The Proposed "Defund ACORN Act": Is it a "Bill of Attainder?"

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Summary

On September 17, 2009, the House passed the "Defund ACORN Act" as part of H.R. 3221, 111th Congress, the Student Aid and Fiscal Responsibility Act of 2009. This Act would limit certain organizations from receiving any federal contracts or grants, if the organization has ever been indicted for a violation of various campaign finance or election laws; has lost a state corporate charter for failure to comply with lobbying disclosure requirements; or has filed a fraudulent form with any federal or state regulatory agency. The limitations would also apply to any organization that has an employment or agency relationship with an individual indicted for a violation of election law. Once excluded, the organization would never be eligible to receive federal contracts or grants again.

In addition, the bill specifically provides for the application of the above criteria jointly and severally to the Association of Community Organizations for Reform Now ("ACORN") and any ACORN-related affiliates. Similar language added as amendments to appropriation bills in the Senate would directly ban ACORN and its subsidiaries from receiving federal grants or contracts. The argument has been made that these proposals would violate the prohibition on bills of attainder found in Article I, § 9, cl. 3 of the Constitution.

The two main criteria which the courts would likely look to in order to determine whether legislation is a bill of attainder are (1) whether "specific" individuals or entities are affected by the statute, and (2) whether the legislation inflicts a "punishment" on those individuals. Under the instant bills, the fact that ACORN and its affiliates are named in the legislation for differential treatment would appear to meet a *per se* criteria for specificity.

The U.S. Supreme Court has also identified three types of legislation which would fulfill the "punishment" prong of the test: (1) where the burden is such as has "traditionally" been found to be punitive; (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;" and (3) where the legislative record evinces a "congressional intent to punish." The withholding of federal contracts or grants does not appear to be a "traditional" punishment, nor does the legislative record so far appear to clearly evince an intent to punish. The question of whether the instant legislation serves as the functional equivalent of a punishment, however, is more difficult to ascertain.

While the regulatory purpose of ensuring that federal funds are properly spent is a legitimate one, it is not clear that imposing a permanent government-wide ban on contracting with or providing grants to ACORN fits that purpose, at least when the ban is applied to ACORN and its affiliates jointly and severally. In theory, under the House bill, the behavior of a single employee from a single affiliate could affect not only ACORN but all of its 361 affiliates. Thus, there may be issues raised by characterizing this legislation as purely regulatory in nature. While the Supreme Court has noted that the courts will generally defer to Congress as to the regulatory purpose of a statute absent clear proof of punitive intent, there appear to be potential issues raised with attempting to find a rational non-punitive regulatory purpose for this legislation. Thus, it appears that a court may have a sufficient basis to overcome the presumption of constitutionality, and find that it violates the prohibition against bills of attainder.

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Background

On September 17, 2009, the House passed the Defund ACORN Act as part of the Student Aid and Fiscal Responsibility Act of 2009. This Act would provide limitations on certain organizations, so that these organizations may not: be a party to any federal contract, grant, cooperative agreement, or any other form of agreement (including a memorandum of understanding); receive federal funds; and no federal employee or contractor may promote or recommend the organization in any way.[1] This disability would apply to any organization that has been indicted for a violation under any federal or state law governing campaign financing or election administration; any organization that had its state corporate charter terminated due to its failure to comply with federal or state lobbying disclosure requirements; and any organization that has filed a fraudulent form with any federal or state regulatory agency.[2] The limitations would also apply to any organization that either employs an individual who has been indicted for a violation under federal or state law relating to an election for federal or state office; has such individual under contract; or provides for such individual to act with the express or apparent authority of the organization.[3]

The bill also specifically addresses the application of the above limitations to the Association of Community Organizations for Reform Now ("ACORN") and any ACORN-related affiliates. The language in question would provide that the term "organization" shall include the Association of Community Organizations for Reform Now ("ACORN") and any ACORN-related affiliate. By providing that ACORN and its affiliates are an "organization," the proposed bill would appear to establish that the proposed bill would apply jointly and severally to ACORN and its affiliates. In other words, a violation of one of the specified disqualifiers for federal contracts or grants in ACORN or in one affiliate would result in the disqualification of ACORN and all its affiliates. Similar language has been considered in the Senate.[4]

Bills of Attainder

Background

The question has been raised whether the implementation of the proposed Defund ACORN Act would be an unconstitutional bill of attainder.[5] The United States Constitution expressly prohibits the federal government from enacting bills of attainder,[6] and the Supreme Court has defined a bill of attainder as a "law that legislatively determines guilt and inflicts punishment upon an

[1] Defund ACORN Act, § 602(a) (amendment to H.R. 3221, 111th Congress, 1st Sess., the Student Aid and Fiscal Responsibility Act of 2009).

