NOTE

CONSOLIDATED EDISON CO. of NEW YORK, INC. v. PATAKI

I. INTRODUCTION

Since entering into a 1997 settlement agreement, the Consolidated Edison Company of New York (Con Ed) had been permitted to utilize a fuel adjustment clause (FAC) to pass through costs to its ratepayers. In February 2000, a steam tube failure occurred inside the Indian Point 2 generator of Con Ed's Indian Point Nuclear plant, necessitating the facilities emergency shut down. Con Ed was forced to purchase replacement power for the lost generating capacity while the plant remained offline at a cost of roughly $200 million dollars.

Con Ed quickly began to pass replacement power costs on to ratepayers via the 1997 FAC arrangement and in March of 2000, the New York Public Service Commission (NYPSC) commenced a prudence review.[1] Shortly thereafter and *prior* to the completion of the prudence review, the New York legislature passed the Indian Point 2 Nuclear Facility-Radiation Leak-Recovery Act (Indian Point Law).[2] The Indian Point Law terminated Con Ed's use of the FAC to recover replacement power costs, finding that imprudent operation of the Indian Point Nuclear plant by Con Ed had necessitated the shut down.

Con Ed claimed that the legislature's action was an unconstitutional bill of attainder[3] and amounted to a punitive freeze on proper recovery of costs from ratepayers via the FAC. The utility prevailed in a suit brought on these grounds in the United States District Court for the Northern District of New York.[4] On appeal, the Second Circuit Court of Appeals affirmed the district court ruling.

The Supreme Court has yet to directly address the applicability of the bill of attainder clause to corporations, however, the Court has signaled support for such a construction. The Second Circuit seized on this favorable Supreme Court dicta and two decades of corporate constitutional development to extend bill of attainder protection into the realm of corporate law.[5] The approach taken by the

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1. In New York, the Public Service Commission (NYPSC) is the utility regulatory agency. *See generally* N.Y. Pub. Serv. Law § 66(12)(k) (2001). Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 261 (N.D.N.Y. 2000).

2. Indian Point 2 Nuclear Facility-Radiation Leak-Recovery Act, ch. 190, 2000 N.Y. Laws 739.

3. "No State shall . . . pass any bill of attainder." U.S. CONST. art. I, § 10.

4. Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 257 (N.D.N.Y. 2000).

5. Three principal Supreme Court cases, cited by the Con Ed court, shed indirect light upon the scope of the definition of "individual." Plaut v. Spendthrift Farms, Inc., 514 U.S. 211(1995); South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Lovett, 328 U.S. 303 (1946). Beginning with *Lovett* in 1946, the Supreme Court recognized that "named individuals or . . . ascertainable members of a group" might be the subject of punishment inflicted by a statute in violation of the Bill of Attainder Clause. The specific use of the "group" label was continued in 1966 with the Supreme Court's dicta in *South Carolina v. Katzenbach*. In *Katzenbach*, the high court stated that "the Bill of Attainder Clause of Article I and the principle of the separation of powers only [protect] individual persons and *private groups*, those who are peculiarly vulnerable to non-judicial determinations of guilt." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (emphasis

Second Circuit reaffirmed not only the validity of the bill of attainder clause in modern jurisprudence, but also the Supreme Court's broad interpretation of the clause *United States v. Brown*.[6]

The Second Circuit considered two principal issues. The first and threshold issue was whether the bill of attainder clause was a purely personal guarantee, such that corporations as non-natural persons are excluded from the protections afforded by the clause.[7] The Con Ed court also considered whether the Indian Point Law satisfied the punishment element under the traditional bill of analysis. Here, the relationship between the statute and the costs incurred by the utility as a result of the plant shut down were crucial.

This note will address the application and scope of the bill of attainder clause as it relates to this case, with particular focus on the availability of such a legal theory for corporate plaintiffs seeking to challenge legislative enactments. Before treating the underlying facts of the Con Ed case in greater detail, a brief background on the history and application of the bill of attainder clause is in order.

II. BILL OF ATTAINDER THEORY

A. Historical Perspective of the Bill of Attainder

During the sixteenth, seventeenth, and eighteen centuries in England, a bill of attainder was a parliamentary death sentence for people who sought or threatened to overthrow the government.[8] America's thirteen colonies continued the bill of attainder tradition, particularly during the revolutionary period.[9] English law also included a provision for bills of pains and penalties.[10] Such bills exacted punishment less than death, primarily involving confiscation of property. The American concept of bill of attainder protection developed to encompass both death and property confiscation as banned forms of legislative punishment.[11] Additionally, the English common law recognized that corporations (the historical equivalent) could suffer property deprivation akin to the modern concept of a taking. Presumably, the American system would have included such concepts as well.

The founding fathers banned the use of bills of attainder. The drafters

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added). Most recently, the Supreme Court in *Plaut v. Spendthrift Farms, Inc.* stated that "laws that impose a duty or liability upon a single individual or *firm*" are within the definition of an unconstitutional Bill of Attainder. Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 239 (1995) (emphasis added).

6. United States v. Brown, 381 U.S. 437, 442 (1965).

7. The scope of "individual" is central to the traditional three-prong test, set forth by the United States Supreme Court in *Nixon v. Adm'r of Gen. Servs.* The three-prong test states that a statute can be a bill of attainder only if (1) it "determines guilt and inflicts punishment," (2) "upon an identifiable individual," and (3) "without provision of the protections of a judicial trial." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

8. *See generally* United States v. Brown, 381 U.S. 437 (1965).

9. Bills of attainder were frequently used by the colonial governments during the American war of independence against Tories sympathetic to the English monarch. *Id.*

10. Brown, 381 U.S. at 441.

11. *Id.* at 442.

believed that prohibiting bills of attainder was important to ensure separation of powers within the three branches of the federal government. The prohibition ensured that the legislature was clearly bound to a lawmaking function, as opposed to the adjudicatory role performed by the judiciary.[12] However, no court has fully analyzed the applicability of bill of attainder to non-natural entities, such as corporations. The Con Ed case forced direct consideration of this question by the Second Circuit Court of Appeals.

