



# Retroactive Taxation of Executive Bonuses: Constitutionality of H.R. 1586 and S. 651

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## Summary

There has been significant controversy about the constitutionality of the legislative proposals (H.R. 1586 and S. 651) to tax bonuses paid to employees of entities receiving assistance from the federal government under the Emergency Economic Stabilization Act of 2008. Under H.R. 1586, the bonuses would be taxed as income to the employee at a rate of 90%. S. 651 would impose an excise tax equal to 35% of the bonus on both the employee and entity. Both bills would apply to bonuses received on or after January 1, 2009, in taxable years ending on or after that date. H.R. 1586 was passed by the House on March 19, 2009, by a vote of 328 to 93. No legislative action has yet been taken on S. 651.

This report analyzes the constitutionality of these bills. Specifically, it examines whether their retroactive application violates the equal protection and due process guarantees of the Fifth Amendment, rises to the level of a taking under the Fifth Amendment, or violates the prohibition on ex post facto laws and bills of attainder. It reaches the conclusion that while certain aspects of the proposed taxing schemes (particularly, the 90% rate in H.R. 1586 and statements in the legislative history targeting specific taxpayers) may raise concerns under the Fifth Amendment and ex post facto clause, the strongest arguments against their constitutionality seem to arise under the bill of attainder analysis.

The two main criteria that the courts will 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). The Supreme Court has 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 cannot reasonably be said to further “non-punitive legislative purposes,” and (3) where the legislative record evinces a “congressional intent to punish.”

Although the bills would apply both prospectively and retrospectively, they would both appear to meet the “specificity” prong. This is because each bill would apply, in part, to a specified group of people, identified by past conduct, who cannot meaningfully withdraw from that group. As to the “punishment” prong, confiscation of property has been found to be a “traditional” punishment. Thus, the closer that a tax rate gets to 100% on income already earned, the more likely that such a tax would be seen by a court as rising to the level of punishment. Also, the deterrence of granting or receiving future bonuses would not appear to be an applicable regulatory purpose where bonuses have already been paid. Thus, the most logical remaining non-punitive regulatory purpose for the statute would appear to be revenue raising. A review of the legislative history established so far, however, seems to indicate that raising revenue is not a primary purpose behind the proposed bills. Rather, the legislative history seems to contain comments that would indicate the existence of a congressional intent to punish those individuals receiving bonuses. Consequently, while both of these bills may raise constitutional issues, H.R. 1586 raises the most serious constitutional concerns.

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## H.R. 1586 and S. 651

Both H.R. 1586 and S. 651 would impose special taxing rules on bonuses paid to employees of the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and certain entities that receive assistance from the federal government under the Emergency Economic Stabilization Act of 2008 (EESA) (P.L. 110-343). Under H.R. 1586, the bonuses would be taxed as income to the employee at a rate of 90%. S. 651, rather than taxing the bonuses as income, would impose an excise tax on both the employee and entity. Each would be taxed on the bonus at a rate of 35%. The excise tax would be in addition to the regular income tax (which has a highest marginal tax rate of 35%); thus, the effective tax rate on the bonus would exceed 35% for employees whose bonuses were also subject to the income tax. Both bills would apply to bonuses received on or after January 1, 2009, in taxable years ending on or after that date.

H.R. 1586 was passed by the House on March 19, 2009, by a vote of 328 to 93. No legislative action has yet occurred with respect to S. 651.

The following table compares some of the significant features of the two bills.

**Table I. Summary of H.R. 1586 and S. 651**

	<b>H.R. 1586</b>	<b>S. 651</b>
How is the bonus taxed?	Bonus taxed as income to the individual at a rate of 90%.	Bonus subjected to 35% excise tax imposed on both the individual and the entity paying the bonus. (Excise tax is in addition to regular income tax.)
Which entities are covered?	<ol style="list-style-type: none"> <li>1. Any entity receiving capital infusions of more than \$5 billion under EESA after December 31, 2007.</li> <li>2. Fannie Mae and Freddie Mac.</li> <li>3. Any member of the same affiliated group of an entity described in the above two categories.</li> <li>4. Any partnership for which at least 50% of the capital or profits interests are owned (directly or indirectly) by at least one entity described in the first two categories.</li> </ol>	<ol style="list-style-type: none"> <li>1. Any entity (other than certain small banks) if, at any time after December 31, 2007, (1) the federal government acquires an equity interest in it pursuant to EESA or the third undesignated paragraph of § 13 of the Federal Reserve Act (12 U.S.C. § 343), or a warrant (or other right) to acquire an equity interest pursuant to such programs, and (2) the entity receives assistance under such programs in excess of \$100 million.</li> <li>2. Same.</li> <li>3. Same.</li> <li>4. No similar provision.</li> </ol>