[2] Section 602(b)(1)-(3).

[3] Section 602(b)(4); § 602 (c)(3)

[4] An amendment directing that no monies authorized could be distributed to ACORN and its subsidiaries was approved in the Senate as an amendment to the 2010 Appropriations bill for Department of Transportation, Department of Housing and Urban Development, and related agencies, see 155 Cong. Rec. S9318 (daily ed. Sept. 14, 2009)(considering H.R. 3288), and the 2010 Appropriations bill for Department of the Interior, Environment and related agencies, 155 Cong. Rec. S9542 (daily ed. Sept. 17, 2009)(considering H.R. 2996). Although this report focuses on the House-passed bill, much of the analysis would be applicable to these provisions.

[5] This report does not address other possible constitutional issues which might be raised regarding this legislation.

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

identifiable individual without provision of the protections of a judicial trial."[7] 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.[8]

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 it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions."[9]

At common law, a bill of attainder was a parliamentary act that sentenced a named individual or identifiable member of a group to death.[10] It was most often used to punish political activities that Parliament or the sovereign found threatening or treasonous.[11] 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.[12] 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.[13]

The two main criteria which the courts look to in order to determine whether legislation is a bill of attainder are (1) whether specific 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, or readily ascertainable members of a group,[14] or identifies such a person or group by past conduct.[15] It has been suggested that a court's determination that a statute referencing a specific group of persons is based on past conduct may in some cases be treated as a *per se* violation of the specificity prong.[16] For instance, in the case

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

[8] "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.

[9] 3 J. Story, Commentaries on the Constitution of the United States 1338 (1833).

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

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

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

[13] *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").

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

[15] Selective Serv. Sys. v. Minnesota Pub. Interest Research Group., 468 U.S. 841, 851 (1984). Although the law appears unsettled, it appears 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).

[16] *See* Case Note, Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a (continued...)

of *United States v. Lovett*,[17] 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.[18] The employees brought suit, and the Supreme Court ruled in their favor, holding that Section 304 was a punishment of named individuals without a judicial trial.[19]

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 Service*,[20] the Court evaluated the Presidential Recordings and Materials Preservation Act,[21] which required that former President Richard Nixon, whose papers and tape recording were specifically named in the act,[22] 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 statute was constitutional despite this specificity. In *Nixon*, the Court found that the bill failed the second prong (punishment) of the test for 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.[23] 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."[24] Thus, it has been suggested that *Nixon* stands for the proposition that any level of

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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").

[17] 328 U.S. 303 (1946).

[18] *Id. at* 304-05, 311-12.

[19] *Id. at* 315.

[20] 433 U.S. 425 (1977).

[21] P.L. 93-526.

[22] 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."

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

[24] 433 U.S. at 472.

specificity is acceptable, even the naming of individuals, as long as a rational, non-punitive basis for the legislation can be established.[25]

As noted, the Defund ACORN Act would limit particular entities from entering into agreements with, receive federal funds from, or be promoted by the federal government. This disability would apply to a potentially broad array of organizations that have either been indicted for violation of specific laws, had a charter revoked for failing to comply with certain disclosure requirements, or that has filed a fraudulent document to a government agency. Although the legislation does not specify, it would appear that such limitations would apply both to organizations that have engaged in such behaviors in the past, and organizations that engage in such behavior in the future.

There does not appear to be a significant argument that these general provisions of the Defund ACORN Act would meet the element of specificity required for establishing that legislation is a bill of attainder. While the legislation would affect an ascertainable group of entities based on past behaviors, it would also appear to apply to entities that met the specified criteria in the future. Further, a court would most likely be able to discern a rational, non-punitive purpose for the application of these criteria: a desire to prevent federal funds being used for activities that violate federal or state law. While the application of this disability to entities that have been indicted (but perhaps not been convicted) under certain laws would appear to be an uneasy fit, courts are likely to grant Congress significant deference in identifying the parameters of groups eligible for contracting with, receiving federal funds from, being promoted by the federal government.

