

SECURITIES LAW ALERT

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Congressional Action to Recoup AIG Bonuses: A Bill of Attainder?

Legal scholars and commentators are using the term “bill of attainder” to describe legislation pending in Congress, H.R. 1586, which would tax bonuses received by, among others, AIG executives. While the legislation will likely undergo significant changes before being presented to President Obama for his signature, an interesting but seldom considered question arises: “What is a bill of attainder?” This question is currently the subject of debate in law school seminars, on television, and at cocktail parties. Because the President and several prominent members of Congress have been critical of the current legislation, any conclusion about whether the legislation is truly a “bill of attainder” would likely be academic, and, thus, is reserved for the reader. Nonetheless, because of the timeliness of the issue and the constitutional considerations present, this article presents the facts, the law, and some interesting points to ponder.

What is a “Bill of Attainder”?

Article I, Section 9 of the United States Constitution forbids Congress from passing bills of attainder. A “bill of attainder” is “a legislative act which inflicts punishment without a judicial trial.” *Cummings v. State of Missouri*, 71 U.S. 277, 323 (1866). James Madison, in Federalist Paper No. 44, stated:

Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen . . . that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.

On March 19, 2009, the United States House of Representatives passed H.R. 1586, which “impose[s] an additional tax on bonuses received from certain TARP recipients.” Essentially, the bill would impose a 90% tax on bonus payments received by employees of firms receiving Troubled Asset Relief Program (“TARP”) funds. The bill was passed in response to the public outcry over bonuses received by executives at AIG, but would apply to any “employee or former employee of a covered TARP recipient.” The bill defines “covered TARP recipient” to include: (1) entities and their affiliates that received capital

infusions under the Emergency Economic Stabilization Act of 2008 exceeding \$5 billion; and (2) the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). The bill exempts entities that repay TARP amounts exceeding a \$5 billion threshold, as well as employees who irrevocably waive or return bonus payments before the close of the taxable year in which such payment is due. Similar but less severe legislation is also pending in the Senate.

Three requirements must be met in order for an unlawful bill of attainder to exist: (1) specification of the affected persons; (2) punishment; and (3) lack of a judicial trial. *See, e.g., 219 South Atlantic Blvd. Inc. v. City of Ft. Lauderdale, Fla.*, 239 F. Supp. 2d 1265, 1275 (S.D. Fla. 2002). As the Supreme Court stated in *United States v. Brown*, 381 U.S. 437 (1965), “the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply – trial by legislature.” *Id.* at 442. The Supreme Court has instructed that the Bill of Attainder Clause was intended to implement the separation of powers as well as to reflect “the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.” *Id.* at 445.

In *Garner v. Board of Public Works*, 341 U.S. 716 (1951), the United States Supreme Court defined bills of attainder as legislative acts

“that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.” *Id.* at 722 (quoting *United States v. Lovett*, 328 U.S. 303, 315 (1946)). Importantly, the Court held that “[p]unishment is a prerequisite.” *Id.* “Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon the circumstances attending and the causes of the deprivation.” *Id.* (internal quotation omitted).

Legal Debate: Is Taxation a Form of Punishment?

H.R. 1586 specifies easily ascertainable members of a group and imposes upon them a heightened tax without a judicial trial. Debate will no doubt arise as to whether the imposition of the tax satisfies the “punishment” requirement for the legislation to be considered a bill of attainder. According to a federal appeals court, “a tax will only be viewed as a criminal punishment when ‘the penalizing features of the so-called tax’ cause it to lose ‘its character as such and become a mere penalty with the characteristics of regulation and punishment.’” *Dye v. Frank*, 355 F.3d 1102, 1106 (7th Cir. 2004) (quoting *Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994)). In *Kurth Ranch*, the Court declared “neither a high rate of taxation nor an obvious deterrent purpose automatically marks [a] tax as a form of punishment.” 511 U.S. 767 at 780.

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The *Kurth Ranch* Court was considering whether an assessment under Montana's Dangerous Drug Tax Act subjected convicted drug offenders to "double jeopardy." By a five-to-four vote, the Supreme Court held that the tax under the Dangerous Drug Tax Act had to be characterized as "punishment" for purposes of double jeopardy analysis. *Id.* at 784. The Court reasoned that "[t]axes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity." *Id.* at 782. According to the Court:

By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits—such as creating employment, satisfying consumer demand, and providing tax revenues—are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

Id. Additionally, the Court noted that the drug tax is also exceptional because while the tax purports to be a species of property tax, the tax "is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed." *Id.* at 783. Because, as the Court held, "[the] tax [is] imposed on criminals and no others, [it] departs so far from normal revenue laws as to become a form of punishment." *Id.*

H.R. 1586 - Bill of Attainder?

As the Supreme Court stated in *Garner*, *supra*, "[w]hether legislative action... amounts to punishment depends upon the circumstances attending and the causes of the deprivation. Whether the tax imposed by H.R. 1586 rises to the level of "punishment" under Supreme Court precedent is subject to debate. The 90% tax imposed by H.R. 1586 is distinguishable from the State of Montana's Dangerous Drug Tax in several ways: the tax is not imposed upon an illegal activity; there is an ostensible "fund-raising" purpose for the tax; and the tax is levied against the income of bonus recipients.

It should also be noted that H.R. 1586 is an act of the United States Congress, as opposed to an act of a state legislature (such as the Montana Dangerous Drug Tax). Unlike state legislatures, which enjoy broad police power, federal congressional power is limited to specific grants of power as enumerated in Article I, Section 8 of

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the Constitution. One enumerated power granted to Congress is the taxing power. Of the enumerated powers, the broadest powers are the power regulate interstate commerce and the power to tax. Certainly, the anger expressed by the sponsors of H.R. 1586 evidences an intent to punish. Congressional action under the taxing power may simply have been the most convenient method to “punish” bonus payment recipients. Considering the circumstances and the motivation behind the tax imposed by H.R. 1586, one could certainly argue that the tax is a form of punishment. The purpose of this article is merely to provide the reader with the facts, the law, and a taste of the relevant legal considerations.

Conclusion

Many might seek to label H.R. 1586 a bill of attainder. However, cogent legal arguments may be made to the contrary. Regardless of how Congress’s attempt to recoup the bonus money is ultimately resolved, the public rage is palpable. In an economic environment where taxpayers feel constrained like never before, the public will surely view any corporate compensation package with extreme skepticism – especially where that corporation has been the beneficiary of a “bailout.” In such a politically charged environment, lawmakers will be quick to act to quell their constituents’ outrage. Over the next weeks and months, it will be interesting to observe whether cash-strapped states might also seek to implement tax code changes similar to those currently pending before Congress.

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