Mr. TOWNS. How much time remains?

The SPEAKER pro tempore. The gentleman has 1¼ minutes remaining.

Mr. TOWNS. Let me begin by first thanking the gentleman from California (Mr. ISSA) for his input. Let me thank the staff for all their input. I'd like to thank Congressman SKELTON. And of course I'd like to thank Congressman LYNCH for all the work they've done to make this bill better.

I'd like to reiterate my strong support for H.R. 1804. It will provide much-needed enhancements to the Thrift Savings Plan and to the Federal Government's retirement system.

I urge all of my colleagues to join in supporting the passage of this measure and, of course, because I think it will do so much for the servicemen and, of course, the widows of servicemen. And I think that we owe them that.

And this legislation is not perfect, but it's a giant step in the right direction. So I'm hoping that my colleagues will support this legislation. And let's move it very quickly through the House, and let's get it to the President's desk for him to be able to sign it.

Thank you so much for the support that we've gotten from everyone.

Mr. BROWN of South Carolina. Mr. Speaker, I rise today in support of Title II of H.R. 1804, the Federal Retirement Reform Act. Congressman TOWNS is to be commended for taking up the cause that Congressman ORTIZ and I, along with many others, have championed with H.R. 775, The Military Surviving Spouses Equity Act. While this bill doesn't repeal the widows' tax imposed by the offset of Survivor Benefit Plans by Dependency and Indemnity Compensation, it helps military survivors during a difficult time for all of us.

When Congress established the Military Survivors' Benefit Plan, or SBP, in 1972, they did so in order to give members of the military a sense of security about their spouses in the event of their death. The plan is voluntary, can be purchased by retirees or will be provided to survivors of active duty servicemembers who are killed in the line of duty. Through the SBP that was bought, spouses and children can receive up to 55% of the servicemembers' retired pay. While SBP is an annuity, survivors of military retirees and veterans may also receive Dependency and Indemnity Compensation (DIC) if their spouse died a service connected death. Under current law, widows are forfeiting, dollar-for-dollar, the SBP annuity their spouse paid for by the amount of the DIC benefit.

It's simply wrong, and unfair to our military surviving spouses who were tasked with supporting their spouses during the most difficult of war times and peace times, to take away that which was intentionally paid for because of a benefit intended to serve another purpose. We don't do this with private life-insurance, we don't do it with the federal survivor benefit, and we shouldn't do it to the families of those who paid the greatest cost for freedom.

This bill, while it doesn't repeal the offset of SBP annuities by the DIC benefit, will be a needed help for widows, widowers and their children. However, I hope that it will not be considered the last step towards equity. By increasing payments by $35 beginning in 2010, surviving spouses will receive a monthly payment of $95 and will continue to receive increased payments until fiscal year 2016 with a $245 increase resulting in a monthly payment of $345. It's the least we can do; we need to repeal the offset.

Finally, I want to thank the veterans service organizations, particularly the Gold Star Wives of America, and Representative SOLOMON ORTIZ, for their hard work towards equity for surviving spouses. While I've sponsored a bill to repeal the SBP/DIC offset since my first term in Congress, even such small steps as the one we took today wouldn't be possible without their help.

Ms. BORDALLO. Mr. Speaker, I rise today in support of the passage of H.R. 1804, the Federal Retirement Reform Act of 2009 in the House of Representatives. The passage of this bill in the House marks an important step towards reducing the "widow's tax" that currently denies surviving family members the full payment of their Survivor Benefit Plan (SBP).

If enacted, Title II of H.R. 1804 would increase the monthly payments under the Special Survivor Indemnity Allowance to surviving spouses or former spouses of deceased service members who were denied the full amount of their annuity under the SBP due to an offset requirement by the Dependency and Indemnity Compensation (DIC) from the Department of Veterans Affairs (VA). This benefit will help thousands of military widows and more than a million current servicemembers and federal civilian employees.

I commend Representative IKE SKELTON of Missouri and Chairman of the House Armed Services Committee as well as Representative ED TOWNS of New York and Chairman of the House Committee on Oversight and Government Reform for their working together to strike a compromise on this important provision in H.R. 1804. I will continue to work with my colleagues on the House Armed Services Committee to find ways to reduce the burden on widows of our nation's servicemembers. The compromise struck in this legislation is a major step forward and we need to continue to find ways to ensure that the servicemembers' widows receiving the full and fair annuity to which they are entitled under the SBP.

Mr. TOWNS. I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from New York (Mr. TOWNS) that the House suspend the rules and pass the bill, H.R. 1804.

The question was taken; and (two-thirds being in the affirmative) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

END GOVERNMENT REIMBURSEMENT OF EXCESSIVE EXECUTIVE DISBURSEMENTS (END THE GREED) ACT

Mr. CONYERS. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 1575) to petition the courts to avoid fraudulent transfers of excessive compensation made by entities that have received extraordinary Federal financial assistance on or after September 1, 2008, as amended.

The Clerk read the title of the bill.

The text of the bill is as follows:

H.R. 1575

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "End the Government Reimbursement of Excessive Executive Disbursements (End the GREED) Act".

SEC. 2. CIVIL ACTION TO AVOID FRAUDULENT TRANSFER.

The Attorney General, after consultation with the Secretary of the Treasury, may commence a civil action in an appropriate district court of the United States to avoid any transfer of compensation by (or on behalf of) a recipient entity to (or for the benefit of) an officer, director or employee made on or after September 1, 2008 (and to avoid the obligation pursuant to which such transfer occurred, to the extent of such transfer), and to recover such compensation (wherever located) for the benefit of such entity, to the extent such entity received less than a reasonably equivalent value in exchange for such compensation and such entity—

(1) was insolvent on the date that such compensation was transferred, not taking into account any covered direct capital investment received by such entity on or after September 1, 2008, or

(2) was engaged in business or a transaction, or was about to engage in business or a transaction, for which property remaining in the recipient entity was an unreasonably small capital, not taking into account any such covered direct capital investment.

Pursuant to the authority provided in this section, the Attorney General may avoid any such transfer in the manner described in this section, or may avoid any such transfer to the full extent that such transfer is avoidable under applicable law by or on behalf of any creditor holding an unsecured claim against such entity.

SEC. 3. SUBPOENA AUTHORITY.

The Attorney General may, after consultation with the Secretary of the Treasury, issue a subpoena requiring the attendance and testimony of witnesses and the production of documentary evidence relevant to possible avoidance of any transfer of compensation under section 2, including evidence regarding the circumstances surrounding any compensation arrangement or transfer of compensation involved, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate district court of the United States.

SEC. 4. DEFINITIONS.

For purposes of this Act—

(1) the term "covered direct capital investment" means a direct capital investment received under the Troubled Assets Relief Program or, with respect to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a Federal home loan bank, under the amendments made by section 1117 of the Housing and Economic Recovery Act of 2008,

(2) the term "officer, director, or employee" includes—

(A) an officer, director, or employee of a recipient entity, and

(B) an officer, director, or employee of a subsidiary of a recipient entity,

(3) the term "compensation arrangement" means an arrangement that provides for the payment of compensation (including performance or incentive compensation, a bonus of any kind, or any other financial return designed to replace or enhance incentive, stock, or other compensation), and

(4) the term ''recipient entity'' means a person (including any subsidiary of such person) that on or after September 1, 2008, is holding (or has the direct benefit of) a covered direct capital investment that exceeds $5,000,000,000 outstanding.

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Michigan (Mr. CONYERS) and the gentleman from Texas (Mr. SMITH) each will control 20 minutes.

The Chair recognizes the gentleman from Michigan.

GENERAL LEAVE

Mr. CONYERS. Mr. Speaker, I ask unanimous consent for all Members to have 5 legislative days to revise their remarks and include extraneous material on the bill under consideration.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan?

There was no objection.

Mr. CONYERS. I yield myself as much time as I may consume.

Members of the House, this is a modest effort to safeguard taxpayer funds and rein in the out-of-control compensation and bonus abuses by companies that have used Federal Government-supplied capital to stay out of bankruptcy.

Essentially, the two main provisions in it are first, it supplements existing fraud laws to allow the Attorney General to use the courts to challenge, on a case-by-case basis, the most egregious bonuses by entities receiving more than $5 billion in direct capital investments. This measure is directly based on fraudulent transfer laws that are in the United States Code, codified, or a matter of common law in every State that goes back to Elizabethan times, if anyone would care to research that.