	<b>H.R. 1586</b>	<b>S. 651</b>
What are bonuses?	Retention and incentive payments and any other bonus that is in addition to the amount payable for services performed by the individual at a regular periodic rate (e.g., hourly, weekly, etc.).  Any reimbursement made by the entity to the individual for the 90% tax is treated as a bonus.  Excludes commissions, welfare and fringe benefits, and expense reimbursements.	Same.  No similar provision.  Same, also excludes contributions to qualified retirement plans and, for payments other than retention bonuses, certain equity payments.
Are all bonuses subject to tax?	Taxpayers with adjusted gross income below \$250,000 (\$125,000 if married filing separately) are not subject to the tax (they would pay tax on the bonus under the regular income tax rules).	Bonuses that are not retention bonuses are only subject to the excise tax to the extent they exceed \$50,000. The entire retention bonus is subject to tax.
What if the individual repays the bonus to the entity?	The 90% tax is not imposed if the individual irrevocably waives his/her entitlement to the payment or returns it to the entity before the close of the taxable year in which the payment is due, so long as he/she does not receive a benefit in connection with the waiver or return.	Excise tax is not imposed if the amount is repaid before the due date of the individual's tax return.
What if the entity repays any assistance to the federal government?	Any amount repaid is not counted towards the \$5 billion threshold (see above).	Any amount repaid is not counted towards the \$100 million threshold (see above) or as aid to Fannie Mae/Freddie Mac.
Withholding	No special provision.	If the bonus is treated as wages for withholding purposes, then withholding is done at 35%.
Nonresidents	No special provision.	If the bonus is not subject to the existing withholding rules for nonresident aliens, then the entity is liable for the 35% tax otherwise owed by the individual.
Notification	No provision.	Entity is required to notify, as soon as practicable after the provision's enactment and at other appropriate times, the Treasury Secretary and individuals of the amount of bonuses paid and taxes deducted/withheld.
Effective date	Applies to bonuses received after December 31, 2008, in taxable years ending after such date.	Same.

**Source:** Congressional Research Service

## Constitutional Analysis

The fact that both bills apply retroactively (at least partially) to payments that have already been received may leave them open to constitutional challenge. Possible arguments include that the bills violate the equal protection and due process requirements of the Fifth Amendment, are

takings for purposes of the Fifth Amendment, or violate the prohibitions against ex post facto legislation and bills of attainder.

## Equal Protection

Some could argue that the bills raise equal protection concerns under the Fifth Amendment by targeting certain taxpayers for the unfavorable tax treatment of bonuses. Under this argument, H.R. 1586, which applies to fewer entities than S. 651, could be more constitutionally suspect.

In general, classifications made for federal tax purposes are constitutionally permissible so long as “they bear a rational relation to a legitimate governmental purpose.”<sup>1</sup> The same standard applies in situations involving retroactive tax legislation.<sup>2</sup> The rational basis test is a low standard of review by the courts. Courts typically show great deference to the tax classifications made by legislatures in recognition of “the large area of discretion which is needed by a legislature in formulating sound tax policies.”<sup>3</sup> As the Supreme Court has noted, “[i]t has ... been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.”<sup>4</sup>

Because legislatures have “especially broad latitude” in creating tax classifications,<sup>5</sup> the bar is low for Congress to adequately justify its rationale for making the classifications in either bill.<sup>6</sup> One could argue that H.R. 1586 and S. 651 are atypical tax legislation and, therefore, the traditional deference to a legislature’s choice of classification may not be appropriate. Tax classifications are usually given deference because they are “a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden” and it is inappropriate for a court, which is not in a position to be familiar with these things, to second guess the legislature.<sup>7</sup> It could be argued that this rationale is not present here, as the legislative history of the bills (particularly H.R. 1586) may evidence a punitive intent, aimed primarily at one company,<sup>8</sup> that is not typically seen in tax legislation. Under this argument, these expressed motivations targeting specific taxpayers may lead a court to question the legitimacy of the government’s interest.<sup>9</sup> This argument may be stronger for H.R. 1586, where the legislative history containing statements targeting one company is more developed, the bill applies to fewer

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<sup>1</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983). Some tax classifications are subject to higher levels of scrutiny. For example, classifications based on a suspect classification (e.g., race or national origin) or that interfere with the exercise of a fundamental right (e.g., freedom of speech or religion) call for strict judicial scrutiny. *See id.*

<sup>2</sup> *See Welch v. Henry*, 305 U.S. 134, 145 (1938).

<sup>3</sup> *Taxation with Representation*, 461 U.S. at 547 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

<sup>4</sup> *Id.* (quoting *Madden*, 309 U.S. at 88).

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 547-48 (“[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.” *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

<sup>7</sup> *Id.* at 547 (quoting *Madden*, 309 U.S. at 88).

<sup>8</sup> *See* discussion *infra* note 87 and accompanying text.

<sup>9</sup> *See United States Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”).

entities, and the 90% rate may be reaching confiscatory levels (arguably making the proposal look less like a tax and more like punishment). On the other hand, courts may be reluctant to adopt this analysis in light of the fact that both proposals apply broadly to companies receiving a threshold amount of taxpayer money (i.e., the bills are not limited only to companies mentioned in the legislative history).

A court searching for an adequate justification for the bills and their classifications that is independent from any desire to target a select group of bonus recipients and payors would likely consider the bills' legislative history.<sup>10</sup> While the intent behind the legislation may not yet be fully articulated (only one House has considered a bill and there are no committee reports or hearings), possibilities include the traditional revenue-raising purpose associated with tax legislation and the imposition of additional regulatory restrictions on the compensation paid by entities receiving federal assistance.<sup>11</sup> Either purpose may be able to justify the classification. For example, if H.R. 1586 was found to have a regulatory purpose, then the \$5 billion threshold may be reasonable under the theory that regulatory concerns are heightened in cases of entities receiving a significant amount of government funds. Thus, the question of whether these bills violate the equal protection guarantees of the Fifth Amendment may turn on whether the bills and their legislative history support this or a similar interpretation.

