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Bills of Attainder: The Constitutional Implications of Congress Legislating Narrowly

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Summary

On occasion, Congress exercises its legislative authority regarding a specified individual, entity, or identifiable group in such a way as to raise constitutional concerns. In particular, the United States Constitution expressly prohibits the federal government from enacting bills of attainder, defined by the Supreme Court as a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." The basis for the prohibition arises from the separation of powers concern that the enforcement of a bill of attainder would allow Congress to usurp the power of the judicial branch.

For instance, in recent years, Congress proposed retroactive taxation of up to 90% of the value of bonuses paid to employees when an employer had received funds from Troubled Asset Relief Program (TARP). Additionally, in response to allegations of election law and other legal violations by the Association of Community Organizations for Reform Now (ACORN), Congress passed several appropriations bills that limited the provision of federal funds to ACORN and its affiliates. In both of these instances, suggestions were made that the legislation might be found by the courts to be prohibited bills of attainder. As regards the limitations imposed on the provision of funds to ACORN, such limitations were upheld by the United States Court of Appeals for the Second Circuit.

The two main criteria that the courts use to determine whether legislation is a bill of attainder are (1) whether "specific" individuals, groups, or entities are affected by the statute, and (2) whether the legislation inflicts a "punishment" on those individuals. The U.S. Supreme Court has also identified three types of legislation that would fulfill the "punishment" prong of the test: (1) where the burden is such as has "traditionally" been found to be punitive (historical test); (2) where the type and severity of burdens imposed are the "functional equivalent" of punishment because they cannot reasonably be said to further "non-punitive legislative purposes" (functional test); and (3) where the legislative record evinces a "congressional intent to punish (motivational test)."

The Court has suggested that each bill of attainder case turns on its own highly particularized facts, and notably, since the signing of the Constitution, the Bill of Attainder Clause has been successfully invoked only five times in the Supreme Court. Nevertheless, there remain potential constitutional concerns when Congress proposes or passes legislation that imposes a burden on a specified individual, entity, or identifiable group.

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Introduction

Congress has various legislative authorities under which it can regulate the behavior of persons and businesses, and it has significant discretion as regards the breadth and scope of such regulation.[1] On occasion, however, Congress exercises its authority regarding a specified individual, entity, or identifiable group in such a way as to give rise to constitutional concerns. In particular, the United States Constitution expressly prohibits the federal government from enacting bills of attainder,[2] defined by the Supreme Court as a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[3] The basis for the prohibition arises from the separation of powers concern that the enforcement of a bill of attainder would allow Congress to usurp the power of the judicial branch.[4]

For instance, there was, for a time, significant controversy about bonuses paid to employees of entities that had received Troubled Asset Relief Program (TARP) funds from the federal government under the Emergency Economic Stabilization Act of 2008.[5] In response to this concern, various proposals were made to impose taxes on such bonuses. One such bill, which passed the House, would have taxed bonuses as income to the employee at a rate of 90%,[6] while another, introduced in the Senate, would have imposed an excise tax equal to 35% of the bonus on both the employee and entity.[7] Significantly, both bills would have applied retroactively to tax bonuses awarded before the legislation was passed.[8] Concerns were expressed that, because these bills targeted the bonuses of employees of specific companies that had received funds, they could be seen as bills of attainder.[9]

A similar situation arose in response to allegations of election law and other legal violations by the Association of Community Organizations for Reform Now (ACORN), a public interest group. Here, Congress passed several appropriations bills that limited the provision of federal funds to ACORN and its affiliates. For instance, § 163 of the 2010 Continuing Appropriation Resolution provided that:

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[1] *See, e.g.*, CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas

[2] U.S. Const. art. I, § 9, cl. 3 provides "No Bill of Attainder or ex post facto Law shall be passed."

[3] United States v. Brown, 381 U.S. 437, 468 (1965).

[4] "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply, trial by legislature." Brown, 381 U.S. at 443.

[5] P.L. 110-343.