B. Bill of Attainder in the Courts: United States v. Brown

Chief Justice Warren stated in *United States v. Brown*[13] that "[t]he Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather . . . a general safeguard against legislative exercise of the judicial function, or . . . trial by legislature."[14] The Supreme Court held that legislative punishment, prohibited by the clause, might target "persons or groups."[15] The Court perceived flexibility not only in the types of punishment covered under the clause, but also the entities that can lay claim to those protections. The Supreme Court took great pains in *Brown* to maintain an inclusive perspective of the bill of attainder.

The *Brown* analysis of the clause's purpose and intent was particularly useful to the Con Ed court.[16] "[T]he bill of attainder clause not only was intended as one implementation of the general policy of fractionalized power, but also reflected the Framer's belief that the Legislative Branch is not so well suited as politically independent judges . . . to the task of ruling upon blameworthiness . . . ."[17] Excluding corporations from such a broad public policy goal would be inconsistent with the Framer's intent. The Supreme Court, however, did not address the ultimate issue in *Brown* of whether non-natural persons enjoy protection.

The Supreme Court in *Brown* stated: "[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."[18] The Court discussed in detail the inclusion of property confiscation in the definition of punishment under the clause. This was evidence, according to the Court, that the Framer's foresaw various methods by which a legislature could exact punishment and that these methods may evolve overtime.[19]

The Supreme Court in *Brown* also discussed the concept of *groups* being

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12. Victor Chen, *Recent Decisions of the United States Court of Appeals for the District of Columbia, Line-of-Business Restriction of the Telecommunications Act of 1996 Is Upheld*, 67GEO. WASH. L. REV. 872, 873-74 (1999) (discussing the bill of attainder clause as to the Telecommunications Act of 1996). *See also* Karey P. Pond, *The Telecommunications Act of 1996: When Legislative Regulation Becomes Unconstitutional Punishment*, 22 W. NEW ENG. L. REV. 271 (2000).

13. United States v. Brown, 381 U.S 437 (1965). The Supreme Court analysis in *Brown* is considered to be seminal law in both the interpretation and application of the bill of attainder clause generally.

14. *Id.* at 442.

15. Brown, 381 U.S. at 447.

16. *See generally* United States v. Brown, 381 U.S. 437 (1965).

17. *Id.* at 445.

18. Brown, 381 U.S. at 447. *See also* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323-35 (1866).

19. United States v. Brown, 381 U.S. 437, 447 (1965).

the target of a bill of attainder. The Court advanced the idea that legislative acts come in many forms and that "ascertainable members of a group" were covered.[20] The Court also recognized that violation of the bill of attainder clause could occur when a legislature targeted an entire category of conduct, as opposed to a specific action.[21]

C. The Three-Prong Test: Nixon v. Administrator of General Services[22]

The Supreme Court in *Nixon* assimilated the relevant prior precedent into a coherent three-prong test for a bill of attainder.[23] The Second Circuit employed the *Nixon* test in its analysis of the Indian Point Law. The three-prong test was stated as follows: "[1] a law that legislatively determines guilt and inflicts punishment [2] upon an identifiable individual [3] without provision of the protections of a judicial trial" is a bill of attainder in violation of the constitution.[24] The three-prong test centers a court's examination of a statute for an attainder violation. *Nixon* defined "identifiable individual" in the second prong of the test to include both individuals in the traditional sense (natural persons) and groups.[25] The Con Ed court extended this distinction in holding that the corporate entity itself is protected by the bill of attainder clause, akin to the approach taken in the application of due process to corporations.

The Court in *Nixon* stated that "the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee."[26] Flexibility was built into the three-prong test developed in *Nixon*, consistent with the inclusive approach taken in *Brown*.

Whether or not a statute inflicted punishment was typically the element of greatest controversy under the *Nixon* approach.[27] The Supreme Court in *Nixon* and later *Selective Service Systems* recognized three distinct tests designed to guide judicial analysis of the punishment element. These were the historical, functional, and motivational tests.[28] The three tests read as follows: "(1) [Historical or Traditional Test] whether the challenged statute falls within the historical meaning of legislative punishment; (2) [Functional Test] whether the

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20. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961). *See also* United States v. Brown, 381 U.S. 437, 448-49 (1965).

21. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961). *See generally* United States v. Brown, 381 U.S. 437 (1965).

22. Nixon v. Adm'r of Gen. Servs., 433 U.S 425 (1977).

23. *See generally* Nixon v. Adm'r of Gen. Servs., 433 U.S 425 (1977).

24. *Id.* at 468.

25. Nixon, 433 U.S. at 470.

26. *Id.* at 475.

27. *See generally* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984).

28. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 476-78 (1977). The historical test looks to see if the alleged punishment is "punishment traditionally judged to be prohibited the Bill of Attainder Clause." McMullen v. United States, 953 F.2d 761 (2d Cir. 1992). The functional test whether the legislation "viewed in terms of type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Id.* (quoting *Nixon, supra* 433 U.S. at 475-76). The motivational test asks the court to "evaluate whether the legislative record evinces a [legislative] intent to punish." McMullen, 953 F.2d at 767 (quoting *Nixon, supra* 433 U.S. at 473, 475-76, 478).

statute 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) [Motivational Test] whether the legislative record 'evinces a [legislative] intent to punish.'"[29]

The Supreme Court in *Selective Service Systems* stated that the severity of the punishment was not dispositive.[30] According to *Nixon*, a "statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim."[31] The Court also indicated that other tests might be acceptable to conclude that the punishment requirement has been satisfied. Evidence of this is found in *Nixon* where the Supreme Court stated that punishment was not limited to past events (retribution), but also extended to legislative attempts to prevent "future misconduct."[32] This broad construction was crucial to the Second Circuit's analysis of the Indian Point Law, which cited deterrence as one of the law's purposes.[33]

1. The Historical Test of Punishment

The issue in the historical or traditional test is whether the "deprivations and disabilities [are] so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [the Clause]."[34] This was a test for *per se* punitive action by a legislature. In the past, the test contemplated death, imprisonment, or punitive property confiscation. The test is narrow, focusing on traditional conceptions of legislative punishment.

2. Functional Test of Punishment

The issue in the functional test is whether the challenged law "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[35] Here, a court determines whether there was a reasonable (and nonpunitive) public policy or legitimate state function contained within the law at issue.[36]

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29. Consolidated Edison Co. of New York v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002). *See also* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

30. Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984). *See also* Flemming v. Nestor, 363 U.S. 603, 616 (1960).

31. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d at 350 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473-78 (1977)).

32. Nixon v. Adm'r of Gen. Servs., 433 U.S. at 476; *See also* United States v. Brown, 381 U.S. 437, 458-59 (1965).

33. The party arguing they have been attained must show that the legislative action was in fact punishment and not the normal exercise of legitimate legislative action. The purposes served by the act must be scrutinized. United States v. O'Brien, 391 U.S. 367, 383 (1968).

34. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 351 (2d Cir. 2002).

35. *Id.* at 350.

36. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d at 351. A number of Supreme Court cases discuss the examination of a statute for the "inability to discern any alternative [nonpunitive] purpose which the statute could be thought to serve as a basis for finding the statute to be punitive." Flemming v. Nestor, 363 U.S. 603, 615 (1960).

3. Motivational or Legislative Intent Test

Most courts agree that the legislative intent or motivation test alone is insufficient to find that the punishment element of bill of attainder has been satisfied. Unless the legislative intent was "overwhelmingly" clear, the test is not dispositive.[37] Isolated statements of a few legislators cannot impute punitive intent to an entire legislative body or statute.[38]

D. Corporations as Individuals under the Three-Prong Test

The Supreme Court has yet to directly address whether corporations enjoy bill of attainder protection, however, dicta in three key cases indicated corporations are in fact covered. Beginning with *Lovett* in 1946, the Supreme Court recognized that "named individuals or . . . easily ascertainable members of a *group*" might be the subject of punishment inflicted by a statute in violation of the bill of attainder clause.[39] The "group" label continued to be used in 1966 with the Supreme Court's dicta in *South Carolina v. Katzenbach.* In *Katzenbach*, the court stated that "the Bill of Attainder Clause of Article I and the principle of the separation of powers only [protects] individual persons and *private groups*, those who are peculiarly vulnerable to non-judicial determinations of guilt."[40]

Most recently, in *Plaut v. Spendthrift Farms, Inc.*, the Supreme Court stated that "laws that impose a duty or liability upon a single individual or *firm*" are within the definition of an unconstitutional bill of attainder (emphasis added).[41] The history of the clause has favored broad construction and the courts have followed this precedent.[42] Significantly, cases where courts have refused to apply constitutional protections to corporations frequently involve competing state interests.[43]

III. DETAILED STATEMENT OF THE CASE

A. History of the Indian Point Nuclear Facility

In 1972, Con Ed installed Model 44 steam generators in its Indian Point 2 Nuclear Power Plant (Indian Point) in Westchester County, New York. Con Ed purchased the generators from Westinghouse.[44] Westinghouse stated that the

37. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 354 (2d Cir. 2002). *See generally* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984). In general, clear and overwhelming proof is required to assert a Bill of Attainder Clause violation based solely upon legislative intent or motivation. *See also* Flemming v. Nestor, 363 U.S. 603, 617 (1960).

38. *See generally* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984).

39. United States v. Lovett, 328 U.S. 303, 315 (1946) (emphasis added).

40. South Carolina v. Katzenbach, 383 U.S. 301, 324 fn.9 (1966) (emphasis added).

41. Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 239 (1995) (emphasis added).

42. *See generally* First Nat'l Bank of Boston v. Bellotti, 438 U.S. 907 (1978).

43. *See generally* United States v. Wilson, 211 U.S. 361 (1911); United States v. Morton Salt Co., 338 U.S. 632 (1950).

44. Westinghouse manufactured two models of steam generators for the nuclear power industry, the Model 44 and 51. Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 257 (N.D.N.Y. 2000).

steam generators had an operational life expectancy of approximately forty years. Later, Westinghouse identified a defect in the metal alloy used in the manufacture of the steam generator tubes in the Model 44 and 51 generators that made the tubes prone to corrosion and weakening, eventually causing a leak inside the generator.[45]

While a number of utilities decided to replace their Model 44 and 51 generators twenty to thirty years ahead of the end of the equipment's operational lifespan, some did not.[46] By January of 1997, approximately sixteen of the thirty plants with the Model 44 and 51 systems continued to use the original Westinghouse generators. Other utilities, including Con Ed, developed anti-corrosion protocols to extend the life of the units.[47] Anticipating the need to replace the Model 44 generators, Con Ed ordered new steam generators in the 1980's and stored those units at the Indian Point site for future installation. These units were brought out of storage for installation after the February 15, 2000 outage.

B. The Indian Point Nuclear Plant Outage

On February 15, 2000, a steam tube inside of the Indian Point 2 steam generator failed. A tear allowed radioactive primary water to leak through the tube wall. Con Ed manually shut down the plant after the primary water mixed with the steam generator's secondary water.[48] Studies found the small radioactive release that resulted from the tube leak presented no public health risk.[49]

Subsequently, Con Ed inspected all the steam generator tubes at Indian Point and reported these findings to the Nuclear Regulatory Commission (NRC).[50] Con Ed replaced the generators in January 2001 and resumed normal plant operations.[51] During the unscheduled outage, Con Ed purchased replacement power from other utilities at an estimated cost of between $165 and $200 million dollars.[52]

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45. Consolidated Edison Co. of New York, Inc. v. Westinghouse Elec. Corp., 567 F. Supp. 358 (S.D.N.Y. 1983). Several utilities that purchased the Model 44 and 51 generators sued Westinghouse because due to the defective product design, including Con Ed. *Id.*

46. Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 257 (N.D.N.Y. 2000).

47. Plaintiff's Brief at 19, Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 257 (N.D.N.Y. 2000) (Nos. 00-9358, 00-9426, 00-9442) [hereinafter Plaintiff's Brief].

48. Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 257 (N.D.N.Y. 2000).

49. Plaintiff's Brief, *supra* note 47, at 19. The release was determined to be only a fraction of the normal amount of detectable background radiation. Plaintiff's Brief, *supra* note 47, at 19.

50. The NRC investigated the Indian Point facility independently, issuing a preliminary report on the incident on August 31, 2000. The NRC investigation focused on the continued safe operation of the plants other reactors. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 344 (2d Cir. 2002). The NRC has broad safety related statutory investigation and review powers. *See generally* 42 U.S.C. § 2011 (1994).