A different question arises, however, as to those portions of the bill that specifically name ACORN, and then provide a different set of rules to that organization. Unlike other organizations that would be covered by these provisions, the ACORN organization is defined to include both ACORN and all ACORN-related affiliates. Thus it would appear that, unlike other organizations identified under this Act, ACORN and it affiliates would each be held "jointly and severally liable" for the behavior ACORN, any one of its affiliates, and all employees thereof. In other words, if ACORN or one of its affiliates were to come under the limitations of the proposed Act, then ACORN and all its affiliates would be similarly affected.

On its face, the naming of ACORN and its affiliates under the proposed Act would appear to support a *per se* finding of the required element of specificity.[26] The Supreme Court, however, has noted that cases regarding bills of attainder cannot be analyzed in the abstract, as each "turns on its own highly particularized context."[27] Thus, the application of the proposed bill jointly and severally to ACORN and its affiliates would appear to require a close examination of the legislation and its particular application to ACORN. For instance, the question can be asked whether the apparent specificity of the proposal can be justified by some regulatory purpose.

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[25] *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).

[26] It appears to be relatively unusual for the Congress to identify individuals or entities for detrimental treatment. *But see* Arjay Assocs., Inc. v. Bush, 891 F.2d 894 (Fed. Cir. 1989).(denying standing to importers to challenge an import ban on products from Toshiba Machine Corporation and Konigsberg Corporation, imposed after those entities diverted military technology to the Soviet Union).

[27] Flemming v. Nestor, 363 U.S. 603, 616 (1959).

As noted, the proposed Act, on its face, applies both retrospectively and prospectively, so that in theory, the proposed legislation could be applied to ACORN and its affiliates based on future behavior. It does not appear to be fatal to a bill of attainder challenge, however, 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 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. . . . "[28]

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.[29] 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.[30] Thus, in the instant case, to the extent that ACORN and one of its affiliates could fall under these provisions based on future behavior, the fact that the law could be applied based on past behavior, and that ACORN and its affiliates cannot meaningfully withdraw[31] would appear to meet a *per se* criteria for specificity.

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 the nature of the regulatory purpose. This would require an analysis of the nexus between this specificity and the regulatory purposes served by the proposed law. In this regard, a court might consider legislative purposes that might be articulated in the legislative history of the proposals in question.

The legislative record regarding this proposed Act does appear to indicate that the Congress identified ACORN and its affiliates as being likely to fall under its various provisions. There does not appear to be an indication, however, of why, within the large group of entities that might be subject to the proposed Act, only ACORN and its affiliates will be subject to special rules regarding joint and several application.

Although one might speculate that ACORN and its affiliates represent a special class of organizational entities that cannot be treated as other organizations, it is not clear on what factual basis such a distinction has been made by the Congress. Further, since any number of other organizations with affiliates could fall under the proposed Act, it would be difficult to establish why ACORN and its affiliates are deserving of differential treatment. Consequently, it would appear likely that a court would find that the instant proposal met the requirement element of specificity.

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

[29] 381 U.S. at 458.

[30] *See also* Selective Service System v. Minn. 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.")

[31] Although ACORN and its entities might, in theory, disband their corporate structures and reconstitute as new and separate entities, this would not diminish the affect of the bill of attainder on the corporate entities when they existed. In other words, although it is an unsettled area of law, it would appear that the corporate entity itself has the right to not be subjected to a bill of attainder. *See* Consol. Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338 (2nd Cir. 2002).

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 types of "punitive" legislation that are barred by the ban on bills of attainder: (1) where the burden is such as has traditionally been found to be punitive; (2) where the type and severity of burdens imposed cannot reasonably be said to further non-punitive legislative purposes; and (3) where the legislative record evinces a congressional intent to punish. Thus, the question can be considered as to whether the legislation at issue would fit into one of these three categories.

Traditional Punishments

The Supreme Court has identified various types of punishments which 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.[32] There do not appear to be any cases where the Court has found that denial of federal benefits to organizations is the type of "punishment" traditionally engaged in by legislatures as a means of punishing individuals for wrongdoing.

"Functional" Punishment

The Supreme Court has also indicated that some legislative burdens not traditionally associated with bills of attainder might nevertheless "functionally" serve as punishment.[33] 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.[34]

It is clear that a denial of the ability to engage financially with the United States can fulfill the punishment prong of the test. 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."[35] For instance, in *United States v. Lovett*, the Court struck down a statute prohibiting individuals from being employed by the United States as a bill of attainder.[36]

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 no federal salary or compensation could be paid to them unless

[32] 433 U.S. at 474-75.

[33] 433 U.S. at 475.

[34] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Nixon v. Administrator of General Services, 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).

[35] 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).

