienter). In 18 states, one can be convicted of capital felony murder, in which one does not have to intend to kill, but must intend to commit the underlying felony. *Id.*

313. See *Ward*, 598 F.2d at 1193 (noting that although Court found no scienter element in language of statute, in order for one to qualify for sanction, prosecution must show scienter-like elements).

314. See *Child Labor Tax Case*, 259 U.S. 20, 37-38 (1922) (noting congressional sanctions for intentional acts indicate punitive sanction). Of course, the special nature of the remedial purpose of the Denial Act may lessen the effect of this factor. If one accepts the remedial purpose, then it appears that Congress is trying to keep those who committed intentional crimes out of veterans' cemeteries in order to protect the cemeteries' sanctity. To then make the remedial purpose itself punitive merely because those sanctioned have committed an intentional act is circular. See *Weaver v. Graham*, 450 U.S. 24, 33 (1981) (noting that sanction of denial of social security benefits to incarcerated felons, most of whom probably committed intentional crimes, did not make sanction punishment for purposes of Ex Post Facto Clause); see also *Rowe v. Burton*, 884 F. Supp. 1372, 1378-79 (D. Alaska 1994) (finding that when sanction imposed only upon knowing wrongdoing by person effected, this is indication of punitive intent; but court also elected not to give factor much weight in analysis), *appeal dismissed*, *Doe I v. Burton*, 85 F.3d 635 (9th Cir. 1996) (unpublished table decision).

ment.³¹⁵ The fact that Congress or state legislatures have decided to punish conduct once is evidence that a second sanction is also criminal punishment.³¹⁶ In this case, the conduct for which the Denial Act imposes the denial of burial rights is almost exclusively conduct formally adjudged to be criminal.³¹⁷ Congress imposed the sanction only on those guilty of criminal conduct.³¹⁸ In some cases, Congress constitutionally can impose both criminal punishment and civil sanctions on the same act.³¹⁹ Therefore, the Supreme Court has deemed that the presence of this factor alone is insufficient to transform otherwise civil sanctions into criminal punishment.³²⁰

A sanction is criminal punishment when its operation promotes the traditional aims of punishment – retribution and deterrence.³²¹ This sanction

315. See *Mendoza-Martinez*, 372 U.S. at 168 (noting that "whether the behavior to which it applies is already a crime" is factor for analysis).

316. See *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 781 (1994) (finding that if sanction is conditioned upon commission of crime, this is significant of its penal and prohibitory intent); *United States v. Constantine*, 296 U.S. 287, 295 (1935) ("The condition of the imposition is the commission of a crime. This . . . is again significant of penal and prohibitory intent . . ."); *United States v. LaFranca*, 282 U.S. 568, 572 (1931) (finding that sanction for infraction of law is criminal punishment); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (finding fact that evidence of crime is necessary for sanction to be evidence of intent to punish); cf. *Kansas v. Hendricks*, 117 S. Ct. 2072, 2091 (1997) (Breyer, J., dissenting) (finding it important that conviction for criminal offense triggered sanction).

317. See 38 U.S.C. § 2411 (1997) (barring burial of those convicted of capital crimes). The Denial Act makes a small exception for those the Secretary finds to have committed a capital crime who are not convicted by virtue of death or flight. See *id.* (providing for administrative hearing to determine whether Secretary should impose sanction on certain veterans); see also *Young v. Weston*, 898 F. Supp. 744, 752 (W.D. Wash. 1995) (applying *Mendoza-Martinez* factors and finding that when statute "is expressly limited in its application to persons who have been convicted of a crime or who have been charged with a crime but found incompetent to stand trial or found not guilty by reason of insanity," this is indication of punitive form and effect).

318. See 38 U.S.C. § 2411 (imposing forfeiture only upon those who have committed federal and most state capital crimes).

319. See *United States v. Ward*, 448 U.S. 242, 250 (1980) (citing *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)) (noting that in some cases other factors, such as legislative history or form of statute, indicate that sanction is civil, even though "same conduct" factor points to criminal punishment); *Rowe*, 884 F. Supp. at 1379 (giving little weight to this factor).

320. See *Hudson v. United States*, 118 S. Ct. 488, 496 (1997) ("This fact is insufficient to render the money penalties and disbarment sanctions criminally punitive . . ."); *United States v. Ursery*, 116 S. Ct. 2135, 2148 (1996) (finding that this factor alone is not sufficient to make civil sanction punitive). Presumably, however, because the Court continues to include this factor in the analysis, its indication towards a finding of criminal punishment should be given some weight when combined with other factors. See *Hudson*, 118 S. Ct. at 500 (Souter, J., concurring) (noting that each factor could tip balance in extreme cases).

321. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (discussing "whether its operation will promote the traditional aims of punishment – retribution and deterrence"); *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (noting that classical purposes of punishment are to

is certainly retributive toward McVeigh.³²² Past criminal conduct prevents him from exercising a right previously earned through military service.³²³ However, because a court must examine the sanction on its face, not as applied to McVeigh, the court must ignore the sanction's retributive effect on McVeigh.³²⁴ On its face, the sanction would have a slight retributive effect by taking away a benefit for prior criminal conduct, the definition of retribution.³²⁵

The sanction is also a deterrent, though probably only a slight one. The loss of burial rights may slightly deter veterans who are considering committing a capital crime.³²⁶ Even though the deterrent factor indicates that the sanction is criminally punitive, the Supreme Court has discounted the weight that the Court will give this factor in the analysis.³²⁷ The Court has held that deterrence can serve both criminal and civil goals.³²⁸ In McVeigh's case, although the sanction may deter future wrongdoing, the civil deterrent would also serve to preserve the sanctity of the national cemeteries.³²⁹ Regardless, the possible deterrent effect of the statute is so small that it is negligible for the purposes of this analysis.³³⁰

Finally, if the court cannot assign rationally an alternative purpose to the statute, or if the sanction appears excessive in relation to the alternative

reprimand wrongdoer and to deter others); *United States v. Constantine*, 296 U.S. 287, 295 (1935) (finding that deterrent and retributive effects of sanction make it penalty); *Manocchio v. Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1992) (noting desire to deter is punitive goal).