## Due Process

Both bills apply to bonuses received on or after January 1, 2009, in taxable years ending on or after that date. Some could argue that the bills violate the due process clause of the Fifth Amendment<sup>12</sup> because they apply to some payments that have already been received and some that may have been arranged for under contracts entered into prior to 2009.

The standard used to determine whether retroactive tax legislation violates substantive due process is whether the retroactive application is “supported by a legitimate legislative purpose furthered by rational means.”<sup>13</sup> As discussed above, rational basis is a low standard of review by the courts. Once it is met, “judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches....”<sup>14</sup> Thus, the threshold is low for Congress to adequately justify its rationale for the bills' retroactive application. One potential issue, in light of certain statements in the legislative history indicating an intent to punish certain taxpayers,<sup>15</sup> may be whether Congress acted with an “improper motive” or “illegitimate [or arbitrary]”<sup>16</sup> purpose in giving the taxing schemes retroactive effect.

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<sup>10</sup> See *id.* (striking down a provision making households with unrelated members ineligible for food stamps after failing to find a legitimate reason for the limitation since it did not advance the stated purposes of the act (ensuring adequate nutrition and stimulating the agriculture economy) and the legislative history made clear the provision was targeted at “hippies” and “hippie communes”).

<sup>11</sup> See discussion *infra* note 86 and accompanying text.

<sup>12</sup> U.S. CONST. Amend. V (reading, in part, that no person shall “be deprived of life, liberty, or property, without due process of law”).

<sup>13</sup> *United States v. Carlton*, 512 U.S. 26, 30-31 (1994).

<sup>14</sup> *Id.* at 31.

<sup>15</sup> See discussion *infra* note 87 and accompanying text.

<sup>16</sup> *Carlton*, 512 U.S. at 32.

The retroactive extent of the bills (back to January 1, 2009) seems constitutionally permissible. Tax legislation that is retroactive to the beginning of the year of enactment has routinely been upheld against due process challenges.<sup>17</sup> While due process concerns may be raised by a more extended period of retroactivity,<sup>18</sup> the Supreme Court has deemed the modest retroactive application of tax laws a “customary congressional practice” required by “the practicalities of producing national legislation.”<sup>19</sup>

Furthermore, the fact that taxpayers may have concluded a transaction (e.g., entered into employment contracts) in reliance on prior law is generally not important to the analysis as “reliance alone is insufficient to establish a constitutional violation.”<sup>20</sup> As the Court has stated, “[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.”<sup>21</sup> Additionally, lack of notice of the retroactive effect of a tax law is not dispositive of whether due process has been violated.<sup>22</sup> Lack of notice may be a concern when the retroactive legislation enacts a wholly new tax, as indicated by the Court in two cases striking down retroactive application of the law enacting the gift tax.<sup>23</sup> In such a situation, the taxpayer has “no reason to suppose that any transactions of the sort will be taxed at all.”<sup>24</sup> Here, the amendment to the federal income tax laws made by H.R. 1586 would not be characterized as a wholly new tax. There may be a stronger argument for describing the excise tax in S. 651 as a new tax, but it arguably falls within the pre-existing framework regulating employee compensation and, therefore, is not as remarkable as the creation of the gift tax. Thus, it is unlikely that the lack of notice would be found to violate due process.

## Takings

It is unlikely that the tax imposed by the bills would offend the Takings Clause of the Fifth Amendment.<sup>25</sup> Since the 19<sup>th</sup> century, the Supreme Court has ruled that the sovereign’s taxing power and its power to take private property upon payment of just compensation are distinct. As the Court said in 1880, “neither is taxation for a public purpose, however great, the taking of

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<sup>17</sup> See *United States v. Darusmont*, 449 U.S. 292, 297 (1981).

<sup>18</sup> See *Nichols v. Coolidge*, 274 U.S. 531, 542-43 (1927) (disallowing the retroactive application of an amendment to the estate tax that changed the tax treatment of a transfer twelve years after it had occurred because it was “arbitrary, capricious and amounts to confiscation”). This case is one of the few instances where the Court has struck down retroactive tax legislation on due process grounds. The Court later unfavorably compared the 12-year period with periods where the “retroactive effect is limited.” *Carlton*, 512 U.S. at 34.

<sup>19</sup> *Darusmont*, 449 U.S. at 296-97.

<sup>20</sup> *Carlton*, 512 U.S. at 33.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 34.

<sup>23</sup> See *Blodgett v. Holden*, 275 U.S. 142 (1927); *Untermeyer v. Anderson*, 276 U.S. 440 (1928). The plurality in *Blodgett* and the majority in *Untermeyer* held the retroactive application of the law enacting the gift tax was unconstitutional because it was arbitrary in that the taxpayers made gifts without knowing they would subsequently be subject to tax. The Court in later cases has clearly distinguished the two cases on the basis that they dealt with the “creation of a wholly new tax” and therefore “their authority is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws.” *Carlton*, 512 U.S. at 34 (quoting *United States v. Hemme*, 476 U.S. 558, 568 (1986)).

<sup>24</sup> *Darusmont*, 449 U.S. at 300.