[6] H.R. 1586, 111th Cong., 2nd Sess. (2009). H.R. 1586 was passed by the House on March 19, 2009, by a vote of 328 to 93.

[7] S. 651, 111th Cong., 2nd Sess. (2009).

[8] Both bills would have applied to bonuses received on or after January 1, 2009 in taxable years ending on or after that date.

[9] Christina Rexrode, *Tax on Bonuses Will Hurt Sector*, New York Times (March 23, 2009) at B2. For an analysis of whether these proposals were bills of attainder, see CRS Report R40466, *Retroactive Taxation of Executive Bonuses: Constitutionality of H.R. 1586 and S. 651*, by Erika K. Lunder, Robert Meltz, and Kenneth R. Thomas.

> [n]one of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organization[s] for Reform Now (ACORN) or any of its affiliates, subsidiaries, or allied organizations.[10]

Further, the 2010 Consolidated Appropriations Act provided in various places that none of the funds made available under various divisions of the act or any prior act could be provided to ACORN or any of its affiliates, subsidiaries, or allied organizations.[11] This legislation was challenged in federal court as a bill of attainder, but was ultimately upheld by the United States Court of Appeals for the Second Circuit.[12]

Generally, a court will have reservations in declaring a provision of law unconstitutional because "legislative decisions enjoy a high presumption of legitimacy."[13] Further, the Supreme Court has suggested that each bill of attainder case "turn[s] on its own highly particularized context."[14] Notably, since the signing of the Constitution, the Bill of Attainder Clause has been successfully invoked only five times in the Supreme Court.[15] Nevertheless, constitutional concerns may arise in this context when Congress proposes or passes legislation that burdens specified individuals or a defined class of persons or entities.

Bills of Attainder

Background

As noted, the prohibition on bills of attainder is based on separation of powers concerns. By passing a bill of attainder,

> the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what

[10] Continuing Appropriations Resolution, 2010, H.R. 2918, 111th Cong. § 163 (2009), Division B of P.L. 111-68, § 163. It should be noted that Department of Justice interpreted this language as not applicable to pre-existing contractual obligations between the United States and ACORN. *See* David J. Barron, Acting Assistant Attorney General, Memorandum Opinion for the Deputy General Counsel, Department of Housing and Urban Development (October 23, 2009) (available at http://www.justice.gov/olc/2009/obligations-public-law11168.pdf).

[11] P.L. 111-117.

[12] On December 11, 2009, a district court in the Eastern District of New York held that the language in the Continuing Resolution that prohibited the provision of federal funds to ACORN was an unconstitutional bill of attainder, and enjoined the enforcement of the prohibitions. ACORN v. United States, 662 F. Supp. 2d 285 (E.D.N.Y. 2009). The decision was overturned by the United States Court of Appeals for the Second Circuit, which found no constitutional infirmity with the legislation. ACORN v. United States, 618 F.3d 125 (2d. Cir. 2010).

[13] United States v. Morrison, 529 U.S. 598 (Commerce Clause and 14th Amendment, § 5); ACORN v. United States, 662 F. Supp. 2d 285 (E.D.N.Y. 2009), *rev'd by* ACORN v. United States, 618 F.3d 125 (2d. Cir. 2010) (bill of attainder).

[14] Flemming v. Nestor, 363 U.S. 603 (1960).

[15] *ACORN*, 662 F. Supp. 2d at 288.

> it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions.[16]

At common law, a bill of attainder was a parliamentary act that sentenced a named individual or identifiable member of a group to death.[17] It was most often used to punish political activities that Parliament or the sovereign found threatening or treasonous.[18] A bill of pains and penalties was identical to a bill of attainder, except that it prescribed a punishment short of death such as banishment, deprivation of the right to vote, exclusion of the designated individual's sons from Parliament, or the punitive confiscation of property.[19] The prohibition on bills of pains and penalties has been subsumed into the prohibitions of the Bill of Attainder Clause, so that a variety of penalties less severe than death may trigger its provisions.[20]

The two main criteria that the courts look to in order to determine whether legislation is a bill of attainder are (1) whether specific or identifiable individuals are affected by the statute (specificity prong), and (2) whether the legislation inflicts a punishment on those individuals (punishment prong).