322. *See supra* notes 260-95 and accompanying text (discussing whether Congress intended sanction to punish). Inquiring into whether a sanction is retributive is the same question as asking whether Congress intended the sanction to punish.

323. *See Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (stating that sanctions would be retributive if they affixed culpability for prior criminal conduct).

324. *See Mendoza-Martinez*, 372 U.S. at 169 (noting that courts must apply factors to statute facially).

325. *But see Hendricks*, 117 S. Ct. at 2082 (defining retributive sanction as that which affixes culpability for prior criminal conduct, turns on finding of scienter, and is triggered by criminal conviction).

326. *See Hudson v. United States*, 118 S. Ct. 488, 496 (1997) (stating that sanction is deterrent if it will "deter others from emulating petitioners' conduct").

327. *See id.* (discounting weight that Court will give factor).

328. *See id.* (stating that "deterrence 'may serve civil as well as criminal goals'" (citing *United States v. Ursery*, 116 S. Ct. 2135, 2149 (1996))); *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (noting that "forfeiture also serves a deterrent purpose distinct from any punitive purpose"); *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997) ("That a sanction has a deterrent purpose does not make it punitive."), *cert. denied*, 118 S. Ct. 1191 (1998).

329. *See Hudson*, 118 S. Ct. at 496 (linking criminal deterrent effect with civil deterrent effect).

330. *See Rowe v. Burton*, 884 F. Supp. 1372, 1379 (D. Alaska 1994) (noting that similar sanction has deterrent effect, but it is de minimis), *appeal dismissed*, *Doe I v. Burton*, 85 F.3d 635 (9th Cir. 1996) (unpublished table decision). It is improbable that the effect the Denial Act may have on a criminal's burial status will sway a criminal prior to the commission of a capital crime.

remedial purpose assigned, then the court will consider the statute criminal punishment.³³¹ If the sanction given is so out of proportion to a remedial purpose, a court will assume that the disproportionality is based on punitive intent.³³² A remedial purpose exists for the Denial Act – the protection of the sanctity of the National Cemetery System. It is not irrational to assign this purpose to the statute. In fact, some members of Congress declared this to be the purpose of the statute.³³³ This alternative purpose is not punitive. Rather, it is an exercise of the power to make rules for burial within national cemeteries.³³⁴ One cannot say that the sanction is out of proportion to the government's purpose. Indeed, the sanction is necessary to achieve that purpose.³³⁵ Specifically, if one defines "preserving the sanctity of national cemeteries" as preventing the burial of anyone who has committed a capital crime, then clearly the former requires the latter. Thus, this factor indicates that a court should consider the sanction in question to be remedial.

If a court were to apply the *Mendoza-Martinez* factors to the face of the statute, only three of the seven factors would indicate to the court that the sanction has the form of a civil remedy.³³⁶ This is not the clearest proof required to transform a sanction Congress intended to be civil into a criminal

331. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (listing last two factors for analysis).

332. See *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (finding that no other legitimate purpose exists for statute than to punish); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 318 (1866) (finding sanction of permanent occupational disbarment so disproportionate to alternative purpose that sanction must be punitive); see also *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (finding that action preventing special protection for homosexuals was so disproportionate that it must be animus-motivated). But see *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (noting that rational relationship exists between sanction and purposes of legislation); *Jensen v. Heckler*, 766 F.2d 383, 386 (8th Cir. 1985) (finding rational connection between sanction and permissible end); *Graham v. Bowen*, 648 F. Supp. 298, 303 (S.D. Tex. 1986) ("On the other hand, when the civil statute is supported by plausible (but less than compelling) purposes that are other than punitive, it will be upheld.").

333. See *supra* notes 289-92 and accompanying text (presenting legislative history for alternative purpose).

334. See 143 CONG. REC. H9838 (daily ed. Oct. 31, 1997) (statement of Rep. Quinn) (noting that Denial Act was "an exercise of the Congress' constitutional authority to prescribe eligibility for any veterans benefit").

335. See *Williamson v. Lee Optical*, 348 U.S. 483, 484 (1955) (noting that means must merely be related to ends to survive rational review). That the sanction is necessary to achieve the purpose places the statute on safe grounds for the purposes of rationality review. Cf. W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 223 (1960) (noting that object of immigration laws such as law in question in *Flemming* have same purpose – removal of evil effect – and punishment, if any exists, is merely inherent side effect and not independent object).

336. See *supra* notes 302-35 and accompanying text (finding that "similar conduct," "scienter," and "deterrent" factors point to criminal punishment, while "tradition," "affirmative restraint or disability," and "rational alternative that is not disproportionate" indicate civil remedy).

punishment.³³⁷ Before closing this analysis, however, a court should examine two factors in addition to those listed in *Mendoza-Martinez* to determine if it supports the sanction's civil or criminal character.³³⁸

(2) *Additional Factors*

(a) *The Nation's Mood*

Next, this Note examines the statute in this case to determine whether the mood of Congress and of the country was so vindictive after the bombing that anything Congress did immediately after McVeigh's trial that affects him directly was punishment.³³⁹ The bombing understandably outraged most citizens of the United States.³⁴⁰ This outrage took many forms. Congress almost immediately passed sweeping changes in antiterrorism, habeas corpus, and death penalty laws to ensure that the government would adequately punish any similar future crimes.³⁴¹ Even before the Department of Justice charged McVeigh, Attorney General Janet Reno announced that the Department of Justice would seek the death penalty against anyone convicted of the bombing.³⁴² The families of the victims, almost certainly seeking revenge against McVeigh, pushed both the legislative and executive branches to punish McVeigh and his co-conspirator, Terry Nichols, to the fullest extent of the law.³⁴³

The families of McVeigh's victims lobbied for the enactment of what eventually became the Denial Act.³⁴⁴ As in *Cummings*, it is unlikely that the

337. See *Hudson v. United States*, 118 S. Ct. 488, 496 (1997) (finding lack of clearest proof required to transform civil sanction into criminal punishment); *United States v. Ward*, 448 U.S. 242, 251 (1980) (requiring "clearest proof" that remedy is punitive in either purpose or effect).