51. Plaintiff's Brief, *supra* note 47, at 19.

52. Consolidated Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 261 (N.D.N.Y. 2000).

C. The 1997 Settlement Agreement and the FAC

In 1997, the NYPSC and Con Ed had reached a five-year agreement under an initiative by the state to establish multi-year tariff agreements. A key element of this agreement permitted Con Ed to pass through costs to ratepayers, via a FAC, in return for the utility's commitment to divest generating capacity.[53] In part, the impetus of the 1997 agreement was to promote New York's electric deregulation activities. The formulation of the agreement allowed Con Ed to mitigate the cost of purchasing power in the New York's newly deregulated wholesale power market.[54]

Following the Indian Point Nuclear plant outage, in March of 2000, Con Ed began passing through to ratepayers the costs incurred in purchasing replacement power for lost generating capacity.[55] Con Ed alleged this action expressly relied on the 1997 agreement and FAC. Therefore, Con Ed's suit was built upon this agreement and the claim that the Indian Point Law unconstitutionally terminated the utility's use of the bargained for FAC without a prudence review by the NYPSC.[56]

D. New York Public Service Commission Prudence Review

In March of 2000, the NYPSC initiated a prudence review of Con Ed's operation of the Indian Point facility leading up to the outage. The NYPSC employed a reasonable operator standard to review Con Ed's conduct.[57] The review examined whether the costs included in the FAC by Con Ed were in fact "prudent or reasonably incurred."[58]

Prior to the completion of this prudence review and despite the NYPSC's requests to delay legislative action, the New York legislature passed the Indian Point Law. NYPSC Chairman Maureen O. Helmer stated in a letter to members of the legislature "[t]his prohibition [under the Indian Point Law] is based on a proposed *legislative finding* that failure to replace [the generators] caused increased risk of . . . plant outages. Until the investigations and proceedings are completed, there is no basis for such a finding."[59]

E. Summary of Plaintiff-Appellee Arguments on Bill of Attainder

Con Ed urged the Second Circuit to adopt the three-prong test for bill of attainder set forth in *Nixon*.[60] The utility asserted that the Indian Point Law imposed legislative punishment as shown via the historical, legislative intent,

53. *Consolidated Edison Co.*, 1997 WL 639953 (N.Y.P.S.C. Sept. 23, 1997).

54. *Id.*

55. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 344 (2d Cir. 2002).

56. *Id.*

57. *Consolidated Edison Co.*, Case 27123, Opinion No. 79-1 (N.Y.P.S.C. Jan. 16, 1979). The NYPSC defined the reasonable operator standard, as "how reasonable people would have performed the tasks that confronted the company." *Id.*

58. N.Y. Pub. Serv. Law § 66(12)(k) (2001). *See also* Long Island Lighting Co. v. Pub. Serv. Comm'n, 666 F. Supp. 370 (N.D.N.Y. 1987).

59. Plaintiff's Brief, *supra* note 47, at 28 (emphasis added).

60. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

and functional tests.[61] Con Ed claimed the law was a punitive confiscation of property because the utility was prohibited from using the FAC mechanism to pass through the cost of purchasing replacement power.[62] Property confiscation was a recognized form of punishment under the historical test discussed in *Nixon* and *Selective Service Systems*. As to the legislative intent test, Con Ed cited members of the New York Assembly that accused the utility of endangering public health, warranting punishment to "discourage the taking of risk."[63] Finally, Con Ed asserted that the Indian Point Law fit the functional test as to the "nature and severity of the burdens imposed by the law."[64] Con Ed cited the NYPSC's admission that had the generators been replaced during a planned maintenance outage, the utility would be entitled to recoup the costs at issue in this case via the FAC.[65]

Con Ed claimed that the bill of attainder clause applied to corporations because the protection was not a purely personal guarantee.[66] The utility further argued that Supreme Court dicta supports inclusion of corporations.[67] Finally, the utility argued that the Indian Point Law was preempted by the Atomic Energy Act because the New York legislature attempted to regulate power plant safety, traditionally a federal role.[68]

F. Summary of Defendant-Appellant Arguments on Bill of Attainder

The State of New York argued that the bill of attainder clause was *per se* inapplicable in this case, because it was a "purely personal" protection. The State also noted the Supreme Court's silence on the inclusion of corporations (non-natural persons) in the definition of "individual" as per the three-prong test.[69] Finally, the State argued that the Indian Point Law was constitutional because there was a connection between the costs incurred by Con Ed and the regulation of the utilities "monopolistic conduct."[70]

IV. ANALYSIS OF THE SECOND CIRCUIT DECISION

The Second Circuit's review focused on the two principle issues raised by Con Ed's bill of attainder claim. First, the court considered the threshold question of whether the bill of attainder clause was applicable to corporate entities, as well as natural persons. Answering this in the affirmative, the court then considered whether the Indian Point Law qualified as punitive under one of

61. Plaintiff's Brief, *supra* note 47, at 38.

62. *See generally* Plaintiff's Brief, *supra* note 49, at 38.

63. Plaintiff's Brief, *supra* note 47, at 51.

64. Plaintiff's Brief, *supra* note 47, at 51.

65. Plaintiff's Brief, *supra* note 47, at 52.

66. United States v. Brown, 381 U.S. 437, 461 (1965) ; Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323-35 (1866).

67. Plaintiff's Brief, *supra* note 47, at 52.

68. Plaintiff's Brief, *supra* note 47, at 55. *See also* Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983).

69. Consolidated Edison Co. of New York v. Pataki, 117 F. Supp. 2d 257, 265-66 (N.Y.N.D. 2000).

70. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 354 (2d Cir. 2002).

the recognized tests set out by the Supreme Court in *Nixon* and *Selective Service Systems*.