<sup>25</sup> U.S. CONST. Amend. V: [N]or shall private property be taken for public use, without just compensation.”

private property for public use, in the sense of the Constitution.”<sup>26</sup> More recently, the Ninth Circuit noted that the rule that taxes do not effect takings is “well established.”<sup>27</sup>

H.R. 1586 imposes a tax at a 90% rate, while S. 651 contemplates multiple taxation of the bonus income, such that for high-income individuals paying the highest current marginal income tax rate (35%), the compound tax rate may be as high as 70%. Even these high tax rates, standing alone, would be unlikely to affect the no-taking conclusion. As the Supreme Court quote above notes, “however great” the tax, it is not a taking. While it may be pointed out that the Court has never addressed a 100% tax, the 70% compound rate contemplated by S. 651 is almost certainly permissible. The 90% tax, however, while closer to a 100% tax, which may be confiscatory, is not unprecedented. During World War II, the marginal federal income tax rate on income over \$200,000 was 94%, and for several decades after the war the highest marginal income tax rate was 90%. Research, however, reveals no reported takings challenges to such high rates.

The fact that the bills would tax bonus payments made before they were enacted does not indicate a taking where, as here, the retroactivity does not exceed one year. Most of the retroactivity challenges to taxes have been litigated on a substantive due process rather than takings theory, and, as discussed above, the courts consistently finding that retroactivity for modest periods does not offend due process.<sup>28</sup> The Supreme Court has indicated that, at least for economic legislation, an enactment that does not offend due process is highly unlikely to offend the Takings Clause.<sup>29</sup> Thus, the few takings decisions revealed by research that deal with retroactive taxes find no constitutional infirmity.<sup>30</sup>

Of course, if a court can be convinced that what looks like a tax is, in reality, an arbitrary confiscation of property, then the principle that taxes are not takings is circumvented. As the Supreme Court said,

... although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exercise of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5<sup>th</sup> Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.<sup>31</sup>

While the courts have reiterated this principle multiple times,<sup>32</sup> research discloses no instance where the Supreme Court has ever found it to be triggered, thus the “arbitrary” threshold lacks definition. One might argue that the bill’s narrow targeting of recipients of bonuses from entities receiving federal monies is an unfair singling out of this group, and note that “singling out” a group of individuals from others similarly situated is a circumstance said by the Supreme Court to indicate a taking.<sup>33</sup> But this is only one of the many factors relevant to whether a taking has

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<sup>26</sup> *County of Mobile v. Kimble*, 102 U.S. 691, 703 (1880).

<sup>27</sup> *Quarty v. United States*, 170 F.3d 961, 969 (9<sup>th</sup> Cir. 1999).

<sup>28</sup> *See, e.g., United States v. Darusmont*, 449 U.S. 292, 298 (1981).

<sup>29</sup> *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641 (1993).

<sup>30</sup> *See, e.g., Quarty*, 170 F.3d at 969.

<sup>31</sup> *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24 (1916).

<sup>32</sup> *See, e.g., Quarty*, 170 F.3d at 969.

<sup>33</sup> *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-544 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (2002).

occurred, and depends on how one defines the group “similarly situated.” All things considered, the strength of the “taxes are not takings” principle suggests that the bills at issue here would not fall on the wrong (takings) side of the line of demarcation. A court would be especially inclined to resist finding a taking if it concluded that the Constitution’s bill of attainder clause (discussed below) was the more appropriate legal theory for evaluating the tax proposals.

Parenthetically, in the unlikely event that a taking were found, the remedy probably would be invalidation of the tax, not the constitutionally stated remedy of “just compensation.” The Supreme Court has recognized that where, as here, the government act held to be a taking takes the form of a requirement that money be paid, requiring a dollar of just compensation for every dollar paid is “utterly pointless.”<sup>34</sup>

## **Ex Post Facto**

It could be argued that the bills violate the ex post facto clause, which prohibits Congress from enacting retroactive penal legislation.<sup>35</sup> Under this argument, the bills would be unconstitutional to the extent they penalize bonus payments that were lawful when made.

The Court, from its earliest days, has interpreted the ex post facto clause to apply only to criminal punishment.<sup>36</sup> Thus, the analysis begins with determining, as a matter of statutory construction, whether the statutory scheme at issue is civil or criminal.<sup>37</sup> The ex post facto clause is generally understood not to apply to tax legislation because taxation is typically not a criminal punishment.<sup>38</sup> Here, neither bill looks like a criminal penalty on its face, nor do their structures — part of the income tax scheme under H.R. 1586 or an excise tax under S. 651 — indicate that Congress intended for either taxing scheme to be treated as such.

Furthermore, because of the deference owed the legislature’s stated intent, the Court requires “clearest proof” to reclassify a civil remedy as a criminal penalty.<sup>39</sup> In *Burgess v. Salmon*, the Court recharacterized a tax as a criminal penalty, and held its retroactive application violated the prohibition on ex post facto laws.<sup>40</sup> The legislation at issue had increased the federal tobacco stamp tax while also imposing criminal penalties on the transfer of tobacco without the proper stamp. At the time of the bill’s passage, the taxpayer had already paid the stamp tax, and the Court held that imposing the higher tax was impermissible. The Court, finding that the higher tax and criminal penalties were “equally authorized,” concluded that since any criminal proceeding would have violated the ex post facto prohibition, the imposition of the higher tax also violated it since “the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.” Here, it does not appear that the tax imposed by either bill would have an “equally authorized” criminal penalty.<sup>41</sup>

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<sup>34</sup> *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion by O’Connor, J.).