Specificity

The Supreme Court has held that legislation meets the criteria of specificity if it either specifically identifies a person, a group of people,[21] or readily ascertainable members of a group,[22] or if it applies to a person or group based on past conduct.[23] For example, where a court determines that a statute referencing a specific group of persons is based on past conduct, this legislation may in some cases be treated as a *per se* violation of the specificity prong.[24] In *United States v. Lovett*,[25] Congress passed Section 304 of the Urgent Deficiency Appropriation Act of 1943, which named three government employees, labeled them as subversive, and then provided that no salary should be paid to them.[26] The employees brought suit, and the Supreme Court ruled

[16] 3 J. Story, Commentaries on the Constitution of the United States 1338 (1833).

[17] Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 473 (1977).

[18] Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Due Process*, 50 Brook L. Rev. 77, 81 (1983).

[19] *Brown*, 381 U.S. at 441-42.

[20] *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) ("[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.").

[21] Although the law appears unsettled, it is likely that corporations are also protected against bills of attainder. *See* Consol. Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338 (2nd Cir. 2002).

[22] United States v. Lovett, 328 U.S. 303, 315 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

[23] Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984).

[24] *See* Case Note, *Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder. - SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), cert. denied, 119 S. Ct. 889* (1999), 112 Harv. L. Rev. 1385, 1388 (1999). *See, e.g.*, United States v. Brown, 381 U.S. 437, 438-39 n.1 (1965) (striking down statute that made it a crime for anyone "who is or has been a member of the Communist Party" to serve as an officer or employee of a labor union); United States v. Lovett, 328 U.S. 303, 305 n.5 (1946) (striking down a statute prohibiting payment of government salaries to alleged Communists "Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett").

[25] 328 U.S. 303 (1946).

[26] 328 U.S. at 304-05, 311-12.

in their favor, holding that Section 304 was a punishment of named individuals without a judicial trial.[27]

As will be discussed later, it is a defense to a bill of attainder challenge to establish that a statute is not intended to punish, but rather to implement a legitimate regulatory scheme. Although this analysis is generally considered under the second prong of the test (whether the law is punitive), it may have implications for the specificity prong. For instance, in the case of *Nixon v. Administrator of General Services*,[28] the Court evaluated the Presidential Recordings and Materials Preservation Act,[29] which required that former President Richard Nixon, whose papers and tape recordings were specifically named in the act,[30] turn those papers and tape recordings over to an official of the executive branch. The former President challenged the constitutionality of the act as a bill of attainder, arguing that it was based on a congressional determination of the former President's blameworthiness and represented a desire to punish him.

It would appear that the identification of papers and recordings under the control of a named person (the former President) would meet the *per se* requirement. The Court in *Nixon*, however, found that the statute was constitutional despite this specificity. In *Nixon*, the Court found that the bill failed the second prong (punishment) of the test for a bill of attainder, since the act fulfilled the valid regulatory purpose of preserving information which was needed to prosecute Watergate-related crimes and was of historical interest.[31] As part of this analysis, however, the Court even questioned whether the statute in question met the specificity prong of the two-part test, finding that naming an individual could be "fairly and rationally understood" as designating a "legitimate class of one."[32] Thus, it has been suggested that *Nixon* stands for the proposition that any level of specificity is acceptable, even the naming of individuals, as long as a rational, non-punitive basis for the legislation can be established.[33]

A different question arises as to whether legislation that applies both retroactively and prospectively, and thus includes persons not yet identified, can violate the prohibition on bills of attainder. It does not appear to be fatal to a bill of attainder challenge that the statute in question applies to both past and future behavior. In one of the relatively few cases in which a successful bill of attainder challenge was made, the Court in *United States v. Brown* invalidated Section 504

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[27] 328 U.S. at 315.

[28] 433 U.S. 425 (1977).

[29] P.L. 93-526.