[36] 328 U.S. 303 (1946),

they were reappointed to their jobs by the President with the advice and consent of the Senate. 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.[37]

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.[38] 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, Congressman 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."[39]

A special counsel for the House noted that the legislation in question was within the discretion of Congress' power under the Spending Clause.[40] However, the Court in *Lovett* noted that other 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.[41] For instance, the Court has found that a ban on lawyers practicing before the Supreme Court[42] was punishment for purposes of bill of attainder analysis, as was a ban on persons holding positions of trust related to legal proceedings.[43] 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.[44]

Thus, the question in the instant case is whether applying the provisions of the proposed Act jointly and severally only to ACORN and its affiliates is a kind of limitation that could be interpreted as punishment. One could argue that the imposition of an expansive prohibition on contracting with the federal government only to the named entities would appear analogous to the ban on federal employment found in the *Lovett* case. As with *Lovett*, the legislation has potential to exclude ACORN or its affiliates from ever contracting with the federal government. While Congress clearly has the discretion to designate how federal funds are allocated, a ban on ACORN or its affiliates applying for any government contracts or benefits, regardless of context,

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[37] 328 U.S. at 308.

[38] 328 U.S. at 313-14.

[39] 328 U.S. at 309-10. (citations omitted).

[40] 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."

[41] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 474-75 (1977) (citing cases).

[42] *See Ex parte* Garland, 4 Wall. 333 (1867)(Act of Congress which required attorneys practicing before this Court to take a 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.)

[43] *See* Cummings v. State of Missouri, 71 U.S. 277, 320 (1867) ("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 (2003) (legislation limiting custodial rights was a bill of attainder).

[44] 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.").

appears to be similar to the limitation imposed in *Lovett* where the named individuals were deemed ineligible for any government employment.

The question does arise, however, whether the burden imposed by the legislation is susceptible to explanation 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*,[45] 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.[46]

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.[47] Thus the question arises as to whether the scope of the instant legislation, which is titled the "Defund ACORN Act," fits into current regulations regarding government grants and contracts.

For this, one would need to look at what legislative purposes are generally accorded to barring individuals or corporations from access to federal benefits or contracts. Currently, extensive government regulation exists establishing who is eligible to receive federal grants or benefits. If there is an adequate relationship between the restriction imposed by the instant legislation and the presumably legitimate, non-punitive governmental purpose of assuring proper awarding and expenditures of federal funds, then the legislation would be likely to be found constitutional.[48]

For instance, the Code of Federal Regulations contains extensive regulations regarding government-wide debarment and suspensions of eligibility for government grants.[49] Under these guidelines, an agency may, in the public interest, suspend a participant in a program or activity based on a variety of bases, including the existence of an indictment, conviction, civil judgment, or other official findings by federal, state, or local bodies against the participant. Although an agency has significant discretion in making this decision, it is required to consider a variety of particularized criteria to make its determination[50]

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[45] 363 U.S. 603, 614 (1959).

[46] 363 U.S. at 618.

[47] 363 U.S. at 618.

[48] *See* BellSouth II, 162 F.3d 678, 688 (1998) (upholding a statute which required local operating companies to open their local telephone markets to competition to avoid the creation of monopolies); Dehainaut v. Pena, 32 F.3d 1066, 1072 (7th Cir. 1994) (upholding indefinite disbarment of former air traffic controllers from reemployment with the Federal Aviation Administration).

[49] 2 C.F.R. Ch. 1, Part 180 (dealing with nonprocurement programs or activities).

[50] 2 C.F.R. § 180.705.

There are also extensive regulations for the debarment of federal contractors from contracting with the government.[51] As a matter of policy, the federal government seeks to "prevent improper dissipation of public funds"[52] in its contracting activities by dealing only with responsible contractors.[53] Debarment and suspension promote this policy by precluding agencies from entering into new contractual dealings with contractors whose prior violations of federal or state law, or failure to perform under contract, suggest they are nonresponsible.[54] Because exclusions under the Federal Acquisition Regulations are designed to protect the government's interests, they may not be imposed solely to punish prior contractor misconduct.[55]

Debarments last for a "period commensurate with the seriousness of the cause(s)," generally not exceeding three years.[56] Debarment-worthy conduct can be imputed from officers, directors, shareholders, partners, employees, or other individuals associated with a contractor to the contractor, and vice versa, as well as between contractors participating in joint ventures or similar arrangements.[57] Due process requires that contractors receive written notice of proposed debarments and of debarring officials' decisions, as well as the opportunity to present evidence within the decision-making process for all debarments except those based upon contractors' convictions.[58]

Thus, it appears that there are already significant existing regulations regarding whether specified entities can be excluded from government programs or activities. Further, suspending organizations based on past criminal behavior would appear to need to fit within the regulatory purpose of the scheme that is already in existence. Although the automatic exclusion of entities from federal contracts or grants based only on indictments of specified laws by the entities or their employees or agencies may not fit comfortably within the existing scheme, it would seem that such a regulation would share a similar rational non-punitive regulatory purpose of ensuring that federal benefits and contracts be administered properly.