<sup>35</sup> U.S. CONST. Art. I, § 9, cl. 3.

<sup>36</sup> *See Calder v. Bull*, 3 U.S. 386, 390-91 (1798).

<sup>37</sup> *See Smith v. Doe*, 538 U.S. 84 (2003).

<sup>38</sup> *See NationsBank of Texas, N.A. v. United States*, 269 F.3d 1332, 1336 (Fed. Cir. 2001); *see also Karpa v. Comm’r*, 909 F.2d 784 (4<sup>th</sup> Cir. 1990).

<sup>39</sup> *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

<sup>40</sup> *Burgess v. Salmon*, 97 U.S. 381 (1878).

<sup>41</sup> *See NationsBank of Texas*, 269 F.3d at 1336. Thus, the situation here may be more like the one in *Bankers Trust Co.* (continued...)

A court’s analysis could be informed by how taxes are treated in other contexts, such as the Fifth Amendment’s prohibition on double jeopardy. The Court has recognized that a tax may at some point lose its character as a tax and become instead “a mere penalty with the characteristics of regulation and punishment.”<sup>42</sup> A high rate of tax and deterrent purpose are evidence that a tax may in fact actually be a penalty, but are not dispositive.<sup>43</sup> Instead, the Court has looked for other features of the tax that distinguish it from a typical tax, including that its imposition is dependent on the commission of a crime.<sup>44</sup> To the extent that this type of analysis suggests that a high rate and punitive intent may not be sufficient by themselves to classify a tax as a penalty, it may further support the conclusion that the taxes imposed by H.R. 1586 and S. 651 are not punishment for purposes of the ex post facto clause.

## **Bills of Attainder**

### **Background**

The United States Constitution expressly prohibits the federal government from enacting bills of attainder.<sup>45</sup> The Supreme Court has defined a bill of attainder as a “law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”<sup>46</sup> The basis for the prohibition lies in the separation of powers concern that the enforcement of a bill of attainder would allow the Congress to usurp the power of the judicial branch.<sup>47</sup>

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.”<sup>48</sup>

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(...continued)

v. *Blodgett*, 260 U.S. 647, 652 (1923), where the Court refused to apply the ex post facto clause to a state law imposing a 2% tax on the value of taxable property in an estate for the five years preceding death if no tax had been assessed or paid during the year preceding death because “[t]he penalty of the statute was not in punishment of a crime....”

<sup>42</sup> See *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) (holding that a state excise tax was a criminal penalty for purposes of the Fifth Amendment’s double jeopardy clause because it was a “remarkably high” tax; had an obvious deterrent purpose; was conditioned on the commission of a crime and imposed only after the taxpayer had been arrested for the conduct that gave rise to the tax; and was levied on goods that the taxpayer did not own or possess when the tax was imposed).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*; see also *United States v. Sanchez*, 340 U.S. 42 (1950) (classifying a federal marijuana tax as a civil sanction, rather than a criminal one, because liability was not dependent on criminal conduct).

<sup>45</sup> U.S. Const. art. I, § 9, cl. 3. provides “No Bill of Attainder or ex post facto Law shall be passed.”

<sup>46</sup> *United States v. Brown*, 381 U.S. 437, 468 (1965).

<sup>47</sup> “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.

<sup>48</sup> 3 J. Story, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 1338 (1833).

At common law, a bill of attainder was a parliamentary act that sentenced a named individual or identifiable members of a group to death.<sup>49</sup> It was most often used to punish political activities that the Parliament or the sovereign found threatening or treasonous.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

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 identifies a person, a group of people, or readily ascertainable members of a group<sup>53</sup> who are identified in the legislation by past conduct.<sup>54</sup> It has been suggested that a court's determination that a statute referencing a specific group of persons for past behavior may in some cases be treated as a *per se* violation of the specificity prong.<sup>55</sup> For instance, in the case of *United States v. Lovett*,<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

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*,<sup>59</sup> the Court evaluated the Presidential Recordings and

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<sup>49</sup> *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 473 (1977).

<sup>50</sup> Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Due Process*, 50 *Brook L. Rev.* 77, 81 (1983).

<sup>51</sup> *Brown*, 381 U.S. at 441-42.

<sup>52</sup> *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”).

<sup>53</sup> *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

<sup>54</sup> *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group.*, 468 U.S. 841, 851 (1984).

<sup>55</sup> *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”).

<sup>56</sup> 328 U.S. 303 (1946).

<sup>57</sup> *Id.* at 304-05, 311-12.

<sup>58</sup> *Id.* at 315.

<sup>59</sup> 433 U.S. 425 (1977).

Materials Preservation Act,<sup>60</sup> which required that former President Richard Nixon, whose papers and tape recording were specifically named in the act,<sup>61</sup> 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.<sup>62</sup> 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."<sup>63</sup> 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.<sup>64</sup>

As noted, H.R. 1586 would impose special taxing rules on bonuses paid to employees of Fannie Mae, Freddie Mac, and certain entities that receive assistance over \$5 billion under EESA after December 31, 2007. Under H.R. 1586, the bonuses would be taxed as income to the employee at a rate of 90%. As noted, the legislation would apply, not only prospectively, but also retroactively, to any bonuses received after December 31, 2008.