A. Applying the Bill of Attainder Clause to Corporations

The Court of Appeals principally focused on whether the bill of attainder clause was limited to natural persons or whether the clause also applied to corporations, like Con Ed.[71] The court relied upon constitutional precedent in the areas of equal protection, double jeopardy, freedom of speech, and search and seizure to consider whether bill of attainder protection was a logical extension of existing corporate constitutional rights.[72] In the absence of definitive Supreme Court guidance, the Second Circuit operated by inference to consider the clause's scope of applicability. The Con Ed court interpreted the trend toward expansion of corporate constitutional rights in other areas by the Supreme Court to favor bill of attainder protection for corporate entities.[73]

The Second Circuit noted that cases in which the Supreme Court refused corporate protection under the attainder clause involved "competing state interests in regulating corporate conduct and investigating corporate wrongdoing . . . ."[74] The Second Circuit distinguished the Con Ed case from *Wilson* and *Morton* involving competing state interests.[75] The Second Circuit held that "[the State] has no interest in inflicting punishment for . . . malfeasance on [a] corporation's shareholders through the legislative process. [A] law enforcement agency, the [NYPSC], has an existing administrative procedure to vindicate the interest in exploring utilities' wrongdoing: the prudence review process."[76]

The Second Circuit also considered whether the bill of attainder clause was a "purely personal guarantee" and therefore by definition excluded from being applied to the corporate setting.[77] The court concluded that the Supreme Court's

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71. The Court acknowledged the unsettled nature of this question, noting a lack of direct treatment by the Supreme Court to establish a clear precedent.

72. The court cited several examples where constitutional protections were found applicable to corporations and individuals. (1) The Supreme Court in *Metro Life* and *Western and Southern Life* recognized that corporations are persons within the definition of the Fourteenth Amendment Equal Protection analysis. Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985); Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 660 (1981). (2) The Supreme Court in *Marshall* recognized that the Fourth Amendment protects commercial buildings (corporations), as well as private residences, from unreasonable searches and seizures. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). (3) The Supreme Court in *Martin Linen* extended double jeopardy protection in criminal prosecutions to include corporations. United States v. Martin Linen Supply Co. 430 U.S. 564 (1977). (4) The Supreme Court in *Virginia Citizens Consumer Council, Inc.* that "commercial speech" and First Amendment protections encompassed corporations, as well as private persons. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

73. Consolidated Edison Co. New York, Inc. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002).

74. *Id.* at 348. *See generally* Wilson v. United States, 221 U.S. 361 (1911). The Supreme Court in *Wilson* was considering the applicability of Fifth Amendment protection in the context of a corporation. *Id.* at 382-84. *See generally* United States v. Morton Salt, Co., 338 U.S. 632 (1950). The Supreme Court in *Morton* considered the right of privacy as it pertained to corporations. *Id.* at 651-52.

75. Wilson v. United States, 221 U.S. 361 (1911); United States v. Morton Salt, Co., 338 U.S. 632 (1950).

76. Consolidated Edison Co. New York, Inc. v. Pataki, 292 F.3d 338, 348 (2d Cir. 2002).

77. *Id.* at 347. *See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995); South Carolina v.

reference to "private groups" signaled that the clause was not exclusive to natural persons. Additionally, the court cited a Fifth Circuit case that implicitly assumed that the clause included corporations within the definition of "individual."[78] The Second Circuit concluded that in the absence of historical limitations on or a narrow construction of the bill of attainder clause by the Supreme Court, there were no barriers to extending the clause's protection to corporations.[79] Concluding that Con Ed enjoyed bill of attainder protection, the Second Circuit proceeded to the second stage of review and consideration of the punitive nature of the Indian Point Law.

1. Evaluating the Second Circuit's Application of the Bill of Attainder Clause

Historically, the bill of attainder clause served to "ensure the procedural protections of the judicial process for the attribution of guilt and imposition of punishment."[80] The policy behind bill of attainder is broad, all-inclusive, and punishment oriented. Significantly, the focus of the bill of attainder clause is procedural fairness and not personal freedom, indicating compatibility in a corporate application.[81]

The Second Circuit analogized the bill of attainder clause to the historical function of procedural due process. The due process clause has long been attributed to both corporations and individuals. Without bill of attainder protection, argued Con Ed, corporations are not fully guaranteed procedural due process, because they lack the primary mechanism to attack punitive legislation.[82]

Bill of attainder provides protection from legislative adjudications in the way that due process protections ensure fairness in judicial and administrative proceedings. Therefore, recognition that corporations have bill of attainder protection was not a revolutionary concept.[83] The same premise supports both constitutional protections.

The Second Circuit analogized that the bill of attainder clause was an important component of the due process clause, just as the Supreme Court reasoned that First Amendment freedoms were an important component of the due process clause.[84] The Second Circuit took note of another Supreme Court

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Katzenbach, 383 U.S. 301, 324 (1966).

78. *See generally* SBC Communication, Inc. v. Federal Communications Comm'n, 154 F.3d 226, 234 (5th Cir. 1998); Club Misty, Inc. v. Laski, 208 F.3d 615, 617 (7th Cir. 2000); Navegar, Inc. v. United States, 192 F.3d 1050, 1065 (D.C. Cir. 1999).

79. Consolidated Edison Co. New York, Inc. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002).

80. *Id. See also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468-69 (1977). United States v. Brown, 381 U.S. 437, 445 (1965); United States v. Lovett, 328 U.S. 303, 316-17(1946).

81. The State's argument relied heavily on a narrow interpretation of those protected by the clause . Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 346 (2d Cir. 2002).

82. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002). *See also* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468-69 (7th Cir. 1988); Screws v. United States, 325 U.S. 91, 106 (1945).

83. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002).

84. *Id. See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 756, 779 (1978). The Supreme Court in *First Nat'l Bank of Boston* approached the applicability of First Amendment protections to corporations by

decision stating that "[c]orporate identity has been determinative in several decisions denying corporations certain constitutional rights . . . but this is not because the States are free to define the rights of their [corporations] without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees."[85] The dicta provided the Second Circuit with an unstated rationale to "rein in" state legislatures by confirming that the constitution overlays such action. The exclusion of bill of attainder from this mantra seems illogical, as the clause directly supports the concept of separation of powers among branches of government.

The Second Circuit bypassed analysis under the historical function test.[86] The general policy of facilitating adjudicatory fairness was the extent to which the court delved into the history of the attainder clause. Perhaps this was recognition that much of the jurisprudence in this area is related to criminal penalties, historically the application of the bill of attainder clause. However, importantly for the Second Circuit, *Brown* stated that punishment included the seizure of property and the infliction of economic harm.[87] Again, without the latitude the Supreme Court built into its *Brown* decision, the Second Circuit would have a lacked the flexibility to endorse an expansive reading of the clause. In this way, the Second Circuit simply took the *Brown* analysis to its logical conclusion in recognizing Con Ed's claim for bill of attainder protection.