The specifics of the instant legislation, however, appear to differ substantially from the regulatory goals of the existing regime. For instance, it is not clear why violation of campaign financing, election laws, or disclosure requirements would be seen as meeting the goals of preventing improper dissipation of public funds, when far more serious criminal violations are not addressed

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[51] See generally CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel.

[52] United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) ("It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.") (internal citations omitted).

[53] 48 C.F.R. § 9.402(a) (directing agency contracting officers to "solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only").

[54] See id. ("Debarment and suspension are discretionary actions that ... are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].").

[55] 48 C.F.R. § 9.402(b) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.").

[56] 48 C.F.R. § 9.406-4(a)(1). Debarments are limited to one year for violations of the Immigration and Nationality Act, but can last up to five years for violations of the Drug-Free Workplace Act. 48 C.F.R. § 9.406-4(a)(1)(i)-(ii). The FAR allows debarring officials to extend the debarment for an additional period if they determine that an extension is necessary to protect the government's interests. 48 C.F.R. § 9.406-4(b). Extension cannot be based solely upon the facts and circumstances upon which the initial debarment was based, however. Id.

[57] 48 C.F.R. § 9.406-5(a)-(c).

[58] 48 C.F.R. § 9.406-3. When debarment is based on a conviction, the hearing that the contractor received prior to the conviction suffices for due process in the debarment proceeding.

by the legislation. Further, it is not clear why these particular legal violations would result in permanent debarment of the organization. While current regulations may limit organizations to relatively short debarments, generally no more than three years, the instant proposal has no mechanism for these organizations to be relieved of their disability.

Of even more concern, is that this permanent debarment would be imposed jointly and severally on ACORN and its affiliates. It would appear that investigating affiliates in order to determine whether they had colluded in illegal behavior might be an appropriate procedure for an agency to engage in. For an agency to make a *per se* assumption that all entities affiliated with a disqualified entity should also be disqualified, however, is not consistent with the goals of the current regulations, which require that such matters be considered individually. Since affiliations with other entities are often voluntary, and may represent a relationship with little or no coordination, current law would not allow such a *per se* exclusion.

The further step of finding that just one organization and its affiliates would be subject to such limitations jointly and severally seems even further from the existing regulatory scheme. It should be noted that there are 361 ACORN affiliates in 120 cities, 43 states and the District of Columbia.[59] Under existing regulations, an agency seeking to evaluate disqualification of these affiliates would most likely need to evaluate them separately. It is not clear on what basis the Congress dispensed with such distinctions, and why the Congress found it necessary to provide that, if even one employee from one ACORN affiliated organization were to commit one of the specified offenses, that ACORN and the rest of its affiliates would lose access to government grants or contracts. While there have been allegations of wrongdoing by ACORN and some of its affiliates, it does not appear that such allegations have been made against all ACORN-related affiliates.[60]

In general, the permanent exclusion of all of these organizations would be difficult to justify as regulatory in nature. While the Court has noted that the courts will generally defer to Congress as to the regulatory purpose of a statute absent clear proof of punitive intent, there appear to be problems with finding a rational non-punitive regulatory purpose for this legislation. Thus, it appears that a court would have a sufficient basis to overcome the presumption of constitutionality, and find that it violates the prohibition against bills of attainder.

Legislative History

The process for the passage of this bill has not been completed, so it is difficult to tell what legislative history a court would have to draw on to evaluate legislative intent. Existing legislative history, however, can be evaluated to determine whether it is consistent with a legitimate regulatory purpose. As noted, it would appear that, to the extent that a regulatory purpose exists, it would be that Congress wished to ensure that federal benefits and contracts be administered properly by organizations that receive federal funds.

It would appear, however, that there was little discussion of the specific provision of the bill during its adoption. The Defund ACORN Act was primarily debated under a motion to recommit, and there seems to have been little evaluation of the provisions of the act. Specifically, no

[59] *See* Staff Report, "Is ACORN Intentionally Structured as a Criminal Enterprise?", Committee on Oversight and Government Reform at 3 (111th Cong., July 23, 2009).

