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IN FOCUS

Retroactive Legislation: A Primer for Congress

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Black's Law Dictionary defines a *retroactive law* as a law "that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect." While Congress often considers legislation that would apply retroactively, the Constitution imposes some constraints on such laws. This In Focus outlines those legal constraints on Congress's power and key considerations for Congress related to retroactive legislation. (Related constitutional provisions that apply only to state legislation, such as the Contract Clause, are not covered.)

Retroactive Punishment

Laws that retroactively impose punishment raise unique questions under the Constitution, particularly with respect to the Ex Post Facto and Bill of Attainder Clauses. Those provisions (and analogous provisions that apply to the states) prohibit enactment of certain laws that are penal in nature, regardless of whether they are expressly styled as criminal laws.

Ex Post Facto Laws

The Ex Post Facto Clause, contained in Article I, Section 9, Clause 3 of the Constitution, provides: "No . . . ex post facto Law shall be passed." The phrase "ex post facto," Latin for "after the fact," refers to laws that apply retroactively. While the clause on its face might appear to bar all retroactive legislation, courts have applied the clause only to penal laws. *See, e.g.*, *Johannessen v. United States*, 225 U.S. 227 (1912). Courts analyze retroactivity as applied to a particular challenger. The Supreme Court has rejected ex post facto challenges to laws that might apply retroactively in some cases but applied only prospectively to the challengers before the Court.

In *Calder v. Bull*, 3 U.S. 386 (1798), Justice Samuel Chase stated that the clause applies to any law that renders criminal an action that was legal when it was taken, aggravates the severity of a crime, increases the resulting punishment, or alters the applicable rules of evidence after the crime was committed to make it easier to secure a conviction.

Whether a law is penal in nature depends on its substance, not its form. In *Burgess v. Salmon*, 97 U.S. 381 (1878), the Supreme Court explained that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." In that case, the Court held that a tax increase enforceable by fines and imprisonment could not be applied to a sale of goods that took place before the act was signed into law. On the other hand, courts have rejected ex post facto challenges to statutes that create retroactive civil penalties, even when the penalties at issue exceeded the amount of actual damages. *See, e.g.*, *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871 (D.C. Cir. 2010). The Supreme Court has also upheld statutes that decrease the frequency of parole eligibility hearings, *see California Dep't of Corr. v. Morales*, 514 U.S. 499 (1995), and statutes that retroactively impose new collateral consequences for past criminal convictions, such as mandatory sex offender registration, *see Smith v. Doe*, 538 U.S. 84 (2002).

Bills of Attainder

Article I, Section 9, Clause 3 of the Constitution also bans bills of attainder—statutes that directly impose punishment by legislation rather than through court proceedings. A law constitutes a bill of attainder if it (1) applies with specificity to an identified individual or group and (2) imposes punishment without a trial. Not all bills of attainder are retroactive, but many are because these laws tend to impose sanctions based on past conduct. For example, in *Cummings v. Missouri*, 71 U.S. 277 (1867), the Supreme Court struck down as a bill of attainder post-Civil War legislation that effectively barred former Confederate sympathizers from holding certain jobs.

The Supreme Court outlined the current framework for analyzing bill of attainder claims in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). *Nixon*'s multipronged test for determining whether a law imposes punishment first applies a historical test, under which a law is punitive if it is one of a limited set of legislative actions that were held to be bills of attainder from before the Founding through the mid-20th century, including banishment, imprisonment, confiscation of property, or employment bans. The second prong considers whether the challenged law in fact functions as punishment, and the third analyzes the motivations of Congress in passing the law. The whole inquiry is highly fact-based. In general, however, courts rarely strike down a law as a bill of attainder if it serves a valid legislative purpose, even if the law targets a specific individual or defined group. As the Court in *Nixon* stated, a nonpunitive statute may properly create "a legitimate class of one."

To illustrate, in *Kaspersky Lab, Inc. v. Department of Homeland Security*, 909 F.3d 446 (D.C. Cir. 2018), the U.S. Court of Appeals for the D.C. Circuit upheld a statute that barred federal agencies from using products or services from the cybersecurity company Kaspersky Lab. Although the statute applied specifically to a single company, the court held that the law did not constitute punishment and was motivated by the legitimate goal of protecting federal computers from cyber threats. By contrast, in *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003), another panel of the same court struck down as a bill of attainder a statute altering the visitation rights of a father who had been accused of sexually abusing his child, in part because of the imbalance between the burden the statute imposed and the statute's "implausible nonpunitive purposes."