S. 651, on the other hand, would appear to apply to a broader range of entities, as the threshold specified would be, with some exceptions, those entities that receive assistance in excess of \$100 million. For those entities, S. 651 would impose two taxes: an excise tax on the employee receiving the bonus and an excise tax on the entities paying such bonuses.<sup>65</sup> Each would be taxed on the bonus at a rate of 35%. For individuals, the excise tax would be in addition to the regular income tax (which has a highest marginal tax rate of 35%). The entities would not owe income tax on the bonuses, so they would only be subject to the 35% excise tax. Again, the bill would

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<sup>60</sup> P.L. 93-526.

<sup>61</sup> 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."

<sup>62</sup> *Nixon*, 433 U.S. at 476-77.

<sup>63</sup> *Id.*, 433 U.S. at 472.

<sup>64</sup> 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).

<sup>65</sup> As it would appear that a bill of attainder can be imposed on both an individual and a corporate entity, the excise tax that applied to the employer may also be the subject of a bill of attainder analysis. *SBC Communs. v. FCC*, 154 F.3d 226, 234 n. 11 (1998).

apply to any bonuses received after December 31, 2008, regardless of whether they were paid before or after the bill was enacted.

At least as applied retrospectively, both of these bills would identify ascertainable groups based on behavior occurring in the past. It is not clear how many bonuses issued after these entities received federal funds would be covered, however, since a significant amount of bonuses paid by these entities were paid before January 1, 2009, and thus would not be covered by the law. It does appear that S. 651, because of the lower threshold established for inclusion in the bill, would appear to apply to a much broader range of entities. Thus, under S. 651, the likelihood of broad retroactive application beyond AIG would be increased.

It should also be noted that the level of specificity may not be immediately ascertainable until a final bill is enacted, because the parameters of the legislation may affect the size and composition of the class. For instance, if the 90% tax specified in H.R. 1586 were to be implemented, this might severely limit the number of bonuses (at least over a certain amount) that would be provided to employees of those entities in the future. If the tax rate is, however, set at the 35% found in S. 651, there may still be some situation in which some bonuses that would be subjected to these tax rates would be awarded. Considering, however, that the 35% excise tax is imposed in addition to any federal or state income tax owed, and that the entity paying the tax would also be subject to a 35% excise tax, the possibilities of a significant number or level of bonuses being paid seems unlikely. Thus, the question arises as to how these bills would be evaluated under the specificity prong of a bill of attainder analysis.

The Court has noted that cases regarding bills of attainder cannot be analyzed in the abstract, as each “turns on its own highly particularized context.”<sup>66</sup> An analysis of hypothetical cases that might be brought to challenge either H.R. 1586 and S. 651, if passed, would appear to be no different. Many different individuals or entities could be affected by each of these bills, and the amount of bonuses and level of taxation could also vary dramatically. Which of these individuals might choose to sue, and the facts specific to their cases could have an influence on any outcome. Having said that, some observation regarding the two bills can be made.

First, both bills, on their faces apply both retrospectively and prospectively. For instance, both bills could be applied to an executive at a covered entity who received a million dollar retention bonus in January of 2009. This taxation would also apply to an executive who received a million dollar bonus after either of the bills were enacted into law. Thus, the question would arise as to whether the instant bills meet the specificity criteria if they apply to both persons or entities who engaged in certain behavior (receipt or payment of bonuses) before enactment, and to people who engaged in such behavior after the passage of the act.

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 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....<sup>67</sup>

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<sup>66</sup> *Flemming v. Nestor*, 363 U.S. 603, 616 (1959).

<sup>67</sup> *See Brown*, 381 U.S. at 438-39 n.1.

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.<sup>68</sup> 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.<sup>69</sup> Thus, in the instant case, the fact that those executives who received bonuses after December 31, 2009, cannot meaningfully withdraw<sup>70</sup> would appear to meet a *per se* criteria for specificity.

However, the *per se* finding of specificity may 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 generally served by tax laws. Further, a court might also consider any additional legislative purposes that might be articulated in the legislative history of the proposals in question.

There is, however, the possibility that a court might not consider this bill to fall under the traditional tax rubric. For instance, a court might determine that the instant bills were not intended to serve any traditional tax purposes, but were instead merely vehicles to punish the employees and entities involved. If this were true, then the level of specificity provided by the statute would appear to be of less importance. Still, certain aspects of the groups in question, such as their size and the level of burden imposed, may lead a court to conclude that traditional purposes for taxation were applicable.

## **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 in question 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.<sup>71</sup> There do not

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<sup>68</sup> 381 U.S. at 458.

<sup>69</sup> 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.”)

<sup>70</sup> Although such employees who are covered may return such bonuses to their employer to avoid taxes, this would appear likely to result in an even more substantial economic loss than the payment of the taxes imposed by the bills, and thus would appear to result in an even more burdensome result.

<sup>71</sup> 433 U.S. at 474-75.

appear to be any cases where the Court has found taxation to be the type of “punishment” traditionally engaged in by legislatures as a means of punishing individuals for wrongdoing.

