



# *Ellenburg v. United States: Supreme Court Holds Criminal Restitution Statute Punitive for Purposes of the Ex Post Facto Clause*

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On January 20, 2026, the Supreme Court decided *Ellenburg v. United States*, holding that criminal restitution under the [Mandatory Victim Restitution Act](#) (MVRA) is a criminal punishment for purposes of the Constitution’s [Ex Post Facto Clause](#). This Legal Sidebar discusses the Supreme Court’s decision in *Ellenburg* and selected considerations for Congress related to the case.

## **Background: Ex Post Facto Clause, MVRA, and Lower Court Litigation**

As discussed in more detail in a [Legal Sidebar](#) that previewed the oral argument in *Ellenburg*, Article I, Section 9, Clause 3, of the Constitution prohibits Congress from passing [ex post facto laws](#)—laws that retroactively impose or increase criminal punishment. (A separate constitutional provision prohibits [state ex post facto laws](#).) The Supreme Court has held that the Ex Post Facto Clause applies only to [penal laws](#), so a law cannot be struck down as an ex post facto law unless it is penal in nature.

In 1995, Holsey Ellenburg, Jr. robbed a bank. At the time of the offense, the Victim and Witness Protection Act (VWPA) gave courts [discretion](#) to order payment of restitution as part of criminal sentences and provided that restitution obligations [expired](#) twenty years from the entry of judgment. In 1996, Congress enacted the [MVRA](#) as part of the [Antiterrorism and Effective Death Penalty Act](#). The MVRA made restitution mandatory for certain offenses and [extended](#) the obligation to pay restitution until “the later of 20 years from entry of judgment or 20 years after the release from imprisonment.”

After Congress enacted the MVRA, a federal jury [found Ellenburg guilty](#) of bank robbery and use of a firearm during a crime of violence. In 1996, he was sentenced to 322 months in prison and ordered to pay over \$7,500 in restitution. He was released from prison in 2022, having paid \$2,154 in restitution while incarcerated. Under the VWPA as in effect at the time of his offense, his restitution obligation would have expired in 2016. However, in 2023, he received a notice from his parole officer stating that he owed \$13,476 in restitution, including accumulated interest, and must make monthly \$100 restitution payments.

Ellenburg, proceeding [pro se](#), filed suit in the U.S. District Court for the Western District of Missouri challenging the continuing enforcement of his restitution obligation under the Ex Post Facto Clause. The

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district court rejected the challenge on the ground that the MVRA's extension of the time period during which restitution must be paid did not constitute an increase in criminal punishment as prohibited by the Ex Post Facto Clause. The U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) affirmed on alternative grounds. While noting that a majority of federal courts of appeals have found that MVRA restitution is a criminal penalty, the court applied Eighth Circuit precedent holding that MVRA restitution is primarily remedial or compensatory rather than punitive. Ellingburg, now represented by counsel, filed a petition for a writ of certiorari, and the Supreme Court granted review on the question of whether criminal restitution under the MVRA is penal for purposes of the Ex Post Facto Clause.

Before the Supreme Court, Ellingburg argued that the text, structure, and legislative history of the MVRA demonstrate that Congress intended for MVRA restitution to be punitive. The United States opposed Ellingburg's petition for a writ of certiorari, but after the Supreme Court agreed to hear the case, the government filed a brief supporting vacatur of the Eighth Circuit's decision. On the question before the Court of whether restitution under the MVRA is a criminal penalty for purposes of the Ex Post Facto Clause, the government agreed with Ellingburg that MVRA restitution is punitive. The government contended, however, that on remand courts could uphold Ellingburg's restitution obligation on the alternative ground that extending the time for payment is not an *increase* in punishment.

Because the government agreed with Ellingburg that the Eighth Circuit's decision should be vacated, the Court appointed an amicus curiae (non-party counsel participating as a "friend of the court") to argue in support of the Eighth Circuit's judgment. The amicus argued in part that the MVRA is not punitive because Congress did not intend for the MVRA to impose punishment and MVRA restitution is not punitive in form or effect.

The Supreme Court held oral argument in *Ellingburg* on October 14, 2025, and issued its decision in the case on January 20, 2026.

## Supreme Court Decision in *Ellingburg*

The Supreme Court reversed and remanded the Eighth Circuit's decision. Writing for a unanimous Court, Justice Kavanaugh held that "the statutory analysis is straightforward: Restitution under the MVRA is plainly criminal punishment for purposes of the Ex Post Facto Clause." In so ruling, the Court pointed to "[n]umerous features of the MVRA," including the following:

The MVRA labels restitution as a "penalty" for a criminal "offense." A court may order restitution only with respect to a criminal "defendant" and only after that defendant's conviction of a qualifying crime. Restitution is imposed during "sentencing" for the offense. At the sentencing proceeding where restitution is ordered, the Government, not the victim, is the party adverse to the defendant.

At sentencing, restitution is imposed together with other criminal punishments such as imprisonment and fines. Indeed, for misdemeanors, restitution may be ... the sole punishment for a federal offense in certain circumstances. In addition, when a defendant does not make the required restitution payments, the court may modify the terms of his supervised release or probation and impose imprisonment if the court determines that "alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence" (internal citations omitted).