[30] Section 101(a) of Title I of the Presidential Recordings and Materials Preservation Act directs that the Administrator of General Services:

> shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which - (1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government; (2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and (3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

[31] *Nixon*, 433 U.S. at 476-77.

[32] 433 U.S. at 472.

[33] *See* Case Note, *Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder. - SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), cert. denied, 119 S. Ct. 889 (1999)*, 112 Harv. L. Rev. 1385, 1388 (1999).

of the Labor-Management Reporting and Disclosure Act, which made it a crime for anyone "who is or has been a member of the Communist Party to serve as an officer or employee of a labor union ... during or for five years after the termination of his membership in the Communist Party."[34] In *Brown,* the Court did not find it significant that future members of the Communist Party would be included in the group affected. Rather, the Court focused on the fact that once a person had entered the Communist Party, his or her withdrawal did not relieve the disability for five years.[35] So, the requirement of specificity is not defeated by the potential of future persons being added to the identified group, as long as the persons or entities identified cannot withdraw from such specified group.[36]

However, a *per se* finding of specificity can still fail to meet the first prong if the group specified by the statute can be justified by a regulatory purpose. This question would require an analysis of the nexus between the specificity and the regulatory purpose that is arguably served by the proposed law. In this regard, the specificity analysis would be similar to the "Functional Test" discussed below.

Punishment

The mere fact that focused legislation imposes burdensome consequences does not require that a court find such legislation to be an unconstitutional bill of attainder. Rather, the Court has identified three tests to determine whether legislation is "punitive": (1) whether the burden is such as has traditionally been found to be punitive (historical test); (2) whether the type and severity of burdens imposed cannot reasonably be said to further non-punitive legislative purposes (functional test); and (3) whether the legislative record evinces a congressional intent to punish (motivational test).

Historical Test of Punishment

The Supreme Court has identified various types of punishments that have historically been associated with bills of attainder. These traditionally have included capital punishment, imprisonment, fines, banishment, confiscation of property, and more recently, the barring of individuals or groups from participation in specified employment or vocations.[37] The courts have been reluctant, however, to further expand the scope of the historical test. For instance, the United States Court of Appeals for the Second Circuit has rejected the argument that denial of federal benefits to specified individuals or organizations was the type of "punishment" traditionally engaged in by legislatures as a means of punishing individuals for wrongdoing.[38]

[34] *See Brown*, 381 U.S. at 438-39 n.1.

[35] 381 U.S. at 458.

[36] *See also* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984) (affected class must be defined by past conduct that makes their ineligibility for a particular benefit "irreversible").

[37] *Nixon*, 433 U.S. at 474-75.

[38] ACORN v. United States, 618 F.3d 125, 136-37 (2nd. Cir. 2010).

Functional Test of Punishment

The Supreme Court has also indicated that some legislative burdens not traditionally associated with bills of attainder might nevertheless "functionally" serve as punishment.[39] The Court has indicated, however, that in those cases, the type and severity of the legislatively imposed burden would need to be examined to see whether it could reasonably be said to further a non-punitive legislative purpose.[40]

The Court has specified that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."[41] For example, it seems clear that, in some instances, a denial of the ability to engage financially with the United States can fulfill the punishment prong of the test. As touched upon earlier in *United States v. Lovett*, the Court struck down a statute prohibiting specified individuals from being employed by the United States as a bill of attainder.[42]

In *Lovett*, the respondents, Robert Lovett, Goodwin Watson, and William Dodd, Jr., were federal government employees in good standing. Congress, however, passed a statute naming those individuals and providing that, after a certain date, no federal salary or compensation could be paid to them. The statute was passed as a result of concerns in the House Committee on Un-American Activities that "subversives" were occupying influential positions in the government and elsewhere, and that Congress had the responsibility to identify and remove those individuals.[43]

The Court noted that the character of the legislation was informed by both the particulars of the legislation and the context in which it arose. In this case, the Court found that the statute operated to bar the named individuals not only from their current jobs, but also from employment by any branch of the federal government for perpetuity.[44] The Court also noted that the congressional proceedings relevant to the legislation had the elements of judicial process. For instance, the chairman of the House Committee on Un-American Activities, Representative Dies, told the House that the three named individuals, among others, were unfit to "hold a Government position," and other statements made during the debate included discussion of "charges" against the individuals and of having sufficient proof of "guilt."[45]

A special counsel for the House noted that the legislation in question was within the discretion of Congress's power under the Spending Clause.[46] However, the Court in *Lovett* remarked that other

[39] *Nixon*, 433 U.S. at 475.