A concern might arise, however, whether a high enough tax rate would rise to the level of “confiscation of property.” For instance, imposition of a 100% tax on past income might be seen by a court as rising to the level of confiscation, since the entire value of the taxable income has been taken from the person. As is indicated elsewhere, a 90% marginal tax rate may have historical precedent, but it is clearly unusual for a particular income source to be singled out for such a high rate. A 35% excise tax on income, on top of a marginal tax rate of 35%, may also result in a relatively high tax rate, but it would still leave some modicum of value with the person who received the bonus.

### ***“Functional” Punishment***

Despite the lack of case law holding that a particular form of taxation is a bill of attainder, it is clear that a tax law that was imposed for punitive purposes could 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.”<sup>72</sup> In one example offered by a commentator, a special tax levied only on the descendants of slaveholders in order to pay reparation to the descendants of slaves would most likely be susceptible to attack as a bill of attainder.<sup>73</sup>

The Supreme Court has also indicated that some legislative burdens not traditionally associated with bills of attainder might nevertheless “functionally” serve as punishment.<sup>74</sup> 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.<sup>75</sup>

For instance, various Supreme Court decisions have invalidated as bills of attainder legislation barring specified persons or groups from pursuing various professions, where the employment bans were imposed as a brand of disloyalty.<sup>76</sup> In *Cummings v. Missouri*,<sup>77</sup> the Supreme Court noted that “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.”<sup>78</sup>

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<sup>72</sup> *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).

<sup>73</sup> Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. Third World L.J. 157, 174 (2004).

<sup>74</sup> 433 U.S. at 475.

<sup>75</sup> *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).

<sup>76</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 474-75 (1977) (citing cases).

<sup>77</sup> *Cummings v. State of Missouri*, 71 U.S. 277, 320 (1867).

<sup>78</sup> See also *Foretich v. United States*, 351 F.3d 1198 (2003) (legislation limiting custodial rights was a bill of attainder).

On the other hand, where a burden imposed by legislation is susceptible to explanation by a valid regulatory (non-punitive) purpose, then a court would be likely to find that such legislation is not intended to be punitive. For instance, in *Flemming v. Nestor*,<sup>79</sup> 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.<sup>80</sup>

However, it should be noted that, unlike the instant proposals, 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.<sup>81</sup>

Thus, the question arises as to whether there is an adequate nexus between the restriction imposed by the instant legislation and some legitimate, nonpunitive governmental purpose.<sup>82</sup> For this, one would need to look at what legislative purposes are generally accorded to tax laws. As noted above, it has been traditionally held that there are three types of taxes: (1) taxes imposed for purposes of raising revenue; (2) taxes imposed to influence future behavior; and (3) taxes imposed for both reasons.

Of these three types of taxes, it would appear that the bills in question might most easily be characterized as falling into the second category — taxes imposed to influence future behavior. As to the House bill, it would appear that a 90% tax would be intended to significantly curb, if not end, the granting by the covered entities of bonuses to persons above a certain income level. Even the Senate version, considering the combined tax effect of the excise tax and applicable income taxes, and considering the excise tax imposed upon the entity employer, would appear likely to have the effect of curtailing or ending the awarding of certain levels of bonuses.

This second category of taxes does have some precedent. For example, there are several excise taxes that apply to private foundations which effectively discourage certain activities by levying a very high rate of tax on them. One of these excise taxes is imposed on private foundations that make expenditures for activities such as lobbying or conducting voter registration drives. The

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<sup>79</sup> 363 U.S. 603, 614 (1959).

<sup>80</sup> 363 U.S. at 618.

<sup>81</sup> 363 U.S. at 618.

<sup>82</sup> 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).

initial tax is equal to 20% of the expenditures, and an additional tax is imposed at the rate of 100% if the expenditures are not corrected (e.g., recovered) in a timely manner.<sup>83</sup>

Another example of this type of excise tax is where a private foundation that fails to distribute an adequate amount of income during the year is taxed at a rate of 30% on the undistributed income, with an additional 100% tax imposed if the income remains undistributed.<sup>84</sup> For one of the private foundation excise taxes, the additional tax is imposed at a rate of 200% — a private foundation with excess holdings in a business entity is initially subject to a tax equal to 10% of the holdings' value, and an additional tax at a rate of 200% is assessed if the foundation fails to address the issue by the end of the taxable period.<sup>85</sup>

Although there is no inherent constitutional concern with these taxes on private foundations, there is the strong implication that they are punitive in nature. The taxes are set at a level where it would generally make little or no economic sense to engage in the taxed activity. Further, the taxes are generally increased after an individual has become aware of the problem, which ensures that future violations are intentional. Thus, these characteristics are more indicative of an attempt to penalize an activity rather than an attempt to raise revenue from them.

However, to the extent that the instant bills fall into this second category, they may raise constitutional issues. Under this category, the legislative purpose, considering the specificity and high levels of taxation, would appear intended to deter future conduct by imposing punitive taxation. However, this legislative purpose cannot be used to justify retroactive application of the act, since those bonuses have already been paid, and there would be no future conduct to deter. Further, despite the lack of deterrence, the level of taxation would still appear to be set at punitive levels. Thus, to the extent that the instant bills are applied retrospectively, they would seem to fall afoul of the requirement that such tax have a valid regulatory purpose aside from punishment.