Bill of attainder protection can also be analogized to the Fifth Amendment takings clause, a protection universally enjoyed by corporations.[88] Economic injury to the corporation from an action like the Indian Point Law can result in a taking.[89] The shareholders must bear the risk of any costs not recovered under the revenue requirement calculation. The logic being that if a utility, like Con Ed, was subjected to a law that banned access to prudent cost reimbursement (such as the Indian Point Law) then it is the shareholder that arguably suffers a taking. This situation could prove especially lethal to utilities, which rely upon entities like the NYPSC to calculate reasonable rates of return. The crucial issue is therefore whether a utility, like Con Ed, had the *opportunity* to receive a reasonable rate of return within the confines of the regulated tariff agreement.[90] The utility is provided no *guaranteed* return and therefore once a reasonable rate of return is established, the issue becomes whether the ratepayer should be charged for poor management decisions by the utility, resulting in stranded or unrecovered costs.

The inability of a utility to recover costs severely hinders capital

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seeing if the expression in question was a violation of what the amendment was to protect, rather than diving whether the protection "applied" to the corporation in the first place. *Id.* at 776.

85. First Nat'l Bank of Boston, 435 U.S. 778. *See also* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Wilson v. United States, 221 U.S. 361, 382-86 (1911); United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950).

86. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 756, 778-79 (1978).

87. United States v. Brown, 381 U.S. 437 (1965).

88. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 348 (2d Cir. 2002).

89. United States v. 91.90 Acres of Land, 586 F.2d 79, 85-86 (8th Cir. 1978).

90. Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

investment, one of the considerations in the ratemaking process.[91] The potential investors that the utility relies upon will be unwilling to invest in projects subject to legislative whim, regardless of prudent operation.[92] By extrapolation the consuming public is placed at risk as the potential for shortages in generating capacity may discourage construction and expansion into new generating capacity.

B. Analysis of the Indian Point Law under the Three-Prong Nixon Test[93]

The Second Circuit reviewed the historical development of the bill of attainder clause.[94] The court stated that a bill of attainder was "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[95] The court acknowledged that the Indian Point Law clearly denied Con Ed the opportunity of a judicial proceeding. Having resolved this basic question, the court turned its attention to the punishment element of the three-prong *Nixon* test.

The prevention of retrospective legislation was the reason the bill of attainder clause was placed in the constitution. Retrospective means "[to define] past conduct as wrongdoing and then [impose] punishment on that past conduct . . . [I]t pronounces upon the guilt of the party, without any of the forms or safeguards of trial."[96] The Second Circuit found that the New York legislature "bypassed" the administrative procedures of the NYPSC and engaged in retrospective punishment.[97] The court stated that the primary role of the legislature was to operate "prospectively," with limited "retrospective" powers.[98] Therefore, the legislature encroached upon the role of the adjudicatory branches of the state government and circumvented the established prudence review procedure.

1. The Punishment Element of the *Nixon* Test

The punishment element was traditionally the most difficult element of a bill of attainder claim for the plaintiff to prove.[99] "[T]he concept of punishment under the bill of attainder clause has always been a fairly broad one."[100] The

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91. *See generally* Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

92. This would be a particularly difficult problem until a Supreme Court ruling or act of Congress standardized corporate applicability in all circuits.

93. The three elements of bill of attainder are as follows: (1) The statute determines guilt and inflicts punishment, (2) upon an identifiable individual, and (3) without provision of the protections of a judicial trial. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

94. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 345 (2d Cir. 2002).

95. *Id.* at 346 (quoting Nixon v. Adm'r of Gen Servs., 433 U.S. 425, 468 (1977). The court applied the attainder test: "a statute can be a bill of attainder only if (1) it determines guilt and inflicts punishment, (2) upon an identifiable individual, and (3) without provision of the protections of a judicial trial." *See also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977); United States v. Brown, 381 U.S. 437, 442 (1965).

96. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 349 (2d Cir. 2002).

97. *Id.*

98. Consolidated Edison Co. of New York, Inc., 292 F.3d at 349.

99. *Id.* at 350. *See also* Consolidated Edison of New York v. Pataki, 117 F. Supp.2d 257, 267 (N.D.N.Y. 2000).

100. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-4, at 642 (2d ed. 1988).

Supreme Court articulated three tests for courts to consider in determining whether a statute is punitive as to a specified individual or entity, placing upon the party who challenged the law the burden to prove that the legislature exceeded the legitimate exercise of legislative power. However, the Supreme Court never indicated these tests were *exclusive*, thereby allowing for alternative theories of punishment. The Second Circuit considered only the three traditional tests (historical, functional, and motivational) in its analysis of the Con Ed case.[101]

a. Application and Analysis of the Functional Test

The functional test was the centerpiece of the Second Circuit's punishment analysis. The court utilized the *Trop v. Dulles* standard to consider the type and severity of the punishment alleged to have resulted from the Indian Point Law.[102] Under the *Trop* standard, where there is an "inability to discern any alternative [nonpunitive] purpose which the statute could be thought to serve," the statute is deemed a functional punishment.[103] Although the court explored a range of factors in considering the functional test, ultimately, the entire punishment analysis and therefore the outcome of the case hinged upon the type of costs incurred by Con Ed while the plant was offline and the relation of those costs to the Indian Point Law. This point is developed below.

The Second Circuit explored several alternative purposes for the Indian Point Law.[104] The court found no nonpunitive alternative purposes that could be completely separated from the Indian Point Law's complete ban on Con Ed's use of the FAC. The court noted that *portions* of the Indian Point Law did contemplate a non-punitive purpose by allocating costs associated with an unexpected outage to the utility and not ratepayers. However, the *Brown* approach to bill of attainder included "eliminating harm to innocent third parties [ratepayers]" as a form of punishment, in violation of the bill of attainder clause.[105] The Second Circuit conceded that if the Indian Point Law had been based solely upon cost-allocation, the punishment element of the *Nixon* test would not have been meant.[106]

The Second Circuit determined, however, that the Indian Point Law was more than a cost-allocation statute. The law served to deter "similar conduct by

101. The Con Ed court notes the distinct lack of guidance from the Supreme Court in determining if a law is punitive. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 351 (2d Cir. 2002).

