A Radical and Unlawful Power Grab over Private Charity and Religion

The Model Protection of Charitable Assets Act Oversight and Investigations

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Contents

Introduction

The Protection of Charitable Assets Act (the ñAct,ò or ñPOCAAò), originally called the Oversight of Charitable Assets Act, was adopted at the July 2011 meeting of the Uniform Law Commission.[2]

POCAA was adopted under the claim for the need to clarify or make more uniform the authority of state attorneys general to correct certain abuses involving charitable assets.

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[1] President of Corporate and Legal Affairs, American Target Advertising, Inc. This paper is a modified and expanded version of a presentation at the 48th Annual Washington Non-profit Legal & Tax Conference, March 22, 2012, Arlington, Virginia.

[2] You may link to the text of the Act here: http://www.law.upenn.edu/bll/archives/ulc/ocaa/MPOCAA_Final_2011.pdf

Instead, however, POCAA *expands* the power of state officials, including those who are not attorneys general. The Act is actually a *radical* expansion of power of the state over private charity and even religion. Additionally, certain key provisions of the Act fly in the face of constitutional limits on government authority.

Through subtle and not-so-subtle defining provisions and reporting requirements, the Act actually would *invite* government abuse of private charity and/or religion. The investigation powers under the Act create what would be unlawful *trespasses* involving private property.

This paper focuses mostly on POCAAôs investigation provisions since, in my opinion, those are the most susceptible to being misused and actually constitute violations of law restricting government authority for searches. However, this paper will touch briefly on a few other provisions of the Act that demonstrate POCAA is actually an expansion, not clarification, of state authority with regard to charitable and religious entities, assets and rights.

<u>There Are Far Too Many Troubling General Provisions in the Act for It to Be Adopted by Any State</u>

POCAA uses the term ñAttorney Generalò as the repository of its powers. Comments in the Act reference the unique authority of the ñAttorney Generalò with regard to charitable assets. The report claims, ñThe Attorney Generalôs duty has sometimes been described as the ópparens patriaeô power ï the duty to protect the public interest in property that has been committed to charitable purposes.ò

The drafting committee,[3] however, has confused basic and fundamental authority of attorneys general involving the protection of charitable assets from misuse. Instead, the committee adopted what amounts to a *wish list* of state charity regulators to expand their powers to intrude into private property rights. The scope and key provisions of the Act are unsupported at common law and by the uniquely American legal protections of private property.[4]

Buried in a footnote on the final page of the Act, the term ñAttorney Generalò includes other state charity officials, such as Secretaries of States. Therefore, the

[3] The ñcommitteeò is the Drafting Committee on Model Protection of Charitable Assets Act of the Uniform Law Commission.

[4] Comments in the Act reference and rely in part on foreign governance of charities.

extensive powers the committee claims to be the unique province of the ñAttorney Generalò would be handled by officials in some states who are not even attorneys.

The Act is premised on what it calls a ñpublic interestò in property of private charities and religious organizations. This paper explains why that term, as used in the Act, is a corruption of both the common law and American law standards of a jurisdictional term called ñstandingò of attorneys general to correct misuses of charitable assets. Plus, the Act potentially creates a ñpublic interestò in religious property, which is a blatant violation of the separation of church and state.

Show Us Your 'Estate' Papers

Most of the published comments about POCAA so far have centered on Section 4, which creates yet another registration requirement for charities. The new, additional requirement to register under POCAA applies when charitable assets exceed $50,000. The Act also includes provisions for filing annual reports and notices of ñreportable events,ò and filing other notices that previously did not need to be filed.

Section 4(c) provides certain exemptions to registration. The first exemption is for any ñgovernment or government subdivision, agency, or instrumentality.ò Given the scandals involving government fraud, waste and abuse, one can argue that the exemption for government is unconscionable. This is Big Brother exempting Big Brother.

Section 4(c) makes religious entities an optional exemption, and provides four ñAlternativesò for these optional religious exemptions. In other words, the drafting committee saw fit to definitely exempt government agencies, but made churches and other religious entities merely an optional exemption for states that would consider adopting the Act.

Section 6 requires the personal representatives of probated estates to file with charity regulators a copy of Wills making charitable bequests and the inventory list of the estates.[5] In the states that do not exempt religious organizations, this forced

[5] Section 6(d) reads: ñIf a decedentós estate opened by a court in this state involves, or may involve, the distribution of property to a person holding charitable assets, unless the distribution is a nonresiduary devise with a value of less than $[50,000] to a named person, the [personal representative] shall deliver to the [Attorney General] not later than [90] days after the date the [personal representative] is appointed:

disclosure of Wills would apply to religious bequests. The Act does not prohibit charity regulators from posting this information online.[6]

The Actôs comments reference that some states require reporting of conservation easements granted under Wills. POCAAôs requirement to report bequests of cash or other property, however, is a radical intrusion on privacy and the right to bequeath private assets to private institutions.