[40] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); *Nixon*, 433 U.S. at 476. *But see* Flemming v. Nestor, 363 U.S. 603, 614 (1959) (upholding termination of Social Security benefits to persons deported for events occurring before the passage of the legislation terminating benefits).

[41] United States v. Lovett, 328 U.S. 303, 315 (1946). Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U.L. Rev. 899, 930-31 (2007).

[42] 328 U.S. 303 (1946).

[43] 328 U.S. at 308.

[44] 328 U.S. at 313-14.

[45] 328 U.S. at 309-10 (citations omitted).

[46] Article I, § 8, Clause 1 provides that Congress has the power to "To lay and collect Taxes ... to pay the Debts and provide for the common Defence and general Welfare of the United States."

Supreme Court decisions have invalidated legislation barring specified persons or groups from pursuing various professions where the employment bans were imposed as a brand of disloyalty.[47] For instance, the Court has found that a ban on lawyers practicing before the Supreme Court[48] was punishment for purposes of bill of attainder analysis, as was a ban on persons holding positions of trust related to legal proceedings.[49] Consequently, the Court in *Lovett* held that the denial of the contractual right to federal employment fell squarely into the type of punishment susceptible to bill of attainder analysis.[50]

The situation can arise, however, where the burdens imposed by legislation on specified or identifiable persons or entities may be justified by a valid regulatory (non-punitive) purpose. In such a case, a court would be likely to find that such legislation is not intended to be punitive. For instance, in *Flemming v. Nestor*,[51] the Court upheld termination of Social Security benefits to persons deported for events occurring before the passage of the legislation terminating benefits, reasoning that Congress was within its authority to find that the purposes of Social Security were not served by providing benefits to persons living overseas. In reaching this conclusion, the Court noted that:

> [O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [bill of attainder grounds]. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the 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. 'It 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 as void.' Fletcher v. Peck, 6 Cranch 87, 128.[52]

However, it should be noted that the legislation in question in *Flemming* was but a small part of a larger regulatory scheme—the Social Security program—making any punitive intent less apparent.[53]

Another factor that may be relevant to a bill of attainder analysis is the duration of the burden imposed by legislation. For instance, if the burden imposed by legislation is of short duration, one might argue that Congress had to act quickly to address a particular situation, with an understanding that more general legislation would be forthcoming in the future. For instance, in

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[47] *See* Cummings v. Missouri, 71 U.S. 277 (1867) (barring clergymen from ministry in the absence of subscribing to a loyalty oath); Ex parte Garland, 71 U.S. 333 (1866) (oath that one had never born arms against the United States required for any federal office of honor or profit).

[48] *See Ex parte* Garland, 4 Wall. 333 (1867) (Act of Congress which required attorneys practicing before this Court to take an oath indicating that they had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States ..." held a bill of attainder).

[49] *See* Cummings v. State of Missouri, 71 U.S. at 320 ("disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment"). *See also* Foretich v. United States, 351 F.3d 1198 (D.C. Cir. 2003) (legislation limiting custodial rights was a bill of attainder).

[50] 328 U.S. at 315-16 ("The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.").

[51] 363 U.S. 603, 614 (1959).

[52] 363 U.S. at 618.

[53] 363 U.S. at 618.

the case of *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*,[54] the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) suggested that the need for quick resolution of a particular regulatory concern might require a degree of specificity that would not otherwise be acceptable. The *SeaRiver* case is closely related to an oil spill that occurred in 1989, when the Exxon *Valdez* ran aground onto Bligh Reef in Alaska, spilling nearly 11 million gallons of oil into the Prince William Sound. The following year, Congress passed the Oil Pollution Act of 1990,[55] which, among other things, excluded from the waters of Prince William Sound any vessel that had spilled more than 1 million gallons of oil into the marine environment after March 22, 1989. The act effectively barred the Exxon *Valdez* from operating in Prince William Sound.