Secondly, we authorize the Attorney General to subpoena necessary information relevant to the bonuses. But, unlike other measures, this act applies to bonuses made as far back as the fall of 2008, so that it could apply to year-end bonuses made by AIG and Merrill Lynch. And so it also can be applied to foreigners, since we found out that a majority of AIG bonuses, as determined by Attorney General Cuomo, were not received by Americans, and that, for some reason, foreign individuals appear less likely to return their bonuses voluntarily.

So, this is a very important complement to everything else that's going on. And later on I'll introduce records for those constitutional Members of the body that want to be assured that this is a constitutional matter. We have Laurence Tribe and three other professors who have analysis of the constitutionality of this measure to be inserted into the RECORD at the appropriate time.

I'll reserve, now, the balance of my time.

Mr. SMITH of Texas. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, H.R. 1575 should not be on the floor today. In the rush to respond to the bonuses paid to AIG executives, some in the majority have, once again, let expediency override common sense. The Judiciary Committee has held no hearings, heard no expert witnesses, and provided no reasoned evaluation of this bill during the normal legislative process. Instead, the bill went directly to full committee markup within hours of its introduction. After markup, it was substantially rewritten behind closed doors. Now it has been rewritten in the dark, once again, and has been sent prematurely to the floor.

In the last few weeks, Congress has learned the hard way about the unintended consequences of rushing to legislate without adequate expert testimony or debate. The results this time could be more costly than any of us would want.

President Obama, Secretary Geithner, leading financial institutions, and even the Washington Post, have already sounded the alarm. Congress' haste to rewrite contracts, claiming that payments under the contracts were ''fraudulent conveyances,'' as this bill attempts to do, could scare banks and other institutions away from the government's financial rescue programs.

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Keenly aware of this, President Obama has urged us to act intelligently, not out of anger, but to pass this bill would be to do the opposite of what President Obama has said that he wants.

Early last week, Secretary Geithner finally announced a toxic assets relief program, relying heavily on private participation. The markets responded by rallying strongly for the first time in months. Why would we scare private institutions away now just when we need them the most?

Bonuses like AIG's may seem unwise and unfair, but to companies receiving them and courts reviewing them, are they really fraudulent?

Our efforts to void legal contracts make the prospect of working with the government look like a walk through a minefield. Remember, it was the current administration that urged congressional Democrats to protect AIG's right to pay these bonuses through the stimulus bill. Congressional Democrats willingly complied. House Democrats passed a bill without even reading it and without any House Republican even supporting it. Then President Obama signed it.

How could bonuses that Congress and the President specifically ratified suddenly be fraudulent? If they were not fraudulent, how can this be anything other than an unconstitutional taking of contractual rights?

What is more, this bill is unnecessary. We have already passed tax legislation to recoup the AIG bonuses. Besides, a great majority of the key AIG bonus recipients have returned their bonuses.

In the end, New York Attorney General Cuomo expects to force the return of all bonuses that went to domestic recipients. He apparently is not as confident about his ability to recoup payments overseas. I am confident, however, that if Mr. Cuomo needs additional authority to recoup overseas payments, the New York legislature is competent to pass legislation through regular order to give him just that authority.

Meanwhile, we cannot say with any confidence that this bill will permit us to recoup anything beyond what Attorney General Cuomo has already recovered or may be able to recover. This bill, accordingly, may be utterly useless.

The AIG bonuses may have been unwise, but what was fraudulent about them when Congress and the President specifically ratified them?

The retribution this bill threatens rests on anger, not on sound policy. It will undoubtedly undermine the Federal Government's ability to recruit bank rescue participants, so this bill will hinder a successful economic recovery rather than contribute to it.

Finally, the House just passed H.R. 1586. We do not need to take follow-up action, and we certainly do not need to take it in haste or to overreact. We should not compromise on our duty to the American people by rushing out this hasty, ill-considered and unnecessary bill. I fully expect there will be bipartisan opposition to this legislation.

Mr. Speaker, I reserve the balance of my time.

Mr. CONYERS. I am pleased to recognize the chairman of the subcommittee from which this measure came, Mr. COHEN of Tennessee, for as much time as he may consume.

Mr. COHEN. Mr. Speaker, I want to thank Chairman CONYERS for the time and for being the lead sponsor on this important legislation. I greatly respect my colleague from Texas, the ranking member, but I would have to disagree with his perspectives on the bill.

First of all, it does not rewrite contracts whatsoever. It just gives a court the opportunity in a contested hearing, with the United States on one side and the recipient of what is alleged fraudulent transfer or excessive compensation or bonus on the other side, to argue whether that compensation was a fraudulent transfer and was excessive and was beyond what would be dictated in the economic conditions and times that the payment was made.

I think that is the American way to have issues such as this determined before a neutral and detached magistrate based on the facts and on the law of this country. This would be applying a fraudulent transfer law which 45 States have and that has existed in common law for many, many years.

The manager's amendment, which makes the bill, is different from the original bill that did have some controversy about the question of its constitutionality. There were several esteemed judicial minds who felt that the original bill was constitutional, a majority of people whose opinions were sought and who replied, but it is almost unanimous agreement that this bill is constitutional. None other than Laurence Tribe of the Harvard Law School and others have taken the position that this is constitutional.

The public was justly outraged, as were many Members of this Congress—I suspect nearly every Member of this Congress—at the size of the bonuses paid to AIG. AIG, Merrill Lynch and other companies were given money, Mr. Speaker, because they were going to be broke. They were broke. They had recklessly ruined their stockholders' investments and had put this country on the verge of economic collapse. Because of that, it was necessary for the United States Congress to respond, both under President Bush and President Obama, and to put moneys into these institutions to make them whole, hopefully, with the idea that they would be lending money to the American consumer and to American businesses to get the economy moving again.

Unfortunately, what some of these people did—Merrill Lynch was one, and AIG was another—is they used these moneys in ways that were not intended, sometimes parceling them out to their associate companies in Europe as well as here, by giving out bonuses called ''retention bonuses'' or other types of bonuses in excess of $1 million and sometimes up to $6 million. The individuals who got these bonuses would have gotten nothing if it were not for the United States' money coming in to make those companies solvent, with the purpose of making them solvent and able to lend money to businesses to get our economy moving—to stimulate our economy. Instead of that, they stimulated each other, and did something to the American public that has not been done since, maybe, to Sabine women. It was the wrong thing to do.

For this purpose, it was important that Congress responded to protect the taxpayer and to protect the Treasury. We passed a bill last week concerning taxes. This is a fairly narrowly drawn bill, surgically drawn to only allow courts to make these decisions on companies that have over $5 billion worth of assets—not community banks, not small folks—but big folks who got big bucks who then put big bucks out to their employees who basically, in many cases, were the people who recklessly put those companies on the verge of collapse, and the American economy and the world economy on the verge of collapse.

It shocks the public conscience, and any of those bonuses should be void against public policy, and because they would be void against public policy, this Congress appropriately acted with legislation. I am proud to stand with Chairman CONYERS and with other members of the Judiciary Committee who brought this legislation that has been reviewed by scholars and that has been found to be constitutional and that gives the Attorney General, in consultation with the Secretary of the Treasury, the opportunity to bring fraudulent transfer charges into court where a judge can make a decision on whether or not the moneys should or should not be expended.

So I urge all of my colleagues to vote as to what is appropriate—to void this act against public policy and against the unjust enrichment of people who have been reckless with our public dollars and earlier with their private dollars and with their stockholders' dollars and to put the whole situation back in balance.

Mr. SMITH of Texas. I yield myself such time as I may consume.

Mr. Speaker, I would like to address in a little bit more detail some of the defects in this bill.

Many of us believe that the AIG bonuses were unwise, but what was fraudulent about them? Urged on by the White House and by the Department of the Treasury, a provision to protect AIG's right to pay the AIG bonuses was sneaked into the stimulus bill, which was subsequently signed by President Obama.

How can bonuses that Congress and the President specifically ratified be fraudulent? If they were not fraudulent, how can this bill do anything but threaten an unconstitutional taking of contractual rights?

Bonus retribution rests on anger, not on sound policy. It will undermine the Federal Government's ability to recruit bank rescue participants. President Obama, Secretary Geithner and others have all recognized the obvious, that the more we rewrite the contracts of companies participating in the rescue programs, the more the companies will run the other way from our programs.