These new powers become more dangerous by virtue of the Actôs using what at first blush may appear to be a subtle term describing generally the power of charity regulators. Upon close inspection, the term is actually a radical one.

The Act authorizes charity regulators to act ñin the public interest,ò as in ñto protect the public interest in charitable assets.ò The committee debated that phrase versus ñin the interest of the public,ò and concluded there was no difference between the two.

Of course thereôs a difference.

The term ñin the public interestò is a *subjective* standard for potentially broad and varying interpretations of *subject matter*. The term is open to widely varying ideological interpretations depending on who is charged with enforcement.

The term ñin the interest ofò or ñon behalf ofò ñthe publicò is an objective matter of *standing*. ñStandingò is a term of *jurisdiction* to bring a cause of action under an objective and legally enforceable law. It is a doctrine used by the courts to ensure that only those with an interest in litigation may actually appear before the courts.

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(1) a copy of the will;
(2) a copy of the [application] [petition] for probate; and
(3) a copy of the inventory or, if none is filed with the court, a statement of the value of the estate.ò

[6] *See*, ñGovernment Privacy Invasionsò in *The National Law Journal*, September 2010, explaining that the North Carolina Secretary of State, the charity regulator of that state, has taken the position that she may post online material and information filed with her office even without express authorization to post that information online. http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202472477551&Government_privacy_invasions&slreturn=1 (password protected).

The Virginia case the committee cites in support of its expansion of authority, *Virginia v. The JOCO Foundation*, 558 S.E.2d 280 (Va 2002), was about whether the attorney general had standing to challenge the use of charitable assets inconsistent with a foundationôs governing documents, and whether the court had jurisdiction to hear the challenge. That decision used the phrase, ñauthority to act on behalf of the public with respect to [charitable] assetsò with regard to the attorney general. The case does not support the notion that the attorney general has a subjective power to determine a ñpublic interestò in private charitable assets.

This one twist of words employed under the Act expands the power of charity regulators, as opposed to clarifying the unique role of attorneys general relative to protecting charitable assets from misuse.

The phrase ñpublic interestò in charitable assets is a corruption of the common law hoisted on the public by charity regulators. For some years, charity regulators have been pushing that corrupted twist of words in an effort to expand their authority over private assets.

POCAA itself is therefore little more than special interest legislation sought by and for charity regulators. It is not based in the common law or American law. The Uniform Law Commission has given us a model law that is inconsistent with the purposes of *clarification*, and instead is an unprecedented intrusion into private property and other rights. One can even argue that POCAA is based more in an ideology than sound law.

Investigations under POCAA – Good Reasons for States to Reject It, and How to Handle and Even Defeat Administrative Subpoenas Under It

Section 3 of the Act, entitled ñAuthority of [Attorney General] to Protect Charitable Assets,ò contains the provisions for charity regulator investigations of charities and even religious organizations. It may as well have been entitled, ñHow Charity Regulators Plan to Violate the Fourth Amendment.ò

By way of background, the Uniform Law Commission drafting committee proclaimed the core meaning of the Act is based in the 1601 Statute of Charitable Uses, often called the Statute of Elizabeth.

The Statute of Elizabeth came nearly two centuries before the American Bill of Rights, and the decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S.

(4 Wheat) 518 (1819), which recognized the American rule for private eleemosynary (charitable) corporations.

In Elizabethan England, no press could operate without license of the Crown. The specific warrant, which is a cornerstone of the Fourth Amendment, had not yet come into use, and general warrants were used to search, harass and intimidate religious and political critics of the Crown.

The Star Chamber was still operating. I joke that some charity regulators may view those as the good old days, but the actual provisions of the Act are no joking matter.

The committee claims to rely on long history and the common law in support of the power in the Act to correct misapplication of assets, which is really what is called ñvisitation,ò a point I explain in my *Chronicle of Philanthropy* article, ñState Regulators Make a Misguided Push to Tighten Control Over Charities.ò[7]

But the committee could not use the term ñvisitationò because, as explained in *Blackstone's Commentaries on the Laws of England*, visitation could only be exercised through the courts, and POCAA creates unilateral powers outside the courtsô process and scrutiny.