338. See *Ward*, 448 U.S. at 249 (finding that *Mendoza-Martinez* factors are neither exhaustive nor dispositive in determining whether civil sanction is punitive in form or effect).

339. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866) (noting that Civil War had to affect passage of sanction during Civil War that directly affected Confederate sympathizers and that punitive intent from those that enacted sanction may have entered into amendment).

340. See Jack Kislring, *Ho, Hum, The Sky Is Falling*, DENV. POST, June 22, 1997, at D2, available in 1997 WL 6077330 (calling McVeigh "enemy of the people").

341. See Paul Queary, *When Victims' Families Talk, Congress Listens, Acts*, DENV. POST, June 20, 1997, at A11, available in 1997 WL 6077175 (noting that Oklahoma City bombing victims' families are pushing changes in federal law, including laws affecting military burial and death penalty appeals).

342. See Roberto Suro, *How a Federal Case Becomes a Capital Case; Secret Panel Must Weigh Legal Issues, Cost of Prosecution and Public Demands for Vengeance*, WASH. POST, Jan. 11, 1998, at A14, available in 1998 WL 2461431 (describing death penalty decision in Oklahoma City case).

343. See Queary, *supra* note 341, at A11 (noting that Oklahoma City bombing victims' families are pushing changes in federal law, including laws affecting military burial and death penalty appeals).

344. See Chronis, *supra* note 4, at A1 (quoting Senator Nickles from Oklahoma, who stated that possibility that McVeigh would be buried in national cemetery created "quite a furor");

punitive feelings which the country, the victims' families, and Congress felt toward McVeigh did not affect legislation enacted closely after his conviction.³⁴⁵ This type of excited action is precisely the type of legislation that the Ex Post Facto Clauses seek to prevent.³⁴⁶ This factor warrants consideration when determining whether the punitive effect of the sanction can transform it into a criminal penalty.

(b) *Bill of Attainder*

The Denial Act applies to a very small number of persons.³⁴⁷ House Bill 2040, the predecessor to the act in question, only applied to Timothy McVeigh and Terry Nichols.³⁴⁸ This feature requires analysis to determine whether the sanction's limited applicability makes it more likely to be criminal punishment.³⁴⁹

A bill of attainder is a bill that imposes punishment on an easily discernible class without the benefit of the protections of a judicial trial.³⁵⁰ The

Kisling, *supra* note 340, at D2 (noting influence of victims' families and that families would not "have put up with an idiotic hitch in the rules that would have let McVeigh be buried in a national cemetery"); Queary, *supra* note 341, at A1 (noting pressure from victims' families to pass legislation and prevent McVeigh's burial in national cemetery).

345. See *Flemming v. Nestor*, 363 U.S. 603, 615 (1960) (noting circumstantial evidence of mood and fierce passions aroused in country at time of enactment may show punitive intent); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866) ("It would have been strange, therefore, had [the amendment] not exhibited in its provisions some traces of the excitement admits which the convention held its deliberations.").

346. See *Cummings*, 71 U.S. (4 Wall.) at 322 ("It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810) ("Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment . . .").

347. See 143 CONG. REC. H9838 (daily ed. Oct. 31, 1997) (statement of Rep. Evans) (noting limited applicability of bill); see also Kenneth E. Johnson, Comment, *Limiting the Legislative Veto: Chadha v. Immigration and Naturalization Service*, 81 COLUM. L. REV. 1721, 1732 (1981) (noting that another sign of lack of procedural due process in statute would be its retrospective nature).

348. See *Hearings*, *supra* note 24, at 78 (statement of Johnny Killain, attorney for Congressional Research Service) (noting fact that only one person was subject to sanction from any bill Congress was considering).

349. See *California Dep't of Corrections v. Morales*, 514 U.S. 499, 520 (1995) (Stevens, J., dissenting) ("The narrower the class burdened by retroactive legislation, the greater the danger that the legislation has the characteristics of a bill of attainder.").

350. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977) (noting that bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial").

United States Constitution bars bills of attainder.³⁵¹ The Bill of Attainder Clauses, along with the Ex Post Facto Clauses, seek to limit the passions of the moment that the majority might feel toward a small minority, unprotected by the political process.³⁵² The framers intended the clauses to be a strong check on tyranny.³⁵³ The Denial Act, however, is not a bill of attainder because even if it inflicts punishment, it does so only after a judicial trial.³⁵⁴ However, the fact that the Denial Act imposes punishment on an easily discernible group while sanctioning a minority that the normal political process has left unprotected may prevent a court from applying it retrospectively to McVeigh.³⁵⁵

The protections of due process that are absent when Congress sanctions a small number of persons guard against the same potential for abuse as the Bill of Attainder Clauses.³⁵⁶ When Congress legislates against a small, select group of persons, courts question the presumption of procedural due process inherent in congressional enactments toward society as a whole.³⁵⁷ Only when

351. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from enacting bills of attainder).

352. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810) (noting protections of Bill of Attainder Clause). In *Fletcher*, Chief Justice Marshall wrote:

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State[,] included in which was the Bill of Attainder Clause.

Id.

353. See Jane Welsh, Note, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 85 (1983) ("There is no doubt that the Framers intended these provisions as powerful weapons against tyranny and basic to the social principles upon which the new nation was founded.").

354. 38 U.S.C. § 2411(b)(3) (1997). The Department of Veterans Affairs can impose the sanction after an administrative hearing, but procedural protections such as a higher burden of proof are present for the protection of the accused. *Id.* § 2411.

355. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (raising separation of power arguments over similar bill).