Secretary Geithner has finally announced the program that was supposed to help the meltdown at the very outset, the toxic assets relief plan. The markets responded strongly and positively to that announcement just last week. So how can we take this action that will only scare participants and that program away precisely when we need them to succeed?

H.R. 1575 will put executive compensation decisions into a multitude of district judges' different hands. The bill cannot fairly or reliably restrain these 1,000-plus judges as they assess in districts across the country what they think is ''reasonably equivalent value for services.'' The bill is, thus, a prescription for arbitrary results.

What is more, in the cases in which the judges find that reasonable compensation was not exceeded, we will recover not one dime of these bonuses. So what is the point?

Mr. Speaker, this bill is the product of hurried decision-making, the trampling of regular order and insufficient vetting. In fact, this bill was rewritten twice behind closed doors before we arrived here today, and it still is riddled with all of the flaws that I have discussed. Mr. Speaker, the answer is therefore clear. We certainly should not pass this bill today.

I reserve the balance of my time.

Mr. CONYERS. Mr. Speaker, I am pleased to recognize the gentlewoman from Houston, Texas, who has served with great effectiveness on the Judiciary Committee, and I would yield her as much time as she may consume (Ms. JACKSON-LEE of Texas).

(Ms. JACKSON-LEE of Texas asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE of Texas. I thank the distinguished gentleman from Michigan and the chairman of the subcommittee, Mr. COHEN, for their leadership.

Mr. Speaker, I am very pleased to be an original cosponsor of this legislation, and frankly, I think it is important that we clear the air and provide a treatise, an instructive recalling, of the reason we are on the floor today.

First of all, this is a moderate approach, a temperate approach, a constitutional approach of, really, paying the taxpayers back, of giving the taxpayers a day in the sun and of using the Constitution and the respect of three branches of government to be able to protect the taxpayers. This does not thwart the work of Secretary Geithner or the administration. It is a complement to them.

Mr. Speaker, the committee undertook a careful constitutional assessment of this bill. We were quite well aware that we did not want to violate the Constitution, and we secured the assistance and the insight of four prominent constitutional scholars to affirm its constitutional soundness.

Mr. Speaker, I insert into the RECORD at this point the letters of law professors Laurence Tribe of Harvard Law School and Michael Gerhardt of the University of North Carolina.

HARVARD UNIVERSITY,
Cambridge, MA, March 24, 2009.

Re constitutionality of H.R. 1575.

Hon. JOHN CONYERS, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

I have been asked to address the constitutional validity of H.R. 1575, the ''End the Government Reimbursement of Excessive Executive Disbursements (End the GREED) Act.'' Having carefully reviewed the text of the bill, I believe it stands on solid constitutional ground. This judgment applies both to the bill as reported by the Judiciary Committee on March 18, 2009, and to the revised version your staff sent me on March 23, which has been narrowed to a provision authorizing the Attorney General to petition a court to avoid a covered payment of compensation in exchange for ''less than a reasonably equivalent value,'' and a related subpoena provision. Because I understand that this narrowed version of the bill is the one now being considered for the House floor, it is this bill that I will address primarily in this memorandum.

Enacting this legislation is well within Congress's affirmative constitutional authority under the Bankruptcy Clause, Article I, Section 8, Clause 4, ''[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.'' That this authority extends not only to laws regarding bankruptcy itself, but also to laws regarding companies facing insolvency generally—and thus to the very entities defined in Section 2 of H.R. 1575—is established beyond question by settled Supreme Court precedent. In Continental Illinois National Bank & Trust Co. v. Chicago Rock Island & Pacific Railway Co., 294 U.S. 648, 667–68 (1935), for example, the Supreme Court stated that, ''[w]hile attempts have been made to formulate a distinction between bankruptcy and insolvency, it has long been settled that, within the meaning of the [Bankruptcy Clause], the terms are convertible.'' And, in Railway Labor Executives' Ass 'n v. Gibbons, 455 U.S. 457, 466 (1982), the Court explained that, ''[a]lthough we have noted that 't]he subject of bankruptcies is incapable of final definition,' we have previously defined 'bankruptcy' as the 'subject of relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' Congress' power under the Bankruptcy clause 'contemplate[s] an adjustment of a failing debtor's obligations.''' (citation omitted.) H.R. 1575 thus fits comfortably within the category of laws that the Bankruptcy Clause empowers Congress to enact—particularly when that clause is coupled with the Necessary and Proper Clause of Article I, Section 8, Clause 18, and when it is supplemented by the Commerce Clause of Article I, Section 8, Clause 3.

Moreover, because H.R. 1575 is limited to the subject of fraudulent transfers from companies that have received at least $5 billion in federal funds since the beginning of September 2008, it is also readily justified as a reasonable condition on the expenditure of funds provided by Congress in the exercise of its power ''To lay and collect Taxes, . . . to pay the Debts and provide for the . . . general Welfare of the United States.'' U. S. Const., Article I, Section 8, Clause 1. The power of Congress to invoke this taxing and spending authority, again in conjunction with the Necessary and Proper Clause, to impose conditions on the receipt of federal funds where, as in this instance, those conditions relate directly and substantially to ensuring that those funds are expended solely for the purposes contemplated by Congress, is thoroughly settled. See, e.g., South Dakota v. Dole, 483 U.S. 203, 206–07 (1987); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Lau v. Nichols, 414 U.S. 563, 569 (1974).

Questions have been raised about whether H.R. 1575 might constitute a forbidden Bill of Attainder, but any such claim would be wholly without merit. The bill is carefully structured to apply to a broad class of individuals and inflicts no punishment whatsoever but merely subjects those individuals to suits brought by the Attorney General to recover excessive compensation. The government cannot prevail in such suits without proving ''in an appropriate district court of the United States'' that the individuals in question gave ''less than a reasonably equivalent value in exchange'' for the ''compensation'' the government seeks to avoid as a ''fraudulent transfer.'' H.R. 1575, Section 2. Even if the ultimate recovery of such compensation were deemed punitive rather than regulatory, that recovery would take place only pursuant to trial in an Article III court, a far cry from the trial by legislature against which the Bill of Attainder Clause is directed. See Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 851–53 (1984); Nixon v. Administrator of General Services, 433 U.S. 425, 472–73 (1977); United States v. Brown, 381 U.S. 437, 458–61 (1965); United States v. Lovett, 328 U.S. 303 (1946). As I explained in my constitutional law treatise, ''The essence of the bill of attainder ban is that it proscribes legislative punishment of specified persons—not of whichever persons might be judicially determined to fit within properly general proscriptions duly enacted in advance. . . . Its application necessarily depends on the presence of improper specification by the legislature of the individuals singled out for punishment. . . . [N]o attainder may be said to have resulted from the mere fact that the set of persons having the characteristic [designated by the legislature] might in theory be enumerated in advance and that the set is in principle knowable at the time the law is passed.'' Laurence H. Tribe, American Constitutional Law 643 (2d ed. 1988). In this instance, moreover, the ''set of persons having the characteristic'' of receiving what H.R. 1575 deems a ''fraudulent transfer'' is not knowable in advance, in part because the characteristic is by no means self-defining and requires factual development in each individual case and in part because the statute would operate not just retrospectively to transfers made between September 1, 2008, and the date of the bill's enactment as law but also prospectively from that date forward.

The remaining constitutional questions raised about H.R. 1575 are somewhat more plausible superficially but in the end are all without merit.

The first of those remaining questions is whether setting aside completed transfers of compensation from functionally insolvent entities receiving more than the designated amounts of federal funds to keep them afloat would amount to a ''taking'' of financial resources from the recipients of those transfers to benefit the federally-supported entities from which the transfers had come and could thus trigger an obligation on the part of the Federal Treasury to provide ''just compensation'' to the transferees—which would, of course, defeat the entire purpose of the bill insofar as its ultimate aim is to avoid a waste of federal tax revenues. The answer is that the Takings Clause is simply inapplicable. Federally imposed obligations to make monetary payments to third parties are not properly characterized as ''takings'' at all under the Takings Clause of the Fifth Amendment. Indeed, such obligations have never been subjected to the Takings Clause by a Supreme Court majority. Although four Justices, writing for a plurality in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), invoked the Takings Clause to review a law imposing such financial obligations, a majority of the Court in that case—including both Justice Kennedy, concurring in the result, id. at 539–47, and Justice Breyer, dissenting in an opinion joined by Justices Stevens, Souter, and Ginsburg, id. at 554–57—squarely held the Takings Clause altogether inapplicable to such mandated monetary transfers, noting that ''application of the Takings Clause [to such financial obligations] bristles with conceptual difficulties,'' id. at 556 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.), difficulties that in my view would be completely insuperable. To be sure, this conclusion of the five Justices in Eastern Enterprises is not itself a holding of the Supreme Court, see When The Dissent Creates The Law: Cross-cutting Majorities And The Prediction Model of Precedent, 58 Emory L.J. 207, 216, 240 (2008), but it affords a strong basis for predicting what the Court would hold in any case presenting the issue today, especially in light of the fact that Justice O'Connor, the author of the plurality opinion viewing the Takings Clause as applicable, has been replaced by Justice Alito, and that Chief Justice Rehnquist, who joined the O'Connor opinion, has been replaced by Chief Justice Roberts. Moreover, the analysis of the five Justices who deemed the Takings Clause inapplicable seems to me logically unassailable.