The owner of the Exxon *Valdez* brought suit, arguing that the exclusion of the Exxon *Valdez* under the Oil Pollution Act constituted an unconstitutional bill of attainder. While the Ninth Circuit held that the legislation in question did meet the specificity prong of the bill of attainder analysis, it found that the legislation was not intended to punish the owners of the Exxon *Valdez*, and thus did not violate the punishment prong of the bill of attainder test. Rather, the Ninth Circuit found that the legislation furthered a rational, non-punitive regulatory purpose.

In the Oil Pollution Act, Congress recognized Prince William Sound as an "environmentally sensitive area," and included various provisions designed to protect the Sound's environment and reduce the likelihood of future oil spills.[56] The act established the Prince William Sound Oil Spill Recovery Institute and an Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Demonstration Program for Prince William Sound; provided for a Bligh Reef navigation light and a vessel tracking and alarm system; and increased equipment and requirements for oil spill response.[57]

The Ninth Circuit found that the exclusion of the Exxon *Valdez* from the Prince William Sound was consistent with this legislative purpose, and Congress could legitimately conclude that a vessel that spilled over 1 million gallons of oil posed a greater risk to Prince William Sound than other tank vessels, because of a pre-existing defect, damage incurred as a result of the spill, or because the spill calls into question the practices of its operators.[58] The court found this case similar to the Supreme Court case of *Nixon*,[59] which held that the Presidential Recordings and Materials Preservation Act,[60] which only applied to the preservation of documentary materials relating to the presidency of Richard Nixon, was not a bill of attainder.

In both of these cases, the reasoning was that there was a specific need for quick legislative action regarding specific situations. Regarding the Exxon *Valdez*, legislative action was needed to avoid another oil spill, while legislation specifically affecting President Nixon was deemed necessary to avoid the possible loss of important historical documents. In both cases, the need for Congress to "proceed with dispatch" allowed Congress to pass legislation that established "a legitimate class

[54] 309 F.3d 662 (9th Cir. 2002).

[55] 33 U.S.C. §§ 2701-61.

[56] 33 U.S.C. § 2732(a)(2)(A).

[57] 33 U.S.C. §§ 2731-35.

[58] *SeaRiver*, 309 F.3d at 675-76.

[59] 433 U.S. 425 (1977).

[60] P.L. 93-526, §§ 104-5.

of one."[61] The holdings in both of these cases appeared to assume that further regulation which applied to persons or entities outside of these "legitimate class[es] of one" would be forthcoming.

Motivational Test for Punishment

A court will also consider the legislative history of a provision in evaluating whether or not legislation is intended to be punitive. The Court, however, has been reluctant to ascribe too much significance to legislative history alone,[62] and will generally require more than just a few statements by individual Members to find such motivation.[63] Further, it seems to be unsettled what information aside from that directly found within the legislative history of a law should be considered by a court.[64]

In some cases, extensive legislative history may suggest punitive intent. For instance, when the proposal to tax employee bonuses of TARP recipients was considered and passed by the House, a variety of remarks were made on the floor concerning the bill. While a small number of remarks addressed the issue of the regulatory purpose of prospective applications of the bill,[65] many remarks were made that seemed to indicate that the application of these bills retrospectively was based on concern with the morality of having paid the bonuses in question, and a desire that the person receiving the bonuses not be able to enjoy their benefit.[66] Some of these comments might have been interpreted as indicating a punitive intent on the passage of the legislation.

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[61] *SeaRiver*, 309 F.3d at 676.

[62] *Flemming*, 363 U.S. at 617 ("[o]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history]").

[63] "Several isolated statements by legislators do not constitute [the required] unmistakable evidence of punitive intent." *Selective Serv. Sys.*, 468 U.S. at 856 n. 15 (internal quotation marks omitted).