356. See *id.* (Powell, J., concurring) (noting tyranny that arises from bills of such specificity).

357. See *id.* (Powell, J., concurring) ("The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'"); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915) (finding that when rule of conduct applies to only few people, due process may

a statute applies to a larger number of people will a political check prevent Congress from acting vindictively.³⁵⁸

As noted above, however, the Denial Act is not a bill of attainder.³⁵⁹ Nor is it, strictly speaking, the type of statute that violates the Due Process Clause³⁶⁰ because it issues a rule of general applicability.³⁶¹ However, it does share enough factors in common with these two prohibited types of legislation to support the argument that the Denial Act's sanction lacks the essential protections of both the Bill of Attainder Clause and the Due Process Clause of the Fifth Amendment. This observation might give a court another factor to consider when determining whether the sanction as applied to McVeigh violates the Ex Post Facto Clause.³⁶²

3. The Result

When applying the *Mendoza-Martinez* test, the Supreme Court requires the clearest proof of either intent to punish or criminal punishment in form and effect.³⁶³ This clearest proof is necessary to overcome the presumption of constitutionality that the Court gives to each congressional enactment.³⁶⁴ This high standard leads to the conclusion that a court would find that the Denial Act does not impose criminal punishment on Timothy McVeigh and thus that applying the statute to him does not violate the federal Ex Post Facto Clause.³⁶⁵

require individualized hearings); *Londoner v. Denver*, 210 U.S. 373, 386 (1908) (finding that when legislation affects only small number of people, due process requires hearing).

358. See *Chadha*, 462 U.S. at 966 (Powell, J., concurring) (noting that when Congress sanctions individuals, normal political process does not check it).

359. See *supra* notes 347-55 and accompanying text (examining Denial Act and determining that it is not bill of attainder because those affected already had judicial trial).

360. See U.S. CONST. amend. V (barring deprivation of life, liberty, or property without due process of law).

361. See *Johnson*, *supra* note 347, at 1732 (noting that procedural due process cases apply only to statutes without general, across board applicability). Despite the small number of persons it affects, the Denial Act does apply to the population at large. It can render any veteran ineligible for burial in a national cemetery. See 38 U.S.C. § 2411 (1997) (placing limits on all applications for burial after enactment).

362. See *California Dep't of Corrections v. Morales*, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting) ("The danger of legislative overreaching against which the *Ex Post Facto* Clause protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers."); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (noting problems with legislating on rights of minuscule minority).

363. See *Fleming v. Nestor*, 363 U.S. 603, 617 (1960) (noting clearest proof standard).

364. See *id.* (noting presumption of constitutionality).

365. See *Cheh*, *supra* note 148, at 1358 (explaining that Supreme Court has never concluded that factors indicated punishment).

The legislative history and structure of the statute are inconclusive, and they do not clearly indicate a punitive purpose.³⁶⁶ Once a court has determined that the legislative intent of the law is civil, only the clearest proof of the punitive form and effect of the statute will transform the civil remedy into a criminal punishment.³⁶⁷ In recent years, the Court has marginalized the *Mendoza-Martinez* factors that indicate a punitive effect.³⁶⁸ McVeigh's case only satisfies a few factors³⁶⁹ and does not constitute the clearest proof that the Court requires to transform a civil remedy into criminal punishment.³⁷⁰ The additional factors that this Note identifies, including the mood of the country and the small number of persons that the act affects, likely are insufficient to create the clearest proof that the sanction is criminal punishment.³⁷¹

In sum, given the current state of the law, the Denial Act does not violate the federal Ex Post Facto Clause as applied to McVeigh because it does not criminally punish him. However, all the evidence of punitive intent and punitive effect³⁷² raises the question of whether an enactment of Congress too easily meets civil sanction standards. The remainder of this Note develops a new test that courts should adopt which would recognize the benefits of some retrospective legislation but would prevent Congress from enacting legislation that violates the core of the Ex Post Facto Clauses.

IV. A New Analysis

The *Mendoza-Martinez* analysis, which the Court revived in *Hudson*, is susceptible to abuse.³⁷³ It is easy for legislatures to evade any kind of meaningful scrutiny by placing a civil label on the sanction, settling the Court's debate on congressional intent.³⁷⁴ Even if Congress fails to do so, the Court's

366. See *supra* notes 260-95 and accompanying text (exploring legislative history in detail).

367. See *Hudson v. United States*, 118 S. Ct. 488, 493 (1997) (stating standard for objective *Mendoza-Martinez* factors).

368. See *supra* notes 316-20 and accompanying text (noting lessening emphasis on some *Mendoza-Martinez* factors).

369. See *supra* notes 302-38 and accompanying text (applying *Mendoza-Martinez* factors to Denial Act and concluding that only three indicate punitive effect).

370. See *Hudson*, 118 S. Ct. at 496 (finding statute civil despite its fitting into two factors).

371. See *Flemming v. Nestor*, 363 U.S. 603, 620 (1960) (requiring overwhelming evidence for civil sanction to transform into criminal sanction and violate Ex Post Facto Clauses).

372. See *supra* notes 273-88, 316-20 and accompanying text (presenting evidence of punitive intent from legislative history and three *Mendoza-Martinez* factors that indicate punitive effect).

373. See *Ricciardi & Sinclair*, *supra* note 21, at 325 (noting that courts or Congress can recharacterize any criminal law as civil).

374. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (accepting civil label as dispositive); see also *infra* notes 404-13 and accompanying text (discussing problem of manipulating legislative history).

disdain for using legislative history to determine intent and the presumption of constitutionality that the Court gives to congressional enactments will almost certainly render a finding of nonpunitive intent.³⁷⁵ On the objective side of the analysis, the Supreme Court's application of some of the standards makes any challenge that does not involve imprisonment an uphill battle.³⁷⁶ The Court's requirement that the challenger of a statute prove the punitive effect of a statute with the clearest evidence has made it quite difficult to support a nonimprisonment *ex post facto* claim.³⁷⁷ This potential for abuse should prompt the courts to reconsider the *Mendoza-Martinez* factors and to develop a new standard for determining whether a civil sanction is punitive in intent or effect. After examining what the framers intended when they drafted the Ex Post Facto Clauses and after analyzing the problems with the *Mendoza-Martinez* test, this Part proposes a new standard for approaching the Ex Post Facto Clauses. This new standard relies less on what Congress says and more on the objective factors that more truly indicate whether the statute criminally punishes a particular individual.