Those five Justices explained why the Takings Clause is ''the wrong legal lens,'' id. at 554, through which to view such measures. Either ''the Government's imposition of an obligation between private parties, or [its] destruction of an existing obligation, must relate to a specific property interest [such as an interest in a specific parcel of land or a specific item of personal or intellectual property] to implicate the Takings Clause.'' Id. at 544 (Kennedy, J., concurring in the judgment and dissenting in part) (italics added). The financial liability that would be imposed on the transferee by the operation of H.R. 1575, and the monetary recovery to the transferor that enforcement of this liability against the transferee would entail, ''no doubt will reduce [the] net worth'' of the transferees who are subject to the law's avoidance provisions, ''but this can be said of any law which has an adverse economic effect.'' Id. at 543 (Kennedy, J.). A decision to apply the Takings Clause to a measure that, like HR 1575, requires only the restoration of improperly transferred funds and not the confiscation or transfer of any specific property interest ''would expand an already difficult and uncertain rule [treating some regulatory measures as takings] to a vast [new] category of cases not [previously] deemed . . . to implicate the Takings Clause,'' id. at 542, and ''would throw one of the most difficult and litigated areas of the law into confusion, subjecting [every level of government] to the potential of new and unforeseen claims in vast amounts.'' Id. There is no realistic prospect that the Supreme Court would plunge headlong into that thicket by applying the Takings Clause to any measure like H.R. 1575, nor is there any good reason for any court or lawmaker to do so.

This is even more obviously correct when the federally imposed obligation to make monetary payments to third parties ripens only with a judicial determination that those subjected to the obligation were wrongfully enriched in the first instance and when the payment obligation has the character of avoiding that unjust enrichment so as to restore the status quo ante. The implicit theory underlying the seminal case of Calder v. Bull, 3 U.S. 386 (1798), was that a government-mandated transfer from one private party to another was either a naked redistribution of wealth and thus beyond the powers the people ceded to government under the original social compact or an act of corrective justice and thus a violation of the separation of powers unless taken pursuant to a judicial determination of prior wrong. Tribe, American Constitutional Law, supra, at 561, 571 & n.9; Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 357 (8th ed. 1927). Precisely such a determination forms the heart of the transfer authorized by H.R. 1575. To call it a compensable taking would thus be incoherent.

Admittedly, the Coal Act provision at issue in Eastern Enterprises was ultimately found to be unconstitutional. But that result followed only because the Coal Act, ''in creating liability for events which occurred 35 years [before its enactment,] ha[d] a retroactive effect of unprecedented scope,'' id. at 549 (Kennedy, J.), and was viewed by five Justices as being in no meaningful sense ''remedial'' in purpose, id., leading Justice Kennedy to the conclusion, as a matter of substantive due process, that the measure was understandable only as '''a means of retribution against unpopular groups or individuals.''' Id. at 548 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994)). But ''[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances,'' id. at 550, circumstances that four Justices deemed absent even with respect to the extreme measure at issue in Eastern Enterprises and that are absent by any conceivable measure with respect to H.R. 1575. This conclusion is strongly reinforced by a long string of Supreme Court rulings concluding that nothing beyond a standard of reasonableness, usually amounting to a bare showing of rationality, constrains retroactive federal legislation in the economic sphere. United States. v. Carlton, 512 U.S. 26, 30–31 (1994); Pension Benefit Guaranty Corporation v. R.A. Gray & Co., 467 U.S. 717, 729–30, 733 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–18 (1976).

The second remaining question is whether changing the lens from that of the Takings Clause (or the Due Process Clause) to that of the Ex Post Facto Clause would provide a sounder basis for attack by those seeking to challenge H.R. 1575. Again, the clear answer is no. Ever since Calder v. Bull, 3 U.S. 386 (1798), the Ex Post Facto Clause ''has [been] considered . . . to apply only in the criminal context,'' Eastern Enterprises, supra, at 524, 538 (Thomas, J., concurring). Measures that are not the functional equivalent of criminal punishment are not subject to the clause. Although Justice Thomas has indicated that ''[i]n an appropriate case [he] would be willing to reconsider Calder and its progeny to determine whether a retroactive civil law that passes muster under . . . Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause,'' id., there is no prospect that others would join him in taking so radical a step. And, more than that, it is hard to imagine that even Justice Thomas would regard H.R. 1575 as presenting ''an appropriate case'' for reconsideration of a principle with so venerable a pedigree.

There is also venerable precedent supporting the general principle that neither the Ex Post Facto Clause nor the Due Process Clause stands in the way of congressional measures authorizing the federal government to rescind even privileges as basic as U.S. citizenship when the means by which such privileges were obtained indicate that they never rightfully belonged to those from whom the government is authorized to recover them. See Johannessen v. United States, 225 U.S. 227, 240–43 (1912). In upholding a congressional measure reversing a decision that would have permitted an instrumentality of the Cuban government to recover the proceeds from a sale of sugar wrongfully expropriated by the Cuban government, a district court quoted the Johannessen Court's observation of the underlying principle that ''[t]here is no such thing as a vested right to do wrong.'' Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 979 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968) (quoting Johannessen, 225 U.S. at 241–42). That principle, too, supports the constitutionality of H.R. 1575.

LAURENCE H. TRIBE,
*Carl M. Loeb University Professor.**

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MARCH 24, 2009.

Hon. JOHN CONYERS, Jr.,
Chair, House Judiciary Committee, House of Representatives, Washington, DC.

Hon. LAMAR S. SMITH,
Ranking Member, House Judiciary Committee, House of Representatives, Washington, DC.

DEAR REPRESENTATIVE CONYERS AND REPRESENTATIVE SMITH: I appreciate the opportunity to share with you my analysis of the constitutionality of the proposed Manager's Amendment to The End the GREED Act. Although I am currently abroad teaching a mini-course on American constitutional law to French law students, I have had the opportunity to closely read the pending bill. As I explain below, I believe that The End the GREED Act, specifically as revised in the proposed Manager's Amendment, is unquestionably constitutional. Each of the powers deployed to enact this bill is plenary, and these powers—individually and collectively—provide an unusually strong, unassailable constitutional foundation for the proposed Manager's Amendment to The End GREED Act.

First, The End the GREED Act is based on Congress' Article I power ''to enact uniform laws on the subject of Bankruptcies.'' The bankruptcy power is a unique, plenary power of the Congress. Indeed, the Supreme Court has held that this power may be used to impair contracts; and in Wright v. Union Central Life Insurance Company, 304 U.S. 502, 513–54 (1938), the Supreme Court declared that an ''adjudication in bankruptcy is not essential to the jurisdiction [that Congress has in the field in bankruptcies.] The subject of bankruptcies is nothing less than the 'subject of relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief'' (citation omitted). The Court ruled, in other words, that the Congress is not confined to addressing insolvency (or its prospects or consequences) in the context of bankruptcy proceedings. This law, particularly the section authorizing a federal civil cause of action for fraudulent transfers, is plainly consistent with that longstanding understanding of the scope of the bankruptcy clause.