Visitation is the authority of the ñfoundersò of a corporation to review and correct abuses. It is, first and foremost, a private cause of action. This appears to be the genesis of the existing authority of attorneys general to act on behalf of the interests of the public. The historic authority of attorneys general was far more limited to acting when the founders could not, or failed to, act.

Instead, charity regulators and the committee have adopted a corrupted term, the ñpublic interest,ò to expand government power over private assets. The term ñpublic interestò translates to ñgovernment interestò in these private assets. This is especially relevant to the Actôs investigation powers, which avoid Fourth Amendment process and protections.

Visitation was used at common law by church officials for ecclesiastical corporations, but in England the Crown took over the Church. It therefore came to pass that there was no separation of church and state in English visitation.

[7] Volume 23, Issue 5: January 13, 2011; the online version is password protected.

Attorney general visitation was also used for corporations created by the Crown, which was more common before the creation of the private American corporation. The Actôs exemption of government agencies and subdivisions is therefore inconsistent with the historic authority of visitation by the attorney general. Why should government-created entities such as Fannie Mae or state universities be exempt?

Historically, the attorney general acting on behalf of the Crown could use visitation under the doctrine of *quo warranto*, or ñwhat warrant,ò to seek a court determination of whether assets were being misused. History does not support the unilateral powers granted under the Act.

Section 3(a) of the Act begins, ñThe [Attorney General] shall represent the public interest in the protection of charitable assetsò to, among other things, ñprevent or remedy the misapplication, diversion or waste of a charitable asset.ò

Thereôs that subjective phrase for subject matter, ñthe public interest,ò again.

Section 3(a) gives charity regulators implied or even express powers to act unilaterally. There are no words of limitation on their authority in Section 3(a). The committee failed to show any appreciable discernment that charity regulators exercising visitation or other authority would be required to proceed under court supervision. Section 3(a) authorizes charity regulators to ñcommence or interveneò in actions, but that does not require them to proceed through the courts as was required even at common law.

The committee was cautioned that an expansion of substantive powers under the Act combined with a lack of clear delineation or articulation of investigative powers consistent with the Fourth Amendment could actually invite misuse or abuse of the Act, allowing regulators to interject subjective interpretations for purposes of investigating private charitable and religious entities.

The Act Violates the Fourth Amendment by Reducing the Standard of 'Cause'

Subsection (b) of Section 3 gives charity regulators investigation powers using the standard ñreason to believe that an investigation is necessary to determine whether an action is advisable,ò and ñthe [AG] may conduct an investigation, *including exercising administrative subpoena power* under [state laws].ò (Emphasis added.)

The committee went full circle on this provision. When objections were raised about the lack of Fourth Amendment standards for the Actôs new powers, the committee first dismissed those objections in rather surprising fashion, claiming:

> ñit could not make decisions based on an assumption or a possibility that a state official would misuse authority provided in the Act.ò[8]

But the very presumption and indeed the *raison d'etre* of the Fourth Amendment is that government officials *will* misuse authority. The committee then made some awkward attempts to create limits within Section 3(b), but the committee eventually *punted* to the respective laws of the states for issuing administrative subpoenas.

The committeeôs deference to state law, however, is an illusion because Section 3(b) uses the standard ñreason to believeò as grounds to commence investigations and issue administrative subpoenas. The committee therefore *lowered* the constitutional threshold of probable cause for issuing administrative subpoenas.

Weôre left with a very flawed Section 3(b) authorizing how investigations, and particularly administrative searches will be made under the Act. Rather than a clarification, the committee actually set the stage for potentially much litigation, including constitutional challenges to the Actôs investigation provisions. What was the committee thinking?

Fourth Amendment law has become convoluted over the past 60 years. However, the decision in *Bozrah v. Chmurynski*, issued by the Connecticut Supreme Court on February 14, 2012, provides a very good and relatively comprehensive summary of Fourth Amendment law governing administrative searches.

First, contrast the language of the Fourth Amendmentôs requiring probable cause versus the Actôs use of ñreason to believe.ò

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

[8] Comment to Section 3 of the April 2011 Committee Meeting Draft with Revised Comments, http://www.law.upenn.edu/bll/archives/ulc/ocaa/2011apr_rev.htm.

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The standard ñreason to believeò does not apply to formal government investigations of or on private property. In *Bozrah*, the Connecticut Supreme Court does a nice job summarizing the requirements of ñprobable causeò for administrative searches. Probable cause, while elusive to define, is much, much more than reason to believe.