One might argue in the alternative that the bills fall into the first category — that they are intended to raise revenue for the United States Treasury. There is some support for this argument; it appears that there may be a significant amount of money that has been paid out as bonuses by the entities in question, and a tax on those funds would mean the generation of many millions of dollars of federal revenue. Further, to the extent that the taxes in question are imposed as a revenue raising measure then the relationship between the individuals identified and the tax imposed would appear to be less important. There is often a significant variation in the size and character of groups that are subject to the rules of taxation, and courts are not generally called up to examine the legislative purposes for such variations.

Finally, one might argue that this tax fits into the third category — a tax designed to both raise revenue and influence behavior — but in a novel way. To the extent that the imposition of these taxes discourages future taxable bonuses from being paid from federal assistance, then the legislative purpose of influencing behavior would be met. To the extent that capturing taxes from bonuses was the purpose, then the application of the tax bill to those who already received bonuses would apply. Thus, the purpose of raising revenue is met by the retrospective application of the bills, while the purpose of discouraging behavior is met by the prospective application.

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<sup>83</sup> I.R.C. § 4945. Foundation managers may also be subject to tax, initially at a rate of 5% and then 50% if they refuse to make the correction.

<sup>84</sup> I.R.C. § 4942.

<sup>85</sup> I.R.C. § 4943.

It is at this point that the issue of specificity may again be raised. A finding that the specificity prong has been met depends on the scope of regulatory goals suggested as the basis for the act. Under this analysis, it appears that two groups must be identified as supporting the two different regulatory goals. The goal of discouraging bonuses would be found to be supported by the application to persons receiving bonuses in the future, while the goal of raising revenue would appear to be the remaining legitimate regulatory goal for imposing the taxes on persons retrospectively. Thus, to the extent that a court could determine that revenue raising was the intended goal of the proposed bills, then it could arguably determine that the legislation was not a bill of attainder. In order to evaluate whether this was the intended purpose of the legislation, a court might look to the legislative history of the bills.

### *Legislative History*

The process for the passage of these 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 the prospect of raising revenue would appear to the most logical regulatory goal to be put forward as a non-punitive reason for the application of these taxes retrospectively.

It would appear, however, there may not be significant legislative history to support a theory that the regulatory purpose of the retroactive application of these laws is to raise revenue. H.R. 1586 was introduced in the House on March 18, 2009, and was considered under a suspension of the rules and was passed on March 19, 2009. During debate, a variety of remarks were made on the floor concerning the bill. A small number of remarks addressed the issue of the regulatory purpose of the bill, but none appear to have suggested that revenue raising was the basis for the proposed bills.<sup>86</sup> On the other hand, many remarks were made that seemed to indicate that the basis for the application of these bills retrospectively was 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.<sup>87</sup> Some of these comments might also be interpreted as indicating a punitive intent on the passage of the legislation.

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<sup>86</sup> 155 Cong. Rec. 3663 (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. 3647 (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. 3657 (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”).

<sup>87</sup> 155 Cong. Rec. H 3644 (daily ed. March 19, 2009) (remarks of Rep. Titus) (“I also rise today in outrage over the recent news that AIG paid out over \$165 million to executives, some of whom are no longer with the company.... I urge Congress and the administration to act quickly to recoup the taxpayers’ money); 155 Cong. Rec. H 3645 (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 (continued...)”).

## 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 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 bills, the fact that the those executives who received bonuses on or after January 1, 2009, cannot meaningfully withdraw would appear to meet a *per se* criteria for specificity.

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(...continued)

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”). When the House passed TARP last year before I was here, this type of abuse is exactly what the American people were afraid of. We knew there was a chance of waste, fraud or abuse, and now it has come to light. We are here today to fix it.”) 155 Cong. Rec. H 3645 (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 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. 3647 (daily ed. March 19, 2008) (statement 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. 3651 (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. 3651 (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. 3655-56 (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 bonus:); 155 Cong. Rec. 3657 (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. 3657 (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. 3660 (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. 3664 (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. 3664 (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”).

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 cannot reasonably be said to further “non-punitive legislative purposes,” and (3) where the legislative record evinces a “congressional intent to punish.” As confiscation of property has been found to be a “traditional” punishment under the first of these categories, the closer that a tax rate gets to 100% on past income, the more likely that this might be seen by a court as rising to the level of punishment. Thus, the 90% income tax found in H.R. 1586, although not unprecedented, may come close to reaching a level considered confiscatory. A 35% excise tax, on top of a marginal tax rate of 35%, such as in found in S. 651, may also result in a relatively high tax rate, but it would still leave some modicum of value with the person who received the bonus.

A concern might also be raised that, absent a “non-punitive legislative” purpose for the application of the tax retrospectively, that the tax might be seen as a “functional” punishment. Although the level of tax in both bills appears to be set high enough to deter a class of future bonuses from being granted, this regulatory purpose cannot be logically applied to situations where the bonuses have already been paid. Thus, the other remaining traditional purpose for taxation, the raising of revenue, appears to be the most logical remaining non-punitive regulatory purpose for the statute. A review of the legislative history established so far, however, would not seem to indicate that raising revenue was a primary purpose behind the proposed bills. Rather, the legislative history seems to contain comments that would indicate the existence of a congressional intent to punish those individuals receiving bonuses. Consequently, it would appear that while both of these bills may raise constitutional issues, H.R. 1586 would raise the most serious constitutional concerns.

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