Second, The End the GREED Act is based in part on Congress' plenary power under Article I to regulate interstate commerce. For instance, section (c) easily satisfies all of the requirements that the Court has recognized with respect to federal regulations of private economic conduct. In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court recognized that pursuant to its power to regulate interstate commerce the Congress had the authority to regulate three categories of private conduct or affairs—the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affected interstate commerce. Ten years later, in Gonzales v. Raich, 545 U.S. 1 (2005), the Court explained that it would only employ the rational basis test to assess the constitutionality of a regulation of economic conduct that was either part of a comprehensive regulatory scheme or could if aggregated substantially affect interstate commerce. There is no question that The End the GREED bill, including section (c), is a regulation of economic transactions, which, if aggregated, could substantially affect interstate commerce. As such, this bill would be subject to the most deferential judicial review possible and easily pass constitutional muster.

Besides Congress' plenary bankruptcy and commerce powers, The End the Greed Act is supported by the Congress' spending power. The conditions imposed by the bill satisfy the requirements for spending measures that the Supreme Court has set forth over the years: They are germane to the purposes of the expenditures; the conditions imposed by the bill are clear and unambiguous; recipient entities have no fundamental right to contract and thus are not giving up a fundamental right in exchange for compliance with the conditions attaching to the funds that they are receiving; and the recipient of the funds are not being forced or coerced to take money from the federal government. Moreover, the courts have been extraordinarily deferential to the Congress in their assessment of the constitutionality of the requirements imposed by the Congress' spending measures: In fact, the Supreme Court has not struck down a spending clause enactment since 1936. I am confident that this spending measure will fare no differently than any of the other spending measures subjected to judicial review since 1936.

I am also confident that The End the GREED bill is not vulnerable to a Takings Clause challenge. First, as I have indicated, the Supreme Court has recognized that the bankruptcy power may be used to impair private contracts. Second, the Supreme Court has usually upheld federal regulations of private contracts that have been challenged under the Taking Clause. See David H. Carpenter, CRS Report for Congress, Constitutional Issues Relating to Proposals to Impose Interest Rate Freezing/Reduction on Existing Mortgages, February 15, 2008, at 4. There is no good reason to think any court would treat The End the GREED Act any differently. Indeed, The End the GREED Act does not run afoul of the Supreme Court's balancing test set forth in Penn Central v. City of New York, 438 U.S. 104 (1978), for determining when regulations effect a taking for purposes of the Takings Clause. In this case, the conduct that is the subject of the regulation is not only arising in an area that is traditionally ''heavily regulated'' but also the federal government is obviously not operating in bad faith or its regulation is not designed to benefit only a very few people as opposed to the general public.

I hope this analysis will be of some help to you and the Committee. It is a great privilege to share it with you. If you have any questions or if I can be of further service to you or the Committee, I hope you will not hesitate to let me know.

Very truly yours,

MICHAEL J. GERHARDT,
Samuel Ashe Distinguished Professor of Constitutional Law & Director of the UNC Center on Law and Government, UNC at Chapel Hill Law School.

Ms. JACKSON-LEE of Texas. The reason we wanted to be extraordinarily thoughtful is that we knew these questions would be asked, but let me tell you the simplicity of what this legislation speaks to: At the same time, let me go on record, Congresswoman JACKSON-LEE from Houston, Texas:

I am in support of the Nation's financial markets, investment houses. They have been at our back for a number of years. They have invested your moneys, your 401(k)s. Capitalism has, in fact, worked, but abuse does not work, so we speak today about abuse, not about crumbling the financial houses, the investment houses. We want them to be strengthened. Young people every day are graduating from college and are saying, ''I want to be an investment banker.'' They want to help grow the economy. We are not unsupportive of that.

In fact, in my own congressional district, it used to be American General. I have AIG employees. I applaud them. They come up to me on the street. I want them to know I appreciate their work in the insurance business—in protecting and in insuring everything from whistles, to haystacks, to Hollywood actors, to the transportation modes that you travel on—but we have got to be able to protect your tax dollars.

Let me tell you why this bill works. Attorney General Cuomo made it work. He issued subpoenas. What do we get? Some $50 billion back—and more growing—from AIG. It shows that the long hand of the law can be effective. The $160 billion given to executives is more than most Americans will see ever in their lifetimes. This is a simple response to it. What it does is it allows the Attorney General to recover prior excessive payments to employees made by the company. It allows the government, as a creditor, to show that the excessive payments that were made have no bearing on the work. It is permissive. It allows. It does not suggest that, in fact, there is a coup d'etat, that the Attorney General can do it without any oversight.

□ 1315

They must go into court. That makes a difference. The judge must ultimately say, You know what? I agree with the petitioner/the attorney general/the government as creditor or I disagree.

Second, it allows the Attorney General to limit payments to company executives to 10 times the average non-payment wages just as it would have been if the case was forced into bankruptcy. This is a fair assessment if a company has taken Federal dollars, and $700 billion given to these companies in October of 2008. Most of them bought up your baby banks, not put that money out to help Americans.

So Mr. Speaker, I think what is key here is that this is reasonable. We have constitutional scholars who have indicated that you are within the constitutional framework. Why would the Judiciary Committee want to eliminate those barriers.

And then secondly and thirdly, we thank the employees that are doing their job every day trying to make this economy work. But what we say to the taxpayers is, if there is ever a committee that has to play the enforcement role to enhance the Constitution, to gather in those who have gone outside the boundaries of reason, who are abusive in issuing moneys to people who are part of the problem, it is the Judiciary Committee, and the Attorney General that complements the work of the Secretary of the Treasury, and our very able leader in the White House, who is constructively trying to put this capitalistic system back on its feet. Then it has to be those of us with the responsibility of enforcement to ensure that we provide the coverage for taxpayers who cannot speak for themselves.

I rise enthusiastically to support H.R. 1575 for the very reason that we will be derelict if this committee, the holders of the Constitution, did not come to the floor and provide this thoughtful legislation that provides you with the protection of evidence that you have already seen in the moneys that have been returned under the New York State Attorney General. Imagine the wielding of that action on behalf of all of the people of the United States.

Support H.R. 1575.

Mr. Speaker, I rise in strong support of H.R. 1575, the "End Government Reimbursement of Excessive Disbursements (End Greed) Act." I want to thank my colleague Congressman JOHN CONYERS, Jr. of Michigan for introducing this important legislation, and I urge my colleagues to support this bill.

BACKGROUND

Mr. Speaker, since August 2008, the federal government has invested hundreds of billions of dollars in private financial institutions. The credit crisis deepened in September when the federal government put Fannie Mae and Freddie Mac into conservatorship after it became clear that the financial situations of two of the nation's largest mortgage purchasers were rapidly deteriorating.

On September 14, 2008, the impact of the crisis widened as global financial services company Merrill Lynch agreed to sell itself to Bank of America, investment bank Lehman Brothers filed for bankruptcy and international insurer and financial services company American Insurance Group ("AIG") asked the federal government for a $40 billion bridge loan.

On September 23, 2008, then-Treasury Secretary Paulson and Federal Reserve Chairman Ben Bernanke appeared before Congress asking for a $700 million rescue plan to buy and resell mortgage backed securities citing fears of a recession if the government did not act.

On October 3, 2008, Congress authorized $700 billion for the Treasury to buy troubled assets to prevent disruption in the economy. One week after the $700 billion was authorized, the Bush Administration decided that it would use a portion of the $700 billion to recapitalize some of the nation's leading banks by buying their shares. The idea was to help healthy banks continue to provide loans to businesses and consumers. This did not happen. Instead, banks began to acquire smaller banks that were not given access to the $700 billion.

Funds were used to pay employee bonuses. The payment of employee bonuses and the use of TARP funds to do so, was expressly prohibited by the TARP bill. Despite this prohibition, the nation's largest banking and financial institutions continued to pay employee bonuses using the TARP funds. This bill puts the teeth in the original TARP bill and provides a mechanism for these financial institutions to return the funds they wrongly used.

Our constituents are worried about the Golden Parachutes that they see given to big business while they struggle to pay mortgages, keep the electricity on, and send their children to college. The saving of corporate executives while unemployment rates continue to go up, has driven many Americans to wonder what has happened to corporate responsibility and accountability.

Mr. Speaker, H.R. 1575, the "End Government Reimbursement of Excessive Executive Disbursements (End GREED) Act," applies to companies that have received more than $10 billion in federal financial assistance since September 1, 2008. The bill ends the unjust enrichment of the corporate executives who wrongly benefitted from their companies' receipt and misuse of TARP funds. As discussed further below, the bill has two key components.

First, it creates a federal fraudulent transfer statute that will allow the Attorney General to recover prior excessive payments to employees made by the company. This allows the government, as a creditor, to show that excessive payments were made bearing no relationship to fair value and to recover those payments for the company.