A. The Framers' Intent

In *Calder*, Justice Chase assumed that the framers, when drafting the Ex Post Facto Clauses, intended to incorporate the English definition of "ex post facto."³⁷⁸ He thus limited its application to laws that adjudge a greater criminal punishment than the person would have received for actions committed prior to the statute's enactment.³⁷⁹ Although Justice Chase wrote only eleven years after the drafting of the Constitution, he may have misinterpreted the framers' intent for the Ex Post Facto Clauses.³⁸⁰ This subpart provides a brief evaluation of the protection the clauses were to contribute to provide background when creating a new standard to judge whether sanctions are civil or criminal.

The framers included the clauses in the Constitution to prevent arbitrary and vindictive legislation.³⁸¹ They also included them to prevent legislators

375. See *supra* notes 122-32 and accompanying text (discussing obstacles for claims attacking legislative history).

376. See *infra* note 414 and accompanying text (noting definition of "traditional punishment" and "affirmative restraints").

377. See *infra* notes 417-21 and accompanying text (noting standard for challenging on punitive effect of sanction).

378. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (accepting English definition of *ex post facto* laws).

379. See *id.* at 390 (limiting clause to laws that criminally punish).

380. See *Field*, *supra* note 52, at 317 (noting possibility of another interpretation of framers' intent).

381. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (arguing that clauses restrain power of legislature over lives and fortunes of individuals); *Calder*, 3 U.S. (3 Dall.) at 391 (stating that clauses protect against laws that are unjust and oppressive); Aiken, *supra* note

from punishing in order to maintain separation of powers.³⁸² To allow ex post facto laws would allow the legislature, in times of turmoil, to infringe upon the rights of an individual in a most insidious way.³⁸³ In *Calder*, Justice Chase limited the rights that the clauses protect to the ability to avoid retroactive criminal punishment.³⁸⁴ However, it is likely that the framers intended to protect property rights as well.³⁸⁵

History provides little evidence that the framers intended for the clauses to have the technical definition that *Calder* gives to them.³⁸⁶ The text of the clauses makes no distinction between civil and criminal laws.³⁸⁷ Some evidence exists, however, that the framers included the Ex Post Facto Clauses to prevent the retroactive application of civil as well as criminal laws.³⁸⁸ In debates on the clauses, the framers made few distinctions between civil and criminal retroactive laws.³⁸⁹ In fact, they used retrospective civil sanctions as examples of the evils of ex post facto laws.³⁹⁰ Therefore, several scholars have suggested that *Calder* was wrong when it interpreted the intent of the framers.³⁹¹

After *Calder*, several Justices argued for a more expansive interpretation of the Ex Post Facto Clauses that was consistent with the purposes of the

13, at 324 ("Such laws place the citizens at the mercy of the government, unable to know the consequences of their acts and constantly subject to the possibility of legislative vindictiveness.").

382. See Aiken, *supra* note 13, at 329 (noting role of clauses in separation of powers).

383. See *id.* (stating protection of liberty in clause).

384. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) ("I do not think [the clause] was inserted to secure the citizen in his private rights, of either property, or contracts."); see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1312 n.324 (1970) (noting Justices in *Calder* expected other constitutional provisions to play stronger role in protecting against retrospective legislation than they presently do).

385. See Field, *supra* note 52, at 322 ("Protections such as these were considered as essential to liberty as the personal liberty of citizens. Property protection was as vital as personal protection.").

386. See *id.* at 321 ("[T]here is not a single mention of the practice of the British Parliament to which Justice Chase referred in his opinion in *Calder v. Bull*.").

387. See *id.* (noting lack of textual distinction between civil and criminal penalties).

388. See *id.* at 319-20 (stating that Madison believed clause applied to civil as well as criminal laws and noting evidence that framers used terms ex post facto and retrospective synonymously).

389. See *id.* at 327 (noting lack of distinction between criminal and civil laws).

390. See Ricciardi & Sinclair, *supra* note 21, at 305-06 (noting that Madison used retrospective and ex post facto interchangeably and noting that many drafters thought impairing of obligations of contract would be ex post facto law).

391. See William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 547 (1946) (stating that framers intended clauses to apply to civil legislation); Field, *supra* note 52, at 328 (same).

clauses and the framers' intent.³⁹² For example, in *Fletcher*, Chief Justice Marshall applied the state Ex Post Facto Clause to a civil statute without reference to *Calder*, apparently concluding that the clauses applied to both criminal and civil legislative enactments.³⁹³ In an opinion written almost thirty years after *Calder*, Justice Johnson argued that the Court should apply the clauses to civil legislation.³⁹⁴ He added that *Calder* leaves "a large class of arbitrary legislative acts without the prohibitions of the constitution."³⁹⁵ Justice Johnson argued that the Court should not read Justice Chase's opinion in *Calder* as the holding of the case and that the history of the clauses suggests that they are equally applicable to civil legislation.³⁹⁶ Nonetheless, because of the precedential value of *Calder*, Justice Johnson concurred in *Calder's* treatment of civil sanctions.³⁹⁷

Calder's criminal/civil distinction has existed too long to argue that the Supreme Court should overturn it.³⁹⁸ Not only is *Calder* long-standing precedent,³⁹⁹ but even the framers agreed that some retrospective civil laws were necessary for the efficient operation of government.⁴⁰⁰ The argument over the validity of *Calder* and the framers' concern with retrospective civil legisla-

392. See *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 (1829) (Johnson, J., concurring) (arguing against *Calder's* limitations on clauses); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810) (applying Ex Post Facto Clauses to civil statute).

393. See *supra* notes 58-68 and accompanying text (noting Chief Justice Marshall's application of clauses to statute without first limiting or distinguishing *Calder*).

394. See *Satterlee*, 27 U.S. (2 Pet.) at 416 (Johnson, J., concurring) (calling application of clauses to criminal laws "unhappy idea").

395. *Id.*

396. See *id.* at 681 (Johnson, J., appending) (listing reasons that *Calder* is not authority for Ex Post Facto Clauses and is wrongly decided if it is).

397. See *id.* at 416 (Johnson, J., concurring) (deciding on basis of precedent to concur in judgment).

398. See *Collins v. Youngblood*, 497 U.S. 37, 41 n.2 (1990) (noting debate about accuracy of *Calder* but electing to adhere to view expressed by Justice Chase); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (noting that Ex Post Facto Clauses only applied to criminal punishment, and although that doctrine may be debatable, scholars and courts have considered subject closed for many years and body of statutory law has grown up around that doctrine). *But see* *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2154 (1998) (Thomas, J., concurring) ("In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.").

399. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864-68 (1992) (discussing importance of precedent).

400. See Aiken, *supra* note 13, at 332 (noting that framers conceded that at times, retroactive civil laws may be necessary); *cf.* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994) (noting benefits of retrospective laws, including responding to emergencies, correcting mistakes, preventing circumvention of new statutes in intervals immediately preceding their passage, or giving comprehensive effect to new laws Congress considers salutary).

tion, however, provides some perspective when analyzing the current permissive standard that allows most retrospective civil sanctions to stand.⁴⁰¹

B. Problems with the Current Standard

Even though the Supreme Court recognizes a distinction between civil and criminal legislation, a searching determination of whether Congress intended a sanction to be criminal and whether the sanction was criminal in effect would eliminate most of the legislation that violates the policies behind the clauses.⁴⁰² The current standard does not provide such a searching inquiry. The Supreme Court has never invalidated a law under the Ex Post Facto Clauses using the *Mendoza-Martinez* factors.⁴⁰³ Several aspects of the current test prevent the revealing, evenhanded inquiry into retrospective legislation that the Ex Post Facto Clauses demand.

The first half of the *Mendoza-Martinez* analysis allows Congress to label a sanction as civil and to avoid any searching constitutional inquiry.⁴⁰⁴ Even if Congress fails to place a "civil" label within a statute, its knowledge of the constitutional standard used in determining civil or criminal intent provides a large incentive for congressmen to use legislative history to deceive the courts as to true congressional intent.⁴⁰⁵ For example, the House of Representatives's Committee on Veterans Affairs had an attorney from the Congressional Research Service testify concerning the Denial Act.⁴⁰⁶ He informed Congress that courts would examine the legislative history of any act that might come out of these hearings for criminally punitive intent.⁴⁰⁷ Immediately after the attorney completed his explanation, one congressman remarked, for the

401. See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2143 (1996) ("[T]he Court has sanctioned legislative flexibility in the civil context, permitting the legislature to trample upon the reliance interests of individuals and companies almost at will.").

402. See Aiken, *supra* note 13, at 359 (arguing for stricter application of civil/criminal distinction to ex post facto challenges).

403. See Cheh, *supra* note 148, at 1358 (noting that Supreme Court has never relied upon factors to invalidate law as criminal punishment); see also Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1505 (1975) ("[C]ourts have all too often failed to consider the possibility that retroactive punishments imposed outside the criminal process are as unjust and as potentially abusive as those imposed within the criminal process.").

404. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (noting that civil label is not dispositive, but clearest proof of punitive effect required to overrule).

405. See Ricciardi & Sinclair, *supra* note 21, at 325 (arguing that Congress can reword any criminal sanction as remedial).

406. See *Hearings*, *supra* note 24, at 15-26 (statement of Johnny Killain, attorney for Congressional Research Service) (discussing potential constitutional ramification of House Bill 2040 and Senate Bill 923).

407. See *id.* at 16-17 (explaining to members of Congress that court may examine legislative history in search of hostility or punitive intent).

record, that the intent of the bill was to preserve the sanctity of national cemeteries, not to punish McVeigh.⁴⁰⁸ Several other congressmen followed suit as the hearing continued.⁴⁰⁹ This example suggests that Congress can easily fabricate its intent.⁴¹⁰ It is just as easy to place a label within the text of a bill as it is to fabricate legislative history in a committee hearing. This is especially true once Congress understands that the constitutionality of a bill may depend upon its label. No rational Congress would ever place a criminal label on a retrospective bill.⁴¹¹ Despite this possibility, courts will accept a congressional label as unmistakable evidence of a civil sanction.⁴¹² The current standard gives the legislature the power to determine when it violates the Ex Post Facto Clauses. It should come as no surprise, then, that it hardly ever does.⁴¹³ This power seems odd considering that the framers included the clauses to prevent legislative abuse.

Another problem with the Court's standard lies in the objective portion of the *Mendoza-Martinez* test. The Court will not classify any sanction other than imprisonment as punishment for two of the standards in that test.⁴¹⁴ Therefore, any challenge not including imprisonment enters the analysis with little chance of demonstrating the "clearest proof" of punitive effect.⁴¹⁵ Congress imposes a rising number of civil sanctions not involving imprisonment that regulate the actions of individuals, and it is likely that some of these may be criminally punitive in effect.⁴¹⁶ Yet, under the Court's current rationale,

408. See *id.* at 17 (statement of Rep. Evans) (stating that purpose of sanction was remedial).

409. See *id.* at 18-21 (noting remedial nature of bill).

410. See J. David Guerrero, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas*, 62 BROOK. L. REV. 1217, 1259 (1996) (noting that loose standards give too great of opportunity for legislative abuse).

411. See Sean M. Dunn, Note, *United States v. Ursery: Drug Offenders Forfeit Their Fifth Amendment Rights*, 46 AM. U. L. REV. 1207, 1241 (1997) (noting leeway Congress has in fabricating intent when Court only subjects it to "clearest proof" standard); Guerrero, *supra* note 410, at 1259 (noting ease with which Congress can fabricate intent); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1016 (1992) (noting ease with which Congress can create legislative history to fool judges).

412. See *Hudson v. United States*, 118 S. Ct. 488, 495 (1997) (accepting civil label).

413. See Aiken, *supra* note 13, at 333 (noting lack of success for challengers of civil sanctions on ex post facto grounds).

414. See *Hudson*, 118 S. Ct. at 495-96 (applying "affirmative disability" and "traditional punishment" tests to money forfeiture and concluding that because money forfeiture is not imprisonment, sanction is not punishment).

415. See *id.* at 496 (finding that sanction was civil even though two factors pointed toward punitive effect).

416. See Cheh, *supra* note 148, at 1333 (noting congressional use of civil sanctions); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*,

a challenger to a sanction that does not include imprisonment faces an almost impossible burden. At a time when Congress's opportunities for abuse are rising, the courts should use a test that can adequately confront the evils that the framers believed the Ex Post Facto Clauses prohibited.