Bozrah addresses ten key points that show why Section 3(b) is unacceptable, and why administrative subpoenas issued pursuant to it would be unlawful and may be quashed:

1. the Fourth Amendmentôs probable cause requirement applies to administrative searches;

2. administrative searches require statutory procedures;

3. the Fourth Amendment guards against arbitrary, undefined searches;

4. an administrative search conducted without warrant stating, and issued upon, probable cause is *per se* unreasonable in violation of the Fourth Amendment;

5. probable cause requires some showing of individualized suspicion **beyond even "strong reason to suspect**;ò

6. unbridled discretion in investigations is inconsistent with the Fourth Amendment;

7. ñ**criminal entry**ò by government officials **under the guise of official sanction** is a serious threat;

8. businesses are free from unreasonable searches upon private commercial property (authorôs note: this applies to charities);

9. unilateral searches absent statutory standards require the neutral, objective scrutiny of a judge to prevent searches based on any *ipse dixit* (meaning, ñbecause I said soò); and

10. probable cause extends only to identifiable violations of law, and does not authorize open-ended searches.

The unilateral administrative searches that the Act seems to authorize or encourage may only be done consistent with a legislative plan on an objective and regular schedule, which the U.S. Supreme Court says acts as a form of substitute for the usual probable cause.[9] Examples include Department of Labor examinations under federal contract compliance programs.[10] It is long-established that government subpoenas for documents (*duces tecum*) are subject to the Fourth Amendment.[11]

The Connecticut Supreme Courtôs decision came within about three weeks after the United Stateôs most important correction of Fourth Amendment case law in decades, *U.S. v. Antoine Jones*, which put the elements of trespass law back into government searches. In other words, the Fourth Amendment does not merely protect ñprivacyò interests, but those in which the law of trespass applies.

At common law, when general searches were employed, the remedy for unlawful or unreasonable searches was that the searching agent could be sued under trespass law. The law of trespass was therefore a disincentive to unreasonable searches. Unless clear lawful *process* is followed, it is every bit a trespass for government officials to infringe or intrude on private property rights.

The Fourth Amendment made specific searches the law, and the use of general searches is no longer authorized.[12]

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[9] ñFor purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that órreasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].ò *Marshall v. Barlow's Inc.,* 436 U.S. 307, 320 (1978).

[10] As discussed in *Bank of America v. Solis*, No. 09-2009, D.D.C. (2011), http://www.workplaceclassaction.com/https-ecf-dcd-uscourts-gov-cgi-bin-show_doc-pl-caseid-139099-de_seq_num-116-dm_id-3132135-doc_num-28.pdf.

[11] òWe are of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment.ò *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

[12] An excellent and detailed treatise is WILLIAM CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602 ï 1791, 2009.

The recent opinion in *Antoine Jones* has implications for limiting the nature of searches, and may signal that the exclusionary rule may not be the only remedy for unlawful searches. This is not good news for those charity regulators not schooled in, or who may be looking to avoid compliance with, the Fourth Amendment.

The many forms of trespass include more than just entry onto real property, of course. Trespasses include intrusions on private property or oneôs person. One example is the trespass of asportation, otherwise known as larceny, which is the removal of property without consent of the owner.

While the vagueness and lack of limitations of Section 3 investigations would be troublesome for charities and religious organizations, it opens the door to challenges against administrative subpoenas issued in violation of the Fourth Amendment. In states where charity regulators are not protected by sovereign immunity, they may be subject to causes of action under laws of trespass if their administrative subpoenas violate the Fourth Amendment.

For out-of-state investigations, the Supreme Court has ruled that sovereign immunity does not protect state officials. *See, Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003). Combining the principles set forth in *Bozrah* (criminal entry), *Antoine Jones* (trespass) and *Franchise Tax Board of California*, one can predict causes of action for criminal trespass where charity regulators are not protected by sovereign immunity.

Government officials violating constitutional rights under color of state law is subject to penalty under 42 U.S.C. 1983, and awards of attorneyôs fees under 42 U.S.C. 1988. POCAA Section 3(b) may be an example for charity regulators of the old adage: Be careful what you wish for.

Based on my experience, some charity regulators are poorly trained in Fourth Amendment law. Although charities do not tend to be litigious, the Actôs failure to abide by Fourth Amendment requirements for investigations could result in a good deal of litigation against state charity regulators.

Caveat: Consent to an unlawful search may waive Fourth Amendment protections.[13] It is better to raise Fourth Amendment objections up front to

[13] *See, Fraternal Order of Police/Department of Corrections Labor Committee v. Washington*, 394 F. Supp. 2d 7, 14 (D.D.C. 2005).

maintain the protections of the Fourth Amendment. Even if you are willing to cooperate with an investigation, ensure that subpoenas comply with the Fourth Amendment. If for no other reason, ensuring compliance with the Fourth Amendment helps limit the scope of the investigation. For example, be sure that the subpoena is limited to the ñplaceò that may be subject to a search and production of documents.

