



MEMORANDUM

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To: House Judiciary Committee
Attention: Stephanie Moore

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Subject: Constitutional Issues Raised by Pending Bills to Expand Liability under the Death on the High Seas Act and the Jones Act

This memorandum is in response to your request to evaluate the constitutional issues implicated by H.R. 5503, the Securing Protections for the Injured from Limitations on Liability Act, as ordered to be reported from the House Committee on the Judiciary on June 23, 2010. Specifically, you requested an evaluation of the constitutional issues raised by the retroactive application of proposed expanded liability provisions of the Death on the High Seas Act and the Jones Act.

The Death on the High Seas Act¹ provides that a lawsuit may be brought “[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States.”² Currently, the recovery available for such death is limited to pecuniary loss sustained by the individuals for whose benefit the action is brought.³ H.R. 5503 would provide additional liability for non-pecuniary losses related to care, comfort and companionship, and would also add the ability to recover for a decedent’s pain and suffering.

The Jones Act currently provides that the personal representative of a seaman injured or killed in the course of employment may bring a civil action against the employer.⁴ As with the Death on the High Seas Act, plaintiffs bringing a general maritime lawsuit under the Jones Act may not recover damages for loss

¹ 46 U.S.C. §§ 30301 – 30308.

² 46 U.S.C. § 30302.

³ 46 U.S.C. § 30303.

⁴ The Jones Act incorporates the provisions of the Federal Employers’ Liability Act, 45 U.S.C. §§ 51–60, which provides a right of action for railroad workers who are injured or killed.

of care, comfort or companionship.⁵ H.R. 5503, however, would provide plaintiffs the ability to recover for such losses.

H.R. 5503, under its own terms, “shall take effect on the date of enactment of this Act and shall apply to cases pending on or after such date.” Thus, the bill could have retroactive effect, as it would impose liabilities for events occurring in the past beyond the liabilities applicable at the time of the incident. It should be noted that as lawsuits have been filed regarding deaths occurring because of an explosion on the Deepwater Horizon drilling rig, the expanded liability provision of H.R. 5503 would appear to apply to these lawsuits. This memorandum evaluates the constitutional issues raised by the retroactive application of these increased liabilities under the Death on the High Seas Act and the Jones Act.

Retroactivity

The Constitution disfavors retroactivity, as “individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted.”⁶ A legislature’s responsiveness to political pressures, the Supreme Court has said, “poses the risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.”⁷

Nonetheless, constitutional restraints on retroactivity are of “limited scope,”⁸ and within reasonable bounds, the retroactive application of statutes can be an acceptable or unavoidable means of achieving a legitimate public purpose. As the Court has said –

Retroactivity provisions often serve entirely benign and legitimate purposes, whether *to respond to emergencies*, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply *to give comprehensive effect to a new law Congress considers salutary*.⁹

Accordingly, several Supreme Court decisions in the past half-century that address retroactive federal statutes have found them constitutionally inoffensive.

Substantive Due Process

The Due Process Clause of the Fifth Amendment declares that no person shall be “deprived of life, liberty, or property, without due process.” The clause has long been read to demand not only procedural due process, but *substantive* due process as well. Substantive due process in the realm of economic legislation – the realm of H.R. 5503 – imposes only a very lax, highly deferential standard: that there

⁵ *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

⁶ *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). *See also* *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (“Retroactive legislation ... can deprive citizens of legitimate expectations and upset settled transactions.”)

⁷ *Landgraf*, 511 U.S. at 266.

⁸ *Id.* at 267. For instance, U.S. Const. art. I, sec. 9, cl. 3 prohibits Congress from passing an ex post facto law – that is, a law attaching new negative legal consequences to pre-enactment conduct. Since the early years of the nation, however, the Supreme Court has construed the clause to apply only to penal legislation. *Landgraf v. USI Film Products*, 511 US 244, 266 n.19 (1994), *citing* *Calder v. Bull*, 3 Dall. 386, 390-391 (1798). As the increased liability found in H.R. 5503 would be civil, not criminal, liability, the Ex Post Facto Clause appears to pose no obstacle to the bill.

⁹ *Id.* at 267-268 (emphases added).

exists a plausible rational basis that the legislative body could have had in mind linking the means chosen and the legitimate public purpose sought to be achieved.

In a leading retroactivity/substantive due process decision, the Supreme Court explained –

To be sure, insofar as the [Act being challenged] requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect. . . . But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . *This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.*¹⁰

The Court did add a caution to this expansive view: “The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.” But that burden, said the Court in a later decision, “is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.”¹¹ It would seem that the retroactive application of the increased liabilities under H.R. 5503 easily satisfies this test: The Court has specifically held in the past that the adjustment of economic burdens between injured parties and those held responsible for such injuries meets the rational basis standard for retroactive legislation.¹² Congress could reasonably suppose that the economic adjustment between the party responsible for the maritime injury or death and the estate of the injured or killed party or those who have lost non-pecuniary benefits was justified as such an economic adjustment.