Finally, courts can easily manipulate the *Mendoza-Martinez* test.⁴¹⁷ A court can focus on one of the factors indicating a civil sanction and subsequently discount any other factors that point toward a punitive effect.⁴¹⁸ The "clearest proof" standard allows this manipulation⁴¹⁹ because a court can always claim that Congress did not provide the clearest proof of punitive effect as long as one factor indicates a remedial effect. It is impossible to prevent manipulation of a factor test when applied by determined judges.⁴²⁰ By making the factors more accessible to challengers of sanctions, however, that manipulation will become more difficult.⁴²¹

All these problems reveal themselves in the case study of the Denial Act.⁴²² Congress announced a remedial purpose for the bill after learning that it must do so in order for the act to survive a constitutional challenge.⁴²³ Even

101 YALE L.J. 1795, 1801, 1844 (1992) (noting increase in civil sanctions in legislation and increase in agency use of civil sanctions); see also Debra Marie Ingraham, Note, *Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject Healy?*, 54 WASH. & LEE L. REV. 1183, 1188 (1997) (noting growth in number of civil sanctions authorized by regulatory legislation).

417. See Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 469 (1993) (noting ease with which court can manipulate standards to reach morally based judgments).

418. See Laurent B. Frantz, *Is the First Amendment Law? – A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 747-49 (1963) (noting that standards can always produce desired result); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 373-77 (1989) (noting ease with which courts can manipulate factors involving legislative history); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391-94 (1995) (noting courts will "transmogrify" standards in order to achieve desired result); cf. *Hudson v. United States*, 118 S. Ct. 488, 501 (1997) (Breyer, J., concurring) (arguing that Court should drop "clearest proof" standard).

419. See Erik Grant Luna, *Fiction Trumps Innocence: The Bennis Court's Constitutional House of Cards*, 49 STAN. L. REV. 409, 426 (1997) (calling clearest proof standard an "injuriouly high threshold"); Amy D. Ronner, *Prometheus Unbound: Accepting a Mythless Concept of Civil In Rem Forfeiture with Double Jeopardy Protection*, 44 BUFF. L. REV. 655, 762 (1996) (noting that clearest proof standard allows Court merely to pay lip service to *Mendoza-Martinez* factors).

420. See Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743, 751 (1994) (noting courts will always impose own beliefs of right and wrong onto multifactor test, no matter what factors are).

421. See Aiken, *supra* note 13, at 360 (arguing that Court should make factors more accessible to challengers of laws).

422. See *supra* Part III.

423. See *supra* notes 404-13 and accompanying text (showing possibility of faking remedial intent).

if the statement of remedial purpose was completely false, that statement plus the placement of the statute in Title 38 of the United States Code probably is enough to establish a remedial intent, despite other punitive legislative history.⁴²⁴ The statute does not provide the clearest objective proof of punitive form and effect because it does not involve imprisonment.⁴²⁵ Congress's ability to manipulate the standards, the Court's limited definition of "traditional punishment," and the "clearest proof" standard make it very difficult to prove that a statute is criminally punitive, even if it has many punitive traits. Recognizing these flaws, courts should develop a new standard that emphasizes factors which truly indicate whether Congress intended the statute to punish and whether the statute has punitive effects.

C. *A Move Toward an Objective Standard*

Because of the viability of *Calder*, the Ex Post Facto Clauses will continue to apply only to criminal laws and to laws that are so punitive that the courts consider them criminal punishments.⁴²⁶ As noted above, however, the difference in the current interpretation of the clauses and the policies behind the clauses presents a strong case that courts should use a new standard that courts and Congress can less easily manipulate.⁴²⁷ A new standard is especially important with the current congressional trend toward imposing more and more civil sanctions to regulate the activity of individuals.⁴²⁸

The two-part standard that courts now use will work with some revisions. If Congress intended the sanction to punish, or the sanction has punitive form and effect, it is criminal punishment.⁴²⁹ The Supreme Court has previously defined punitive intent as the desire to sanction the person affected rather than to regulate the activity affected.⁴³⁰ This distinction is without definition and

424. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (requiring clearest proof of legislative intent to punish).

425. See *supra* notes 417-21 and accompanying text (showing difficulty in establishing clearest proof of punitive form and effect).

426. See *Russell v. Gregoire*, 124 F.3d 1079, 1083 (9th Cir. 1997) (noting application of clause to civil sanctions that courts consider punishment), *cert. denied*, 118 S. Ct. 1191 (1998).

427. See *supra* notes 404-21 and accompanying text (presenting problems with current ex post facto jurisprudence).

428. See *supra* note 416 and accompanying text (discussing rise in civil sanctions).

429. See Aiken, *supra* note 13, at 360 (noting both subjective and objective standards indicate punishment); Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1670-78 (1980) (noting intent and effects are two key components of punishment).

430. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (noting definition of punishment); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 484 (1978) ("[C]ourts should instead focus on the danger that those enacting the new procedures did so with knowledge of whom they would adversely affect and how.").

is thus essentially meaningless. Any attempt to regulate an activity necessarily sanctions the person performing the activity. Likewise, any attempt to sanction an individual regulates the activity for which the individual is being sanctioned. It is almost impossible to accomplish one without the other. Instead of using this vacuous phrase, courts should focus instead on whether Congress was, or intended to be, vindictive.⁴³¹

Courts should analyze indicia of punitive intent with this in mind and should place little emphasis upon legislative history that members of Congress can manipulate.⁴³² The courts should focus on objective manifestations of vindictive congressional intent, such as evidence of outside pressure to punish an individual,⁴³³ evidence of the mood of the country which is so overwhelming that it presumptively affects Congress,⁴³⁴ prior versions of the same legislation,⁴³⁵ the form and structure of the statute enacted,⁴³⁶ and the number of people that the sanction affects.⁴³⁷ Courts should also consider some evidence that Congress could potentially manipulate. Courts should examine such evidence closely, however, in order to determine if legislators have offered it solely to prevail in a constitutional challenge.⁴³⁸

Second, because of the important policies behind the Ex Post Facto Clauses, courts should eliminate the high burden placed on proving a civil sanction's criminally punitive nature.⁴³⁹ The framers included the clauses in

431. See *Cummings*, 71 U.S. (4 Wall.) at 327 (noting vindictiveness of legislation shows its criminally punitive nature); Aiken, *supra* note 13, at 361 (finding that vindictiveness can be shown when bill is directed at certain individuals or when legislatures know that sanctions will harm specific individuals); Ely, *supra* note 384, at 1303 n.293 (noting that investigations into legislative motivation for vindictiveness may be necessary under certain circumstances).