Second, on an ongoing forward basis, it allows the Attorney General to limit payments to company executives to ten times the average non-management wages, just as would have been the case if the company had been forced into bankruptcy. In addition, the bill authorizes the Attorney General to issue a subpoena to obtain pertinent information from these companies about employee bonus and compensation payments.

I urge my colleagues to support this bill. It is the right thing to do and prevents unjust enrichment by the bank and financial institution executives. The TARP funds were originally intended to be used by the banks to continue to provide services to the public. The TARP funds were not supposed to be used for the executives and bankers to get engorged and rich.

Mr. SMITH of Texas. Mr. Speaker, I will be the remaining speaker on this side.

I will reserve the balance on my side.

Mr. CONYERS. Mr. Speaker, I have no further speakers.

I reserve the balance of my time.

Mr. SMITH of Texas. Mr. Speaker, I yield myself the balance of my time.

Mr. Speaker, I would like to close by reiterating that this bill is misguided and should be opposed for many reasons.

The AIG bonuses were unwise, but what was fraudulent about them? How can bonuses Congress and the President specifically ratify through the stimulus bill be fraudulent? Bonus retribution rests on anger, not sound policy. It will undermine the Federal Government's ability to recruit bank rescue participants.

President Obama has urged us not to act out of anger, and Secretary Geithner has finally just announced a toxic assets relief program relying heavily on private participation. The markets responded to Secretary Geithner by rallying strongly. Why would we scare the private institutions away now?

State fraudulent conveyance law is already working. New York Attorney General Andrew Cuomo has used New York State law tools to force at least 15 of the top AIG bonus recipients to return their bonuses. He has recouped at least $50 million. He expects to recoup all bonuses paid to U.S. recipients, and he and other State authorities may recoup bonuses that went overseas.

H.R. 1575 puts executive compensation decisions into a multitude of district judges' different hands. H.R. 1575 cannot constrain executive compensation. It just leaves it to over 1,000 district judges to arbitrarily determine whether compensation exceeds a reasonably equivalent value for services.

The House just passed H.R. 1586. We don't need to take a follow-up action.

Just 2 weeks ago, the House passed H.R. 1586 to go after the AIG bonuses under the Tax Code. H.R. 1575 is redundant and poses some of the same risk. So why does that make sense?

H.R. 1575 is not only unwise, it is unnecessary. It is not only unnecessary, it is the product of a ransacking of regular order. And not only that, it will hamper our economic recovery.

Mr. Speaker, I just want to say to my colleagues that Republican leader JOHN BOEHNER, Whip ERIC CANTOR, and Conference Chairman MIKE PENCE are all going to vote ''no'' on this legislation.

I strongly urge a bipartisan ''no'' vote on H.R. 1575.

I yield back the balance of my time.

Mr. CONYERS. Mr. Speaker, I close regretfully lamenting the comments of my good friend, LAMAR SMITH, the ranking member on this committee, because he may not have sensed the outrage of the American people in terms of the fact that these outrageous bonuses were being arrogantly issued out with government funds that were by the billions, that were going to corporations to supposedly save them from bankruptcy. And so for him to ignore the fact that at least 47 States already have these laws, to think that there would be a constitutional problem with the government in this very limited case directing the courts to, on a case-by-case basis, review their appropriateness is rather astounding.

So I would like to personally make myself available, particularly to new Members of this great body of the 111th Congress, to please consult with me before you do anything that will prevent us from having a long friendship and get to know each other a lot better in the Congress.

Mr. CONYERS. Mr. Speaker, I submit the other two law professor letters for the RECORD.

MARCH 24, 2009.

Hon. JOHN CONYERS, Jr.,
Hon. LAMAR SMITH,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CONGRESSMAN CONYERS AND CONGRESSMAN SMITH: I am writing to express my opinion that the fraudulent transfer provisions of H.R. 1575 pass constitutional muster. I am writing in my capacity as an expert on fraudulent transfer law, not on behalf of any group or individual.

I am the Harry A. Bigelow Distinguished Service Professor at the University of Chicago. I joined Chicago's faculty in 1980, was Director of its law and economics program from 1992 to 1994, and served as its Dean from 1994 to 1999. I have been a visiting professor at Stanford, Harvard, and Yale. Currently a Director of the American College of Bankruptcy, I was Vice Chair of the National Bankruptcy Conference from 1997 until 2004. My publications include a number of articles on fraudulent transfer law.

I begin by emphasizing that the fraudulent transfer provision of H.R. 1575 has modest scope. It creates a new federal procedure, but the substantive right in question has existed under state law for a long time. In every jurisdiction, creditors (including the United States) have the ability to avoid transfers made by an insolvent or financially troubled debtor for less than reasonably equivalent value. Indeed, more than half the states have enacted the Uniform Fraudulent Transfer Act (''UFTA''), which uses nearly identical statutory language.

Apart from the UFTA being a state-based procedure and generally broader in scope, the only substantive difference between the UFTA and H.R. 1575 is on the narrow question of the time at which insolvency or unreasonably small capital is judged. Under H.R. 1575, it is at the time of the payment, while under the UFTA. It is the time that the contract is entered into. Such a difference, however, should not be of great moment. Congress has enacted fraudulent transfer rules before (typically in bankruptcy legislation) and has departed more substantially from the nonbankruptcy rule. For example, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 enacted a fraudulent transfer provision that allows recovery against insider employees who receive more than reasonably equivalent value and it contains no insolvency requirement or unreasonably small capital requirement at all.

Because H.R. 1575 largely replicates rights that the United States already possesses under state law, there seems little doubt that Congress has the power to enact it. While the statute does reach, among other things, transfers that have already taken place, this has been the case with previous fraudulent conveyance statutes enacted by Congress, most recently in 2005. I am not aware that anyone has ever suggested that these were constitutionally suspect.

H.R. 1575 is not an ex post facto law, as it involves only civil liability. See Calder v. Bull, 3 U.S. 386 (1798). Nor is it a bill of attainder as it applies generally to entities that have received a particular type of federal funding. The only remotely colorable constitutional argument against H.R. 1575 is that it violates the due process rights of the transferees because of the statute's retroactive effect. This should not, however, create a constitutional problem, as long as Congress's intent to apply it retroactively is expressed clearly.

In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), the Supreme Court noted that it ''is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.''

On the rare occasions in which it has struck down legislation that has had a retroactive effect, the Court has emphasized that, to constitute a due process violation, it must cross a significant threshold, such as, in one case, prospective liability on account of conduct that a company had ceased many decades before. While ''legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience,'' as a general matter ''Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties.'' Eastern Enterprises v. Apfel, 524 U.S. 498, 529–30 (1998).

Legislation, such as H.R. 1575, that largely tracks existing state law cannot take private parties by surprise. In this case, the basic principle—that financially troubled debtors cannot give their assets away—has been part of Anglo-American law for centuries. See Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (1601).

If you or your staff have any questions or would like further information, I would be happy to be of assistance.

Sincerely,

DOUGLAS G. BAIRD.

UNIVERSITY OF CALIFORNIA,
Los Angeles, CA, March 24, 2009.

Re H.R. 1575, 111th Congress, 1st Session.

Hon. JOHN CONYERS, Jr.,
Chairman, House Committee on the Judiciary, Washington, DC.
Hon. LAMAR SMITH,
Ranking Member, House Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN CONYERS AND RANKING MEMBER SMITH: Chairman Conyers has asked me to analyze whether the fraudulent transfer provisions in the Manager's amendment to H.R. 1575 violate the United States Constitution. For the reasons set forth below, it is my view as a professor of law that the fraudulent transfer provisions of the Manager's amendment to H.R. 1575 are constitutional on their face and as applied to avoid payments of excessive compensation made under contracts entered into before the date of enactment.

The Manager's amendment to H.R. 1575, prepared for floor consideration in the House of Representatives, seeks to authorize the Attorney General to file a civil action to avoid, as fraudulent transfers, certain payments of excessive compensation made by entities who received more than $5 billion in federal government funds on or after September 1, 2008. It does so by vesting the Attorney General with two kinds of fraudulent transfer avoiding powers.