102. Trop v. Dulles, 356 U.S. 86, 97 (1958).

103. *Id. See also* Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 351 (2d Cir. 2002). A number of Supreme Court cases discuss the examination of a statute for the "inability to discern any alternative [nonpunitive] purpose which the statute could be thought to serve as a basis for finding the statute to be punitive." Flemming v. Nestor, 363 U.S. 603, 615 (1960).

104. The approach here is one of negative inference, in that a reviewing court is encouraged to examine possible legitimate legislative purpose in a given law and the absence of such a legitimate finding signals to the court that the law under review was designed to punish individuals within the scope of the enactment. *Id.*

105. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 352 (2d Cir. 2002). *See also* United States v. Brown, 381 U.S. 437, 458 (1965).

106. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 352 (2d Cir. 2002).

Con Ed and other public utilities in the future."[107] The Indian Point Law therefore played, according to the Second Circuit, an "economic-regulatory function."[108]

The court also considered the deterrence value of the Indian Point Law generally. "By forcing Con Ed to absorb costs of the outage, the statute encourages Con Ed and other utilities to be more diligent thereafter in avoiding similar outages."[109] Because the court defined Con Ed as a monopoly, the state had a legitimate interest in encouraging the utility to mind its costs. As the court noted, "[s]tate regulation of utilities to promote economic efficiency is a longstanding and unquestionably legitimate goal of state legislation."[110]

The Second Circuit stated that if the Indian Point Law had served an "economic-regulatory" function, that this would be a sufficiently non-punitive purpose under the *Nixon* three-prong test.[111] However, the Con Ed court was concerned with the "type and severity of the burdens" imposed on the utility by the Indian Point Law.[112] The Second Circuit reasoned that if Con Ed had installed the new generators during a planned outage, the utility could have used the FAC to recover prudently incurred costs, the very same costs, according to Con Ed, that were banned by the Indian Point Law.

The costs to Con Ed were relatively consistent regardless of when the generators are replaced. Although the court conceded certain costs would differ between a planned and forced outage, this alone did not justify passage of the Indian Point Law.[113] "It does not protect ratepayers from, or compensate them for, new unjustified costs, because those costs would have been incurred even if Con Ed had acted as a prudent, model corporate citizen."[114] Ultimately, the Second Circuit determined that the costs incurred by Con Ed during the plant shut down were not unique to unplanned outages. Therefore, the court failed to find any connection between the deterrence of imprudent corporate behavior and the Indian Point Law's ban on Con Ed's use of the FAC.

The Second Circuit next examined alternatives available to the state legislature, short of an all-out prohibition on the use of the FAC, to achieve the alleged deterrence goal.[115] The court noted that the legislature considered no alternatives. The Second Circuit felt the legislature could have narrowed the prohibition in the Indian Point Law to cover only those costs incurred as a result

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107. *Id.*

108. Consolidated Edison Co. of New York, Inc., 292 F.3d at 352. The Indian Point Law then serves to encourage Con Ed and other utilities to be careful in the way in which they operate, as carelessness could result in a prohibition to use the pass-through feature of the FAC should the utility wish to use it. *Id.*

109. Consolidated Edison Co. of New York, Inc., 292 F.3d at 352.

110. *Id.*.

111. *See generally* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

112. The *Nixon* case discussed the importance of considering the "type and severity" of the burdens imposed on the person or group who is the focus of the legislative action in determining if that action is in fact barred by the Bill of Attainder Clause of the United States Constitution. Nixon v. Adm'r of Gen. Servs, 433 U.S. 425, 475 (1977).

113. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 353 (2d Cir. 2002).

114. *Id.* at 354.

115. *See generally* Nixon Adm'r of Gen. Servs., 433 U.S. 425, 482 (1977).

of "misconduct" or "negligence" by Con Ed. In the words of the court, "the legislature . . . made no attempt whatsoever to ensure that the costs imposed on Con Ed were proportional to the problems that the legislature could legitimately seek to ameliorate."[116] The court felt that the Indian Point Law far exceeded any state deterrence goal by placing a disproportionate burden on Con Ed. Therefore, the court held that the Indian Point Law served only punitive goals and therefore violated Con Ed's constitutional rights under the bill of attainder clause.[117]

The State of New York argued vigorously that the state has a legitimate traditional interest in the regulation of utilities that operate within its borders.[118] This argument, however, missed the point. No one disputed the state's role in regulating, investigating, and prosecuting utilities, however the legislature cannot inflict punishment in derogation of established adjudicatory procedures.[119]

The legislature took the position that they created the NYPSC and therefore could bypass that agencies adjudicatory procedure via direct state action.[120] The Second Circuit correctly called foul. Utilities rely on the procedures set forth by the NYPSC, particularly the prudence review process. Absent the prudence review process, utilities could be arbitrarily denied recovery of costs, regardless of sound management and efficiency.[121]

In conclusion, the strongest argument under the functional test was that the costs incurred by Con Ed were virtually identical to those incurred during a planned outage. This fact defined the outcome of the punishment analysis and ultimately the outcome of the case. The legislature was therefore deprived of its principal argument that the Indian Point Law was designed to shield the public from negligently incurred costs associated with unplanned outages.[122] Had the nature of the costs associated with the outage been *distinguishable* from the costs of *normal* equipment replacement, the Second Circuit may have gone the other way. In Con Ed's case, the costs were *not* distinguishable in any meaningful way and therefore by definition, the Indian Point Law could not have served the purpose that the State of New York claimed that it did.[123] The Second Circuit therefore concluded the punishment element to be satisfied under the functional test.

b. Application and Analysis of the Historical Test

The Second Circuit balanced two competing issues under the historical test. On one hand, Con Ed was arguably deprived of a property interest in being

116. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 354 (2d Cir. 2002).

117. *Id.*

118. *See generally* Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983). "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Id.* at 352.

119. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 348 (2d Cir. 2002).

120. *Id.* at 347.