432. See *supra* notes 406-13 and accompanying text (citing potential problem of doctoring legislative history). Examples of such legislative history would be statements at committee hearings and labels placed within the text of a statute.

433. See *supra* note 344 and accompanying text (discussing pressure from families of victims of bombing to enact legislation preventing McVeigh's burial in national cemetery).

434. See *Cummings*, 71 U.S. (4 Wall.) at 322 (noting that harsh, retributive feelings from Civil War had to affect state constitutional amendment).

435. See *supra* notes 260-69 and accompanying text (discussing how previous versions of Denial Act can indicate punitive intent).

436. See *Russell v. Gregoire*, 124 F.3d 1079, 1087 (9th Cir. 1997) (discussing form and structure of community notification act in determining if there was punitive effect), *cert. denied*, 118 S. Ct. 1191 (1998).

437. See *supra* notes 347-58 and accompanying text (presenting problems with legislation that affects small number of persons).

438. See Aiken, *supra* note 13, at 360 (arguing that retrospective laws should be subject to more stringent scrutiny).

439. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 88 (1997) (arguing that courts should scrutinize more strictly laws that affect solely discrete and insular minorities because they reflect prejudices that render democratic process

order to curb legislative abuse.⁴⁴⁰ Yet the "clearest proof" requirement makes it too difficult to establish that this legislative abuse has taken place.⁴⁴¹ Eliminating the "clearest proof" requirement would make a challenger of a sanction prove by a preponderance of the evidence that Congress intended to punish.⁴⁴²

If one cannot prove through objective evidence that Congress had a punitive intent, the challenger should have an opportunity to prove that the statute was punitive in form and effect using the *Mendoza-Martinez* factors.⁴⁴³ The courts must recognize, however, that traditional punishment and affirmative restraints involve more than imprisonment.⁴⁴⁴ Under the revised test, a sanction could meet those standards any time that the government prevents an individual from exercising a right that he could have exercised prior to the law's enactment.⁴⁴⁵

These changes will reduce the ability of the courts to manipulate the standards. The courts will no longer be able to hide behind one or two *Mendoza-Martinez* standards and claim that the challenger did not present enough evidence of punitive form and effect to meet the "clearest proof" burden.⁴⁴⁶

This new objective test would not change the result every time someone challenges a retrospective civil sanction as a violation of the Ex Post Facto Clauses. It should not invalidate all retrospective sanctions, because there are some benefits to certain limited retrospective laws.⁴⁴⁷ In fact, the new objective test may not change the result if McVeigh were to challenge the Denial Act.⁴⁴⁸ It would, however, make it easier to strike down retrospective civil

untrustworthy). Laws directed against McVeigh are arguably as untrustworthy as any law affecting a discrete and insular minority.

440. See *supra* notes 386-91 and accompanying text (discussing framers' intent for clauses).

441. See *supra* notes 417-21 and accompanying text (describing problems with "clearest proof" standard).

442. See Aiken, *supra* note 13, at 333 (noting framers did not contemplate high standard).

443. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (giving opportunity to prove punitive form and effect).

444. See *United States v. Austin*, 509 U.S. 602, 613-16 (1993) (noting that governments have used punishments other than imprisonment throughout history).

445. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (noting punishment involves more than loss of liberty).

446. See *Hudson v. United States*, 118 S. Ct. 488, 496 (1997) (using two *Mendoza-Martinez* factors to prevent transformation into criminal punishment); *Mendoza-Martinez*, 372 U.S. at 169 (requiring clearest proof of punitive form and effect to transform intended civil sanction into criminal punishment).

447. See Aiken, *supra* note 13, at 360 (noting flexibility in government requires some retrospective laws).

448. See *supra* notes 297-338 and accompanying text (applying traditional factors to Denial Act). Because the courts would discount most congressional speeches as easily manipu-

legislation, especially legislation with clear objective indications of vindictiveness. This is precisely what the framers intended the Ex Post Facto Clauses to do.⁴⁴⁹

V. Conclusion

The framers included the Ex Post Facto Clauses in the Constitution to prevent the enactment of vindictive retrospective legislation. It is arguable whether the framers intended the clauses to cover all laws or merely those laws that imposed criminal punishment. Regardless, the clauses presently cover only retrospective criminal laws. However, the Supreme Court provided some grounds for those who sought to have civil sanctions overturned on ex post facto grounds. If a challenger could clearly prove that a civil sanction was a criminal punishment in disguise, the Court would invalidate it. The Court eventually began testing both the intent and the effects of the sanction to determine if a civil sanction was a criminal punishment.

The application of the Court's test to the Denial Act reveals that the test may be too burdensome for a challenger. The factors in the test are stacked against a challenger of a sanction. The test relies too heavily on easily manipulated indicia of congressional intent. In the objective half of the test, two factors are almost impossible to meet. Finally, the clearest proof requirement has made it easy for a court to manipulate the factors to determine the outcome. The Supreme Court must change the test in order to protect fully against the kind of arbitrary and vindictive legislation that the clauses exist to prevent. This Note suggests one possible solution – a new test that would use objective indicia to provide a clearer view of whether the sanction in question is truly criminal punishment.

lated, the intent test would focus on whether outside indicia of punishment could overcome those discounted speeches and other indications of a civil intent. The effect test would generally be the same because although this is probably an affirmative restraint, even under a liberalized view it is not a traditional form of punishment.

449. See Aiken, *supra* note 13, at 324 (noting purpose of Ex Post Facto Clauses).