Example 1: The current California investigation statute, California Government Code Section 11184, reads as follows:

> (a) In any hearing in any part of the state or in any investigation conducted under this article, the head of the department shall issue process and subpoenas *in a manner consistent with the California Constitution and the United States Constitution,* and the process and subpoenas shall be served in the same manner as provided for the service of a summons as described in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure. (Emphasis added.)

The statuteôs only standard is that subpoenas must be issued in a manner consistent with the Constitution. But thatôs mere legislative pablum, because the legislature could not direct the AG to issue subpoenas in a manner *inconsistent* with the Constitution. Subpoenas issued unilaterally under such a statute are clearly subject to being challenged as unreasonable on Fourth Amendment grounds. POCAAôs deference to state law about administrative subpoenas, but using the weakened standard of ñreason to believe,ò only makes it more likely that a court would find a subpoena unreasonable and in violation of the Fourth Amendment.

Example 2: One deputy AG issued an investigation demand, essentially an administrative subpoena, because I disagreed with her interpretation of a registration statute. Her investigation statute required her to state the cause in her demand, which it did not. I wrote her, citing to the statutory requirement that she state her cause. She replied by merely citing the statute requiring her to have cause. It was apparent that she did not even know the meaning of *cause*. I wrote back, copying the Attorney General, stating that criminals may take advantage of her not knowing the meaning of cause, which left the citizens of her state vulnerable. I suggested she watch a couple of episodes of *Law & Order*. The matter was dropped.

Application of Search Powers to First Amendment Freedoms

ñYour First Amendment right can be terminated,ò says the officer in this video.

History shows that government investigations have been used to trample First Amendment rights, or intimidate and chill their free exercise. The following is a brief summary of the intersection of First Amendment law and the law of government searches.

Investigations that infringe on First Amendment rights may be quashed. *See*, *NAACP v. Alabama*, 357 U.S. 449 (1958). That case involved a subpoena demanding the names of members of the NAACP, which would seem to put the case into the realm of the Fourth Amendment. However, the U.S. Supreme Court had recently weakened Fourth Amendment protections where administrative searches were involved.[14] The courtôs decision to quash the Alabama subpoena on First Amendment grounds, specifically, the freedom of association, nevertheless demonstrates that First Amendment rights may be impacted by searches.

Charitable solicitations are protected by the First Amendment. *See*, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988); *Secretary of State v. Munson*, 467 U.S. 947 (1984); and *Schaumburg v. Citizens for Better Environment,* 444 U.S. 620 (1980).

ñIt is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . . .ò *Sweezy v. State of New Hampshire Wyman*, 354 U.S. 234, 245 (1957).

ñ[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and subject of overriding and compelling state interest.ò *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

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[14] *NAACP V. Alabama* came eight years after *United States v Morton Salt Co.*, 338 U.S. 632 (1950). But subsequent decisions diminished the value of *Morton Salt* as precedent, particularly with regard to its use of the term ñofficial curiosityò as a basis for demanding documents.

Discretion of determining the ñpublic interestò and impacting on First Amendment rights may be deemed unconstitutional. *See*, *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 2000):

> The state may not condition protected speech "upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).
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> The Court held that this section of the statute was unconstitutional on its face because it presumed that the mayor would "act in good faith and adhere to standards absent from the ordinance's face." Id. at 770. "The doctrine [forbidding unbridled discretion] requires that the limits the city claims are implicit in its law be made explicit by textual incorporation." Id. Like the catch-all provision in City of Lakewood, 13-22-9(1)(b)(xiv) confers unconstitutional discretion on the director because it presumes that she will use her blanket authority to request additional information only in good faith and consistent with implicit standards. As a result, 13-22-9(1)(b)(xiv) threatens to overwhelm the narrow and objective provisions that precede it.

Conclusion

POCAA should be scrapped. It has too many flaws, misconstrues the authority of attorneys general to bring actions to correct misuse of charitable assets, extends those powers to non-lawyers, infringes on religious liberty, and even violates the Fourth Amendment.

The timing of this model law could not be worse. With states already running budget deficits, they do not need to be saddled with faulty laws to enforce. Worse yet, the Act could result in states paying penalties to parties aggrieved by the violation of rights under POCAA.

It is troubling that the Uniform Law Commission adopted such a faulty model law, which is in fact a radical power grab over charities and religious organizations. The Act seems to have an ideological bent, which one would not -- should not -- expect from the Uniform Law Commission.