121. Consolidated Edison Co. of New York, Inc., 292 F.3d at 347.

122. *Id.* at 354.

123. Consolidated Edison Co. of New York, Inc., 292 F.3d at 354-55.

prohibited from recovering costs incurred in the purchase of replacement power.[124] On the other hand, the court admitted uneasiness in equating deprivation of property, as in Con Ed's case, with confiscation of property as defined by the Supreme Court.[125] The court cited *Duquesne Light Co. v. Barasch* in which the Supreme Court held that "adverse utility-rate decision[s] [are] not confiscatory" as contemplated under the Takings Clause, unless the rate of return becomes unreasonable.[126] The Second Circuit avoided entirely a punishment analysis under the historical test, stating that "[w]e need not resolve this close question to conclude that [the Indian Point Law] is nonetheless a bill of attainder."[127]

The "close question" the Second Circuit sought to avoid was whether *deprivation* of property is equivalent to *confiscation* of property. This distinction is more than semantics and is linked to the fundamental ratemaking concept of affording the utility an opportunity to recover a reasonable rate of return. Historically, only property confiscation (akin to a taking) is considered a "punishment" that qualifies under the three-prong *Nixon* test for bill of attainder.[128] The principal issue under the historical test, had the Second Circuit pursued it, would have required the court to consider whether the approximately $200 million dollars in replacement power costs banned from FAC recovery by the Indian Point Law amounted to a confiscation of Con Ed's property interests, sufficient to meet the punishment element of the *Nixon* test. This represents a regulatory question in the first instance, to be determined by the NYPSC, perhaps contributing to the court's decision to avoid the historical test.

c. Motivational or Legislative Intent Test

The Second Circuit stated that legislative intent alone was insufficient to support a bill of attainder theory. The court noted, however, that such evidence would bolster Con Ed's claims. The court quoted one of the sponsors of the Indian Point Law as saying "Con Edison has done a terrible thing here . . . [a]nd [the Indian Point Law] is going to stop them and punish them."[129] The court agreed that this statement indicated intent to punish; however, it was unwilling to impute an isolated statement to the entire legislature.

The Second Circuit, like most courts, gave cursory attention to the motivation of the state legislature in its punishment analysis.[130] However, this test was particularly relevant to the Indian Point Law. The act made clear that negligent behavior by Con Ed required the legislature to act to "discourage the

124. Under the Indian Point Law, Con Ed was forced to absorb approximately $200 million dollars in operating costs that couldn't passed through to the ratepayer.

125. *Id.* at 351.

126. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 351 (2d Cir. 2002). *See generally* Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

127. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002).

128. *Id.* at 351.

129. Consolidated Edison Co. of New York, Inc., 292 F.3d at 355 (quoting A. 10096, N.Y. Senate Debate Transcript, at 3906-07 (2000) (Statement of Sen. Velella)).

130. *Id.* at 354-55.

taking of risks" and presumably future misconduct.[131] Furthermore, the act repeatedly discussed the protection of "health, safety and economic interests" from risky behavior by Con Ed. However, unless the intent is overwhelming, the courts universally appear unwilling to let statutory language alone determine if the punishment element was satisfied.

d. Acceptable Alternatives to the FAC Prohibition

The definition of punishment depends upon context.[132] The Second Circuit noted that the state assembly, according to legislative history, never considered alternative and less punitive options for addressing its concerns following the Indian Point outage.[133] The state "could have limited the pass-through prohibition to the incremental cost of energy beyond that prevailing when the replacement generators were purchased."[134] Additionally, the state could legitimately have required Con Ed to absorb costs specific to an unplanned outage.[135] An absence of legislative debate or consideration of any of these options supports the notion that the Indian Point Law was intended to be punitive from the start.

C. Impact of the Con Ed Precedent

Whether this case will have a far-reaching precedential impact or withstand future Supreme Court scrutiny is uncertain. The specificity of the Indian Point Law's language made it easier for the Second Circuit to hold for the corporation. The real impact of the decision was the recognition that corporations enjoy constitutional protection under the bill of attainder clause, not just natural persons. Furthermore, the Second Circuit undertook the first, extensive analysis of the scope of bill of attainder protections. The Second Circuit's analysis successfully separated the bill of attainder protection from the person, such that the corporation was entitled to protection unto itself.[136]

The interesting precedential question is whether the Second Circuit would have held for the State of New York if the costs of replacing the generators preemptively had been distinguishable from the costs associated with the unplanned outage. The court was quite taken by this thought. "[The Indian Point Law] does not protect ratepayers from, or compensate them for, new unjustified costs, because those costs would have been incurred even if Con Ed had acted as a prudent, model corporate citizen."[137] For the court, cost reimbursement under the FAC was a metaphor for the state's role as regulator of the retail utility market. Therefore, the state would have passed the functional punishment test if the FAC prohibition was reasonably connected to state control of Con Ed's monopolistic tendencies. Absent this nexus, the state legislature

131. Indian Point 2 Nuclear Facility-Radiation Leak-Recovery Act, ch. 190, 2000 N.Y. Laws 739.

132. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 354 (2d Cir. 2002).

133. *Id.*

134. Consolidated Edison Co. of New York, Inc., 292 F.3d at 354.

135. *Id.*

136. *See generally Id.* at 347.

137. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 354 (2d Cir. 2002).

exceeded its proper role. This is the second precedential legacy the Second Circuit created in the Con Ed case.

V. CONCLUSION

The Second Circuit's decision represents the opening of a completely new chapter of corporate constitutional law, offering corporate plaintiffs, such as regulated utilities, a new tool to challenge punitive legislative actions. Furthermore, the decision clearly warns legislators against bypassing established adjudicatory processes in the face of public outrage over a perceived corporate injustice. Moreover, this decision provides a measure of procedural certainty in the prudence review process for utilities relying on FACs to recover stranded costs in the modern deregulated utility market.

This decision signifies the logical extension of Supreme Court dicta in the area of corporate constitutional law, while remaining grounded in the historical context of the bill of attainder clause itself. However, arguably the Second Circuit rendered its decision under particularly favorable circumstances, which could marginalize the decision in the long term. For this reason, a full Supreme Court analysis will be illustrative as to the breadth and depth of corporate bill of attainder protection, particularly for regulated utilities.

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