[60] *See generally* id.

indication was given why ACORN and its affiliates, unlike other organizations subject to the proposed Act, would have the Act applied to them jointly and severally. No explanation was given as to whether there were other organizations with other affiliation structures, and why those entities would not be subject to this *per se* rule. Thus, it is difficult to evaluate the strength of the regulatory purpose arguments for this particular provision from the existing legislative history.

There are significant indications that some Members of Congress are concerned that ACORN and its affiliates have engaged in criminal behavior and that they receive federal funds.[61] Remarks made specific to this proposed legislation also seem to indicate a concern regarding the past behaviors of ACORN and its affiliates. [62] These remarks appear to express both moral and regulatory objections to these entities receiving federal funds, and could certainly be read as indicating that Congress had made certain factual evaluations regarding alleged past behaviors of ACORN. Punitive intent, however, does not appear to be clearly expressed on the face of the existing legislative history.

Conclusion

As noted, the two main criteria which the courts will look to in order to determine whether legislation is a bill of attainder are (1) whether "specific" individuals or entities are affected by the statute, and (2) whether the legislation inflicts a "punishment" on those individuals. The "specificity" prong of this text can be met by a finding that legislation identifies persons based on their past conduct. Further, the requirement of specificity is not necessarily 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. Thus, under the instant bill, the fact that ACORN and its affiliates are named and can be included in the legislation based on past behavior would appear to meet a *per se* criteria for specificity.

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[61] *See* Staff Report, "Is ACORN Intentionally Structured as a Criminal Enterprise?", Committee on Oversight and Government Reform at 3 (111th Cong., July 23, 2009)

[62] 155 Cong Rec H 9675 (daily ed.September 17, 2009)(statement of the Rep. Issa). Congressman Issa, who sponsored the proposed language as an amendment to the appropriations bill, stated that

> ACORN has been linked to multiple instances of voter registration fraud and other illicit activity. In recent days, media accounts have detailed ACORN employees' alleged complicity in illegal schemes too unseemly to discuss in this chamber. To continue funding this organization would not just be indefensible-it would be an outrage.
>
> An analysis of federal data shows that ACORN has received more than $53 million in direct funding from the Federal Government since 1994, and has likely received substantially more indirectly through States and localities that receive Federal block grants.
>
> The Census Bureau recently decided to sever all ties with ACORN to ensure the integrity of their operations. This was the right decision. Unfortunately, ACORN's links to the Federal Government do not stop with the Census Bureau. This organization has infiltrated a host of federal programs, consuming taxpayer dollars even as it has repeatedly been found to engage in criminal activity.
>
> To fully protect taxpayers, we must enact a comprehensive ban on Federal funding for this corrupt and criminal organization. This motion to recommit will do exactly that.

The Court has also identified three types of legislation which would fulfill the "punishment" prong of the test: (1) where the burden is such as has "traditionally" been found to be punitive; (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;" and (3) where the legislative record evinces a "congressional intent to punish." The withholding of federal contracts or grants does not appear to be a "traditional" punishment, nor does the legislative record at this point clearly evince an intent to punish. The question of whether the instant legislation serves as the functional equivalent of a punishment, however, is more difficult to ascertain.

The specifics of the instant legislation appears to differ substantially from the regulatory goals of the existing legal regime regarding federal contracting and federal grants. Unlike the existing regime, this legislation focuses on relatively minor legal violations such as campaign financing, election laws, or disclosure requirements. Further, while current regulations may limit organizations to relatively short debarments, generally no more than three years, the instant proposal has no mechanism for these organizations to be relieved of their disability. In addition, this permanent exclusion would be imposed jointly and severally on ACORN and its affiliates, essentially establishing a *per se* rule that all affiliates and ACORN would be held responsible for the behavior of any other affiliates or ACORN, or an employee thereof.

In general, absent an agency proceeding to determine that ACORN and everyone of its affiliates have engaged in unlawful behavior, the permanent exclusion of all of these organizations would be difficult to justify as regulatory in nature. While the Supreme Court has noted that courts will generally defer to Congress as to the regulatory purpose of a statute absent clear proof of punitive intent, there appear to be several potential problems raised by attempts to find a rational non-punitive regulatory purpose for this legislation. Thus, it appears that a court may have a sufficient basis to overcome the presumption of constitutionality, and find that the proposed Defund ACORN Act violates the prohibition against bills of attainder.

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