The Court also cited the MVRA's placement in Title 18 of the U.S. Code, which governs "Crimes and Criminal Procedure," and the relationship between imposition of MVRA restitution and other types of criminal sentences. It identified several past decisions as evidence that "this Court's precedents have understood restitution under the MVRA to be criminal punishment." The Court acknowledged that some provisions of the MVRA reflect the nonpunitive objective of compensating crime victims but ultimately held that "Congress intended restitution under the MVRA to both punish and compensate. And so long as the text and structure of the Act demonstrate that Congress intended at least 'to impose punishment,' that 'ends the inquiry.'"

The Court [opined](#) that its ruling in *Ellingburg* “does not mean that a restitution statute can never be civil” but concluded that “the statutory text and structure of the MVRA demonstrate that restitution under that Act is criminal punishment.”

Justice Thomas authored a concurring opinion, in which Justice Gorsuch joined. He wrote separately to “clarify the foundation” of the Court’s Ex Post Facto Clause precedent. Specifically, he cited the Court’s 1798 decision in *Calder v. Bull* as the case that “established that the Ex Post Facto Clauses forbid only those retroactive laws that impose ‘punishment’ for a ‘crime.’” He [opined](#) that, in attempting to apply *Calder*, more recent judicial decisions “have adopted a framework that turns largely on legislative labeling, has little basis in history, and is unnecessarily convoluted.” He asserted that the “modern framework is incongruous with the historical purpose of Ex Post Facto Clauses” and [advocated](#) for adoption of the broader historical understanding that “punishment simply referred to the law’s coercive sanction—meaning a traditional deprivation of life, liberty, or property—redressing [a] public wrong.”

## Considerations for Congress

The Supreme Court’s ruling in *Ellingburg* does not fully resolve the litigation over Ellingburg’s individual restitution obligation, but it does provide guidance to Congress on the scope of the Ex Post Facto Clause.

With respect to Ellingburg’s case in particular, the Supreme Court [remanded](#) the case to the Eighth Circuit for further proceedings and noted, “On remand, the Court of Appeals may consider the Government’s separate arguments for affirmance of the District Court’s judgment.” Thus, although the Supreme Court has held that MVRA restitution is a form of criminal punishment, that finding alone does not require the conclusion that the MVRA is an unconstitutional ex post facto law as applied to Ellingburg. For instance, the Eighth Circuit may consider on remand whether to join the majority of federal appeals courts that have considered the issue and hold that the MVRA’s extension of the time to pay restitution did not impose an ex post facto *increase* in punishment as applied to past offenses.

At a more general level, the Supreme Court’s ruling that MVRA restitution is punitive signals to Congress that the Ex Post Facto Clause may apply to retroactive legislation imposing or modifying restitution obligations. Ex Post Facto Clause limitations articulated by the Supreme Court cannot be altered by legislation, and federal and [state](#) laws that exceed such limitations are unconstitutional. However, there are several ways in which Congress can draft legislation to avoid or limit possible ex post facto issues.

First, the Court in *Ellingburg* [stated](#) that its conclusion that the MVRA is punitive “does not mean that a restitution statute can never be civil.” *Ellingburg* did not provide express guidance on how Congress could create a restitution obligation that is civil rather than criminal, but it left open the possibility of doing so.

Second, the Ex Post Facto Clause applies only to [retroactive punishments](#), so legislation that violates the clause when applied retroactively may be constitutional when applied to post-enactment offenses. The ruling in *Ellingburg* therefore does not raise questions about the validity of restitution obligations related to crimes committed *after* enactment of the MVRA or any other restitution statute. When enacting future restitution statutes, Congress could avoid raising ex post facto concerns by providing that the statutes apply only prospectively.

Third, because the Ex Post Facto Clause applies only to retroactive [increases in punishment](#), if Congress chooses to provide that a restitution statute applies retroactively, it can limit the risk of a successful ex post facto challenge by ensuring that the legislation does not increase punishment. As noted, some appeals courts have held that this is true of the MVRA. As of the January 2026 decision in *Ellingburg*, the Supreme Court had not considered that issue.

Beyond the context of the Ex Post Facto Clause, the litigation in *Ellingburg* may also be of general interest to legislators drafting or considering legislation that might raise constitutional questions. The

MVRA's effective date provision makes the law applicable to post-enactment sentencing "to the extent constitutionally permissible." Because *ex post facto* review hinges in part on whether "the [intention](#) of the legislature was to impose punishment," Ellingburg [cited](#) that effective date language in his Supreme Court brief as evidence that Congress understood the MVRA to be punitive and thus to raise potential issues under the *Ex Post Facto* Clause if applied retroactively—that is, to cases where the offense was committed before enactment but sentencing occurred after enactment.

Principles of [judicial review](#) dating back to *Marbury v. Madison* hold that, if a statute is challenged in court, the courts will apply the statute only to the extent it is constitutional. Language such as the portion of the MVRA's effective date provision cited above therefore appears to be superfluous as a substantive matter and may be invoked by challengers to argue that Congress itself doubted the constitutionality of legislation it enacted. The Court's opinion and the concurrence in *Ellingburg* did not discuss this argument. Questions like this could also arise in other [statutory interpretation](#) cases where courts seek to determine the intent of Congress.

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