First, section 2(1)–(2) gives the Attorney General the power to avoid constructive fraudulent transfers made for less than a reasonably equivalent value if the company making the payments either was insolvent or possessed an unreasonably small capital on the date of the payments. Both insolvency and unreasonably small capital are determined without consideration of the federal government funds or lines of credit. Second, the legislation authorizes the Attorney General to stand in the shoes of an actual unsecured creditor of the payor who could avoid the payments under other applicable law to avoid excessive compensation payments to the same extent.

Having extensive familiarity with the interface of bankruptcy, insolvency, and constitutional law, it is my view as a scholar that the fraudulent transfer provisions of the Manager's amendment to H.R. 1575 are constitutional on their face and as applied to avoid payments of excessive compensation made under contracts entered into before the date of enactment. The Commerce Clause, Bankruptcy Clause, and Necessary and Proper Clause provide ample congressional power to enact this legislation. See U.S. Const., art. I, §8, cls. 3, 4 & 18.

Even though the United States did not put recipients of federal government funds into bankruptcy, conservatorship, or receivership as a condition of receiving those funds, H.R. 1575 could be supported under the Bankruptcy Clause. In Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982), the Court stated, ''although we have noted that '[t]he subject of bankruptcies is incapable of final definition,' we have previously defined 'bankruptcy' as the 'subject of relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' * * * Congress' power under the Bankruptcy Clause 'contemplate[s] an adjustment of a failing debtor's obligations.' '' (citations omitted) As the Court noted in Continental Illinois

National Bank & Trust Co. of Chicago v. Chicago, Rock Island & Pacific Railway Co., 294 U.S. 648, 667–68 (1935), the Bankruptcy Clause applies to regulate insolvent companies as well as those that are bankrupt: ''While attempts have been made to formulate a distinction between bankruptcy and insolvency, it has long been settled that, within the meaning of the [Bankruptcy Clause], the terms are convertible.''

Moreover, under the Commerce Clause, H.R. 1575 is valid regulatory legislation applicable to companies that do business in interstate commerce.

Furthermore, the legislation properly invokes fraudulent transfer law remedies that have been part of Anglo-American bankruptcy and insolvency laws since enactment of the Statute of 13 Elizabeth in England in 1571. These laws, in their modern form, are part of the statutory or common law of every state as well as the federal bankruptcy code. They permit the avoidance of actual intent or constructive fraudulent transfers. In pertinent part, constructive fraudulent transfer laws operate to permit the avoidance of transfers made for less than a fair consideration or reasonably equivalent value while the transferor is insolvent (in either the balance sheet or equity sense) or left with an unreasonably small capital.

Many of the companies that received federal government funds were undoubtedly insolvent in the balance sheet or equity sense or left with an unreasonably small capital before the receipt of the funds. Had the United States not intervened to advance the federal government funds, the excessive compensation payments would have been avoidable in a bankruptcy or receivership, or, alternatively, under applicable fraudulent transfer laws to the extent they were not given in exchange for reasonably equivalent value or fair consideration. Indeed the contracts under which these payments were made themselves might have been avoidable as fraudulently incurred obligations under these laws, at least to the extent they authorize payments in excess of the fair value of services rendered.

When a business is insolvent, unable to pay its debts as they mature, or left with an unreasonably small capital, the assets of that business can be considered to be equitably owned by its creditors. The fraudulent transfer laws prevent a business from giving away assets that it does not equitably own. Therefore there is a strong historical legal underpinning for application of fraudulent transfer principles in the Manager's amendment to H.R. 1575.

Had the United States not made available the federal government payments, these excessive payments would have been avoidable in many different scenarios. It undoubtedly was never the intention of the United States to make federal government funds available to enable a recipient entity to facilitate fraudulent transfers. Accordingly there is a rational basis making it appropriate for Congress to enact regulatory legislation to prevent that result and for a court to enforce H.R. 1575 to avoid the excessive payments. Indeed, in addition to statutory remedies, a court of equity might exercise equitable powers of reformation or recharacterization to facilitate this result.

Nevertheless, entities resisting disgorgement of the transfers might seek to challenge the constitutionality on several grounds. Recipients of excessive payments might allege that the legislation violates their contract rights. The response is that congressional impairment of contract rights is not unconstitutional. First, although the Manager's amendment to H.R. 1575 permits the court to interfere with contractual obligations, it is clear that the Contracts Clause of the Constitution only limits impairment of obligations of contracts by the states and does not limit federal power to impair contractual obligations. See U.S. Const., art. I, §10.

Second, because the avoidance only takes place in a federal court judicial proceeding based on adequate notice and an opportunity to be heard, there is no denial of due process in violation of the Fifth Amendment. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 307 (1950) (considering due process under the Fourteenth Amendment; the analysis would be similar under the Fifth Amendment).

Third, under H.R. 1575, there is no taking of private property for public use without just compensation in violation of the Fifth Amendment. Courts have held that the Bankruptcy Code's authorization of lien avoidance does not implicate a taking under the Fifth Amendment. See, e.g., Travelers Ins. Co. v. Bullington, 878 F.2d 354, 359 n.6 (11th Cir. 1989); Yi v. Citibank (Md.) N.A. (In re Yi), 219 B.R. 394, 401 (E.D. Va. 1998). Here, recipients of the excess payments do not enjoy liens in property, but simply contract rights under contracts that are also avoidable. The Court has upheld the power of Congress to limit contractual compensation rights without causing violation of the Fifth Amendment. See Reconstruction Fin. Corp. v. Bankers Trust Co., 318 U.S. 163, 168–70 (1943) (77 railroad reorganization case in which claims for compensation for services, attorneys fees, and expenses of indenture trustee of secured mortgage bonds was referred to interstate commerce commission for determination). By limiting avoidance of compensation claims only to the extent they exceed reasonably equivalent value, H.R. 1575 places a ''reasonable limitation'' on the permissible amount of compensation disbursements. Under the Supreme Court's reasoning in Kuehner v. Irving Trust Co., 299 U.S. 445, 452, 455 (1937) the placement of such a reasonable limitation does not violate the Fifth Amendment, even though it results in the destruction of a creditor's contractual remedies.

Thus, constitutional challenges to H.R. 1575 should fail. And even if they succeed, at best the recipient would have a claim against the United States under the Tucker Act for any excessive payments disgorged.

In order to let you put this analysis in context, let me share with you my qualifications to make this analysis. After graduating from Harvard Law School cum laude in 1974, I served as Associate Counsel to the House Committee on the Judiciary, working primarily with Republican members from 1974–1977 on bankruptcy law reform, among other issues. As a staff member, I was one of the principal drafters of the 1978 Bankruptcy Code. Since then, I have devoted my entire career to the pursuit of bankruptcy law and scholarship. After leaving the Hill I commenced working as a bankruptcy lawyer and also served as a consultant on bankruptcy matters to the House Judiciary Committee until 1982, well past enactment of the 1978 Bankruptcy Code. I also served as a consultant to the Department of Justice on bankruptcy matters during 1983–1984.

I commenced teaching bankruptcy law in 1979 as an adjunct professor at the UCLA School of Law and became a full time professor there in 1997, after teaching at Harvard Law School in 1995–1996 as the Robert Braucher visiting professor from practice.

My interest in bankruptcy legislation has continued over the years. I served on the legislation committee of the National Bankruptcy Conference for several years, acting as its Chair from 1992–1999. Chief Justice Rehnquist appointed me to serve on the Judicial Conference's Advisory Committee on Bankruptcy Rules from 1992–2000.

During my career, I have paid particular attention to the interface between bankruptcy law and the United States Constitution. While serving as a congressional staff member, I co-authored a House Judiciary Committee Report in 1977 correctly predicting that it would be unconstitutional to give a grant of broad pervasive jurisdiction to non-tenured bankruptcy judges. See H.R. Rep. No. 95–595, 95th Cong., 1st Sess. 23–39 (1977). The United States Supreme Court validated this position in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

I have served as amicus curiae to the courts on the intersection of bankruptcy and constitutional law, most recently in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) where the Court adopted the amici suggestion of an in rem exception to a state's assertion of sovereign immunity in bankruptcy cases. Within the past few months, I have authored a book ''Bankruptcy and the Supreme Court,'' which devoted an entire chapter to bankruptcy and constitutional law.

Please let me know if you have additional questions with respect to this important legislation. I appreciate the opportunity to be of service.

Sincerely yours,

KENNETH N. KLEE.

Ms. WATERS. Mr. Speaker, I rise in strong support of the End GREED Act, H.R. 1575. We worked on this bill in the Judiciary Committee, and with bipartisan support, I believe that we made significant improvements over the original bill.