[64] For instance, the federal district court in *ACORN v. United States*, in evaluating punitive intent, considered a Member press release suggesting that ACORN had engaged in various misdeeds. ACORN v. United States, 662 F. Supp. 2d at n.9 (noting that Representative Issa stated that "[t]axpayers should not have to continue subsidizing a criminal enterprise that helped Barack Obama get elected President") (citation omitted). The Second Circuit, however, in its decision overturning the district court, did not reference this press release in its review of the legislation's legislative history.

[65] 155 Cong. Rec. H3663 (daily ed. March 19, 2008) (statement of Rep. Woolsey) ("We need a massive overhaul of our financial services regulations, and it can't come a moment too soon. While H.R. 1586 is a measure to fix a specific problem, we need to put in place laws to prevent these abuses from happening in the first place. The days of the "anything goes" mentality on Wall Street must come to an end, and it must end now. Mr. Speaker, today must be the first of a series of bills that come to the House Floor to address our broken regulatory and oversight system of the financial services sector. I urge my colleagues to support this legislation as a way not only to express our outrage, but also as our commitment to a new system of regulation and oversight."); 155 Cong. Rec. H3647 (daily ed. March 19, 2008) (statement of Rep. McGovern) ("But we also need to make sure that bad behavior isn't rewarded with taxpayer money, and that's what this bill is all about. And as President Obama has rightly said, we must also put in place the appropriate rules and regulations going forward so that this kind of financial collapse never happens again."); 155 Cong. Rec. H3657 (daily ed. March 19, 2008) (statement of Rep. Stark) ("This legislation is straightforward. Any executive of a company surviving because of government intervention (including AIG, Fannie Mae and Freddie Mac) that has received or chooses to accept a bonus will be taxed at a 90% rate. Companies will no longer continue to be able to reward bad actors at taxpayer expense.").

[66] 155 Cong. Rec. H3645 (daily ed. March 19, 2009) (remarks of Rep. Pingree) ("It is unconscionable for AIG to pay out $165 million in bonuses to the same top executives who mismanaged the company to the point of failure. It is fundamentally wrong to be rewarding the very same people who ran AIG while it was losing billions and billions of dollars with risky schemes that directly led to the staggering $170 billion bailout last year. It is a stunning example of greed and shamelessness, and it is gross mismanagement and misuse of taxpayer funds that borders on criminal.") 155 Cong. Rec. H3645 (daily ed. March 19, 2009) (remarks of Rep. Maloney) ("I applaud Speaker Pelosi, Mr. Miller, and Chairman Rangel of the Ways and Means Committee for coming together so swiftly to react and incorporating ideas (continued...)

In other situations, however, there may be less direct evidence of the motivational basis for such legislation. For instance, in the bills to limit the provision of federal monies to ACORN, there was some discussion of alleged misdeeds of ACORN during consideration of the bills.[67] The United States Court of Appeals for the Second Circuit, however, found that a "smattering" of Members' remarks suggesting a punitive intent was not sufficient to show that the legislation was motivated by punitive intent.[68] Consequently, it may be difficult to predict in particular cases when evidence

(...continued)

