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Retroactive Legislation: A Primer for Congress

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 limited 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 Contracts Clause, are not discussed here.)

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 whether they are styled as criminal laws.

Ex Post Facto Clause

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 Ex Post Facto Clause on its face might appear to bar all retroactive legislation, courts have applied the Clause only to penal laws. 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. In *Johannessen v. United States*, 225 U.S. 227 (1912), the Supreme Court declared that the Ex Post Facto Clause’s “prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description.”

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 upheld statutes that create retroactive civil penalties against Ex Post Facto challenges, 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. Not all bills of attainder are retroactive, but many are because they 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 postbellum legislation that effectively barred former Confederate sympathizers from holding certain jobs.

The Supreme Court outlined the 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 considers the historical application of the Bill of Attainder Clause, whether the challenged law in fact functions as punishment, and the motivations of Congress in passing the law. The inquiry is highly fact-based. But, in general, 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. As the Court in *Nixon* noted, a nonpunitive statute may properly create “a legitimate class of one.”

For example, in *Kaspersky Lab, Inc. v. Department of Homeland Security*, 909 F.3d 446 (D.C. Cir. 2018), 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 held that a statute altering the visitation rights of a father who had been accused of sexually abusing his child constituted an unconstitutional bill of attainder, 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.

Retroactive Legislation

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Committee on the Judiciary.
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Crimes Against Humanity in International Criminal Law M. Cherif Bassiouni,2023-08-28 This book Crimes Against Humanity in International Criminal Law by M Cherif Bassiouni provides an in depth analysis of the development and application of crimes against humanity within international law It explores the historical evolution from the Nuremberg Trials and the legislative history of international charters to modern day international criminal tribunals The author an experienced law professor and president of several human rights organizations aims to clarify the legal principles and philosophical underpinnings of international criminal law focusing on post World War II legal developments The book is intended for legal scholars practitioners and students interested in international criminal justice providing insights into the codification prosecution and future challenges of enforcing international human rights law

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