Bill of Attainder Clause

The Constitution’s Bill of Attainder Clause bars Congress from enacting laws that effectively declare the guilt of, and impose punishment on, an identifiable individual or entity, without a judicial trial.¹³ Such enactments are seen to usurp the judicial function, thereby offending the separation of powers principle so fundamental to the U.S. Constitution. An example of a law held to be void as a bill of attainder is a statute making it a crime for a Communist Party member to serve as an officer or employee of a labor union.¹⁴ As pertinent here, the argument might be that H.R. 5503, by applying to pending cases, departs from the usual prospective-only application of enactments, and would be likely to include any lawsuits already filed regarding the Deepwater Horizon incident. This retroactive feature of the bill arguably betrays an underlying intent to punish parties responsible for that incident. Then, too, the punishments that may be found constitutionally offensive are “not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct.”¹⁵ Thus, one can imagine an argument that the bill punishes existing entities engaged in maritime activities generally.

In the Court’s most comprehensive statement of its test for bills of attainder, *Nixon v. Administrator of General Services*, the Court indicated that to offend the Bill of Attainder Clause, the law must (1) single

¹⁰ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976) (emphasis added).

¹¹ *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

¹² *Usery*, 428 U.S. at 14-20. In *Usery*, the Court held that the imposition upon coal mine operators of the liability to compensate former employees for black lung disabilities contracted in the course of their work was a rational measure to spread the costs of the employees’ disabilities to those who had profited from the fruits of their labor.

¹³ U.S. Const. art. I, § 9. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). The Constitution applies the same prohibition against bills of attainder to the *states* through article I, section 10.

¹⁴ *United States v. Brown*, 381 U.S. 437 (1965).

¹⁵ *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851-652 (1984).

out a specific person or class and (2) be punitive.¹⁶ The Court then listed several indicators that a federal law is punitive. First, the law may impose punishment traditionally judged to be prohibited by the Clause. Second, even in the absence of such a traditional punishment, the law may not be rationally described as furthering a nonpunitive legislative purpose. And third, the legislative history may evince a congressional intent to punish. The Court may also consider whether less burdensome alternatives would have achieved the same nonpunitive purpose. A statute need not satisfy all these factors; rather, a court weighs them together.

It might be argued that at least the retroactive application of the statute meets the first, specificity requirement. One indication: the identity of the class (parties with pending lawsuits) was “easily ascertainable” when the legislation was passed.¹⁷ We need not dwell on the specificity requirement, however, because it is likely – assuming Congress does not “evince a congressional intent to punish” in passing H.R. 5503 – that a court would find the bill not to satisfy the second, punitive requirement and thus not to be a bill of attainder. Monetary liability for the injuries one causes is not a type of punishment historically prohibited by the Bill of Attainder Clause. Moreover, the bill can reasonably be said to further a nonpunitive legislative purpose: the attaching of additional civil liabilities to the entity that caused the non-pecuniary deprivations or the pain and suffering compensated under the relevant statutes. In language plainly relevant to the Deepwater Horizon explosion, a court has noted: “[E]ven if the [law in question] singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder.”¹⁸ Thus, as long as the committee reports and floor debates during deliberations on H.R. 5503 do not suggest a punitive motive, the bill is unlikely to be deemed a bill of attainder. It would seem, as suggested above, that there are obvious candidates for nonpunitive purposes that Congress might put forward in the legislative history of the bill.

Ex Post Facto Clause

This clause prohibits the United States from enacting an ex post facto law – that is, a law that makes criminal an act that was not criminal when done, or that increases the criminal punishment for an act over that applicable when the act was done.¹⁹ When adopted as part of the original Constitution, many persons believed the Ex Post Facto Clause to apply to retroactive legislation of *either* a civil or criminal nature, but in 1798 the Supreme Court decided that the phrase, as used in the Constitution, applies only to criminal statutes.²⁰ This early ruling remains the law today.²¹ Thus, because H.R. 5503 does not impose criminal penalties, it raises no constitutionality concerns under the Ex Post Facto Clause.

¹⁶ 433 U.S. 425 (1977).

¹⁷ *Brown*, 381 U.S. at 448-449.

¹⁸ *Seariver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 674 (9th Cir. 2002).

¹⁹ U.S. Const. art. I, § 9. The Constitution applies the same prohibition against ex post facto laws to the *states* through article I, section 10.

²⁰ *Calder v. Bull*, 3 Dall. 386, 390-391 (1798).

²¹ *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 266 n.19 (1994).