from many bills-from my colleague, Steve Israel, from Gary Peters, from myself, from Elijah Cummings, from many, many others-and coming forward swiftly with this bill that would tax at 90 percent. The remaining 10 percent would probably be taxed by States and cities."); 155 Cong. Rec. H3647 (daily ed. March 19, 2008) (remarks of Rep. Jackson-Lee) ("I'm a lawyer. I realize that this may be subjected to constitutional challenge and/or the courts, but you know? I'm prepared to battle in the courts. Why? Because they look at issues of equity. What does equity mean? It means who's in here with unclean hands, and if there is a situation where they are taking Federal money, such as AIG, and all of a sudden they give retention bonuses, our courts will look at this legislation and say it is fair to give the money back to the American people because the circumstances have changed."); 155 Cong. Rec. H3651 (daily ed. March 19, 2008) (statement of Rep. Pomeroy) ("The people have said no. In fact, they've said: Hell no. And give us our money back. This is not just another case of runaway corporate greed and arrogance, ripping off shareholders by excesses lavished around the executive suite. These bonuses represent a squandering of the people's money because it's the vast sums we have been forced to pour into this now pathetic company. The bill before us is unlike any tax bill I have ever seen. But it reflects the strong feelings of our constituents and the bipartisan will of this body. We will not tolerate these actions. We are not going to wring our hands, shake our heads, look at our feet and mumble 'Ain't it a shame.' Starting right here, right now, we are saying: No more. We are saying: Give us our money back. And we will not stop until we get it back."); 155 Cong. Rec. H3651 (daily ed. March 19, 2008) (statement of Rep. Pomeroy) ("Let today's vote say loud and clear to those running to cash their ill-gotten checks: You disgust us. By any measure, you are disgraced, professional losers. By the way, give us our money back."); 155 Cong. Rec. H3655-56 (daily ed. March 19, 2008) (statement of Rep. Rangel) ("First of all, Mr. Speaker, I want to thank Congressman Peters, Congressman Israel and Congresswoman Maloney for coming together and working with the committee to see how, the best we could, right a wrong.... All this bill does is just pull out that part that they called bonuses); 155 Cong. Rec. H3657 (daily ed. March 19, 2008) (statement of Rep. Levin) ("The head of AIG has suggested their returning the bonuses. They should. And if they don't, we're taking action. We have the authority under the Tax Code not to punish but to protect the taxpayers of the United States of America. That's what we are doing today, and we should pass this overwhelmingly."); 155 Cong. Rec. H3657 (daily ed. March 19, 2008) (statement of Rep. Blumenauer) ("In most of my career here, we have watched the Tax Code twisted, stretched, bent to lavish rewards on a tiny minority of Americans, a few thousand of the richest Americans, and the favored special interests. Today, in a sharp reversal, under your leadership, we used the Tax Code to rebalance the scales. We will use the Tax Code to strip away the outrageous benefits of these bonuses to some of the people who helped drive the economy into the ditch in the first place."). 155 Cong. Rec. H3660 (daily ed. March 19, 2008) (statement of Rep. Hare) ("I thank the chairman. These people have stolen the very money that is supposed to help keep people in their homes); 155 Cong Rec. H3664 (daily ed. March 19, 2008) (statement of Rep. Jackson-Lee) ("It appears that the AIG executives may not have broken the law but certainly the spirit of the law.");155 Cong. Rec. H3664 (daily ed. March 19, 2008) (statement of Rep. Dingell) ("Mr. Speaker, I rise today in strong support of H.R. 1586, which will impose a significant tax on bonuses received by employees of certain TARP-recipient companies. This legislation, of which I am an original co-sponsor, sends a clear message that excessive compensation practices by TARP-recipients are indefensible and, as such, must be heavily penalized.").

[67] The Court noted that Senator Bond referenced an "endemic and system wide culture of fraud and abuse" at ACORN, 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009), while various other Members described ACORN as "this crooked bunch," "this corrupt and criminal organization," and being involved in "child prostitution," "shaking down lenders," "corrupting our election process," "trafficking illegal aliens," and being in the "criminal hall of fame." *See* 155 Cong. Rec. H9946-10129. Congressman Issa published an eighty-eight-page staff report that concluded that ACORN and organizations associated or allied with it constituted "a criminal enterprise" that had "repeatedly and deliberately engaged in systemic fraud" and "committed a conspiracy to defraud the United States by using taxpayer funds for partisan political activities." This report was read into the Congressional Record when one of the challenged appropriation laws was introduced. See 155 Cong. Rec. H9308, 9309-10, 9317 (daily ed. Sept. 14, 2009) (Senator Johanns) (describing ACORN as "besieged by corruption, by fraud, and by illegal activities, — all committed on the taxpayers' dime.").

[68] ACORN v. U.S., 618 F.3d 125 at 141.

of punitive intent in legislative history would be sufficient to establish that a bill was an unconstitutional bill of attainder.

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