Retroactive Civil Legislation

Congress has much greater leeway to enact retroactive legislation in the civil sphere than in the criminal sphere. However, certain constitutional limits apply, and courts interpreting ambiguous statutes apply a general presumption against retroactivity.

Separation of Powers

Retroactive legislation may raise separation-of-powers concerns. For example, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Supreme Court held unconstitutional on separation-of-powers grounds a statute that would have required federal courts to reopen final judgments entered before its enactment because the law interfered with the judicial power to rule with finality.

Due Process Limitations

The Fifth Amendment's Due Process Clause prohibits the government from depriving any person of "life, liberty, or property, without due process of law." Litigants have often challenged retroactive civil laws on due process grounds, alleging that such laws impermissibly create unforeseen liability for past actions. Due process review of retroactive laws employs a version of the deferential rational basis test that normally applies to most legislation: the law needs only to be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

Nonetheless, courts consider the retroactive application of a statute separately from any prospective application, subjecting retroactive laws to somewhat more exacting scrutiny than prospective laws. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Supreme Court rejected the notion that "what Congress can legislate prospectively it can legislate retrospectively," explaining that justifications for prospective legislation may be insufficient to support retroactive effect. However, the *Turner Elkhorn* Court also held that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." Rather, retroactive civil legislation violates due process only if it is "particularly harsh and oppressive" or "arbitrary and irrational." *R.A. Gray & Co.*, 467 U.S. at 733 (internal quotes omitted).

The Takings Clause

The Fifth Amendment's Takings Clause prohibits the taking of private property for public use without just compensation. A retroactive law that deprives a person of a vested property right may constitute a taking. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of the Supreme Court stated that the Takings Clause serves as a safeguard against retrospective laws affecting property rights that is similar to the protection the Ex Post Facto Clause provides in the realm of criminal law. A violation of the Takings Clause may invalidate the government action at issue or entitle the property owner to compensation.

Analysis of a retroactive civil law under the Due Process Clause and the Takings Clause may overlap. For example, the plurality opinion in *Eastern Enterprises* concluded that a 1992 law requiring a company that had ceased coal mining operations in 1965 to pay millions of dollars into a miners' pension fund violated the Takings Clause because the statute "improperly places a severe, disproportionate, and extremely retroactive burden" on the company. Justice Kennedy, concurring in the judgment and dissenting in part, would instead have held that the statute violated the Due Process Clause because it had "a retroactive effect of unprecedented scope" and no rational relation to a legitimate government interest.

Limits on Period of Retroactivity

Regardless of the specific legal basis for a challenge to retroactive legislation, courts have recognized that the Constitution limits how far back a retroactive law may reach. The Supreme Court has not established firm time limits, and the permissible period of retroactivity may be fact-specific.

Statutes that reach back only a year or two generally do not raise serious constitutional concerns. Congress routinely passes tax laws that apply to the full calendar year in which they are enacted, and has at times passed tax laws applicable to an entire calendar year that ended before enactment. The courts have upheld those laws against due process challenges, expressing approval of statutes that establish "only a modest period of retroactivity . . . confined to short and limited periods required by the practicalities of producing national legislation." *United States v. Carlton*, 512 U.S. 26 (1994).

By contrast, both the plurality and Justice Kennedy's opinion in *Eastern Enterprises* deemed excessive a 35-year period of retroactivity. Furthermore, in *Nichols v. Coolidge*, 274 U.S. 531 (1927), the Supreme Court struck down a tax that applied to a transaction that occurred 12 years before the statute was enacted, observing that Congress may legislate "to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity." On the other hand, the U.S. Court of Appeals for the Ninth Circuit has upheld a statute that reached back seven years, holding that in that case a shorter period of retroactivity, such as one or two years, "would have been arbitrary and irrational." *Montana Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996).

Statutory Interpretation

Although the Constitution does not generally prohibit nonpunitive retroactive legislation, some commentators and courts contend that such legislation raises fundamental concerns about fairness because it imposes liability when it is too late for regulated parties to alter their behavior. In *Calder v. Bull*, Justice Chase acknowledged that issue, even as the Court upheld a retroactive law:

> Every law that takes away, or impairs, rights vested . . . is retrospective, and is generally unjust; and may be oppressive; and it is a good general rule, that a law should have no retrospect.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court similarly proclaimed, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." In light of those concerns, courts have declined to construe statutes to apply retroactively absent clear evidence of congressional intent. Thus, if Congress intends civil legislation to have retroactive effect, it must clearly state that the law applies retroactively and may wish to specify the period of retroactivity.

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