This narrowly crafted measure gives the Attorney General the ability to recover the most egregious bonuses by entities that receive or have received more than $5 billion in direct capital investment by the U.S. under TARP or HERA by filing a civil action in federal court. Every state in the U.S. has some form of similar fraudulent transfer statute, including my home state of California.

The Attorney General could only do so where the entity was insolvent and paid excessive compensation to an officer, director, or employee who provided less than reasonably equivalent value in exchange. This applies to bonuses paid after September 1, 2008.

This legislation takes another critical step in executive compensation by reaching bonuses made at the end of 2008. For example, more than $3 billion in bonuses were paid by Merrill Lynch late last year.

This bill also provides a mechanism for recovering bonuses paid to non-citizens who would be unaffected by the tax provision Congress recently passed. New York Attorney General Cuomo reported that only 47 percent of AIG bonuses were paid to U.S. citizens. Therefore, this bill authorizes the Attorney General, after consultation with the Treasury Secretary, to subpoena witnesses and to obtain necessary information relevant to the bonuses.

Finally, Mr. Speaker, I know some of the critics of this legislation have raised questions about the constitutionality of this bill. Please let me add to the RECORD the comments of several prominent constitutional scholars who have confirmed that the bill is constitutional. Here's what some of the constitutional scholars have said about this bill:

Prof. Laurence Tribe (Harvard)—''Having carefully reviewed the text of the bill, I believe it stands on solid constitutional ground.''

Prof. Doug Baird (Univ. of Chicago)—''Because H.R. 1575 largely replicates rights that the United States already possesses under state laws, there seems to be little doubt that Congress has the power to enact it.''

Prof. Michael Gearhardt (UNC)—''I believe that The End GREED Act is unquestionably constitutional. Each of the powers deployed to enact this bill is plenary, and these powers—individually and collectively provide an unusually strong, unassailable constitutional foundation for The End GREED Act.''

Prof. Ken Klee (UCLA)—''It is my view as a professor of law that the fraudulent transfer provisions of the Manager's amendment to H.R. 1575 are constitutional on their face and as applied to avoid payments of excessive compensation made under contracts entered into before the date of enactment.''

Mr. Speaker, I urge my colleagues to support H.R. 1575, the End GREED Act.

Mr. CONYERS. I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Michigan (Mr. CONYERS) that the House suspend the rules and pass the bill, H.R. 1575, as amended.

The question was taken.

The SPEAKER pro tempore. In the opinion of the Chair, two-thirds being in the affirmative, the ayes have it.

Mr. SMITH of Texas. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX and the Chair's prior announcement, further proceedings on this motion will be postponed.

RAISING A QUESTION OF THE PRIVILEGES OF THE HOUSE

Mr. FLAKE. Mr. Speaker, I rise to a question of the privileges of the House and offer the resolution previously noticed.

The SPEAKER pro tempore. The Clerk will report the resolution.

The Clerk read as follows:

H. RES. 312

Whereas, The Hill reported that a prominent lobbying firm, founded by Mr. Paul Magliocchetti and the subject of a ''federal investigation into potentially corrupt political contributions,'' has given $3.4 million in political donations to no less than 284 members of Congress.

Whereas, the New York Times noted that Mr. Magliocchetti ''set up shop at the busy intersection between political fund-raising and taxpayer spending, directing tens of millions of dollars in contributions to lawmakers while steering hundreds of millions of dollars in earmark contracts back to his clients.''

Whereas, a guest columnist recently highlighted in Roll Call that ''. . . what [the firm's] example reveals most clearly is the potentially corrupting link between campaign contributions and earmarks. Even the most ardent earmarkers should want to avoid the appearance of such a pay-to-play system.''

Whereas, multiple press reports have noted questions related to campaign contributions made by or on behalf of the firm; including questions related to ''straw man'' contributions, the reimbursement of employees for political giving, pressure on clients to give, a suspicious pattern of giving, and the timing of donations relative to legislative activity.

Whereas, Roll Call has taken note of the timing of contributions from employees of the firm and its clients when it reported that they ''have provided thousands of dollars worth of campaign contributions to key Members in close proximity to legislative activity, such as the deadline for earmark request letters or passage of a spending bill.''

Whereas, the Associated Press highlighted the ''huge amounts of political donations'' from the firm and its clients to select members and noted that ''those political donations have followed a distinct pattern: The giving is especially heavy in March, which is prime time for submitting written earmark requests.''

Whereas, clients of the firm received at least $300 million worth of earmarks in fiscal year 2009 appropriations legislation, including several that were approved even after news of the FBI raid of the firm's offices and Justice Department investigation into the firm was well known.

Whereas, the Associated Press reported that ''the FBI says the investigation is continuing, highlighting the close ties between special-interest spending provisions known as earmarks and the raising of campaign cash.''

Whereas, the persistent media attention focused on questions about the nature and timing of campaign contributions related to the firm, as well as reports of the Justice Department conducting research on earmarks and campaign contributions, raise concern about the integrity of Congressional proceedings and the dignity of the institution.

Now, therefore, be it: *Resolved*, that (a) the Committee on Standards of Official Conduct, or a subcommittee of the committee designated by the committee and its members appointed by the chairman and ranking member, shall immediately begin an investigation into the relationship between the source and timing of past campaign contributions to Members of the House related to the raided firm and earmark requests made by Members of the House on behalf of clients of the raided firm.

(b) The Committee on Standards of Official Conduct shall submit a report of its findings to the House of Representatives within 2 months after the date of adoption of the resolution.

The SPEAKER pro tempore. The resolution qualifies.

MOTION TO TABLE

Mr. HALL of New York. Mr. Speaker, I move to lay the resolution on the table.

The SPEAKER pro tempore. The question is on the motion to table.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

Mr. FLAKE. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER pro tempore. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

Pursuant to clause 8 of rule XX, this 15-minute vote on tabling House Resolution 312 will be followed by 5-minute votes on adopting House Resolution 305 and House Resolution 306; and suspending the rules with regard to H.R. 1575 and House Resolution 290.

The vote was taken by electronic device, and there were—yeas 217, nays 185, answered ''present'' 16, not voting 13, as follows:

[Roll No. 175]

YEAS—217

Abercrombie
Ackerman
Adler (NJ)
Altmire
Andrews
Arcuri
Baca
Baird
Baldwin
Barrow
Berkley
Berman
Berry
Bishop (GA)
Bishop (NY)
Blumenauer
Boren
Boswell
Boucher
Boyd
Brady (PA)
Braley (IA)
Brown, Corrine
Capps
Capuano
Cardoza
Carnahan
Carney
Carson (IN)
Clarke
Clay
Cleaver
Clyburn
Coble
Cohen
Connolly (VA)
Conyers
Cooper
Costa
Costello
Courtney
Crowley
Cuellar
Cummings
Dahlkemper
Davis (AL)
Davis (CA)
Davis (IL)
Davis (TN)
DeFazio
DeGette
Delahunt
DeLauro
Dicks
Dingell
Doggett
Doyle
Driehaus
Edwards (MD)
Edwards (TX)
Ellison
Engel
Eshoo
Etheridge
Farr
Fattah
Filner
Frank (MA)
Fudge
Gonzalez
Gordon (TN)
Grayson
Green, Al
Green, Gene
Griffith
Grijalva
Gutierrez
Hall (NY)
Hare
Harman
Hastings (FL)
Heinrich
Higgins
Hinchey
Hinojosa
Hirono
Holden
Holt
Honda
Hoyer
Inslee
Israel
Jackson (IL)
Jackson-Lee (TX)
Johnson (GA)
Johnson, E. B.
Jones
Kagen
Kanjorski
Kennedy
Kildee
Kilpatrick (MI)
Kilroy
Kissell
Klein (FL)
Kratovil
Kucinich
Langevin
Larsen (WA)
Lee (CA)
Lewis (GA)
Lipinski
Lowey
Luján
Lynch
Maffei
Maloney
Markey (CO)
Markey (MA)
Marshall
Massa
Matsui
McCarthy (NY)
McCollum
McDermott
McGovern
McMahon
Meek (FL)
Meeks (NY)
Melancon
Michaud
Miller (NC)
Miller, George
Mollohan
Moore (KS)
Moore (WI)
Moran (VA)
Murphy (CT)
Murphy, Patrick
Murphy, Tim
Murtha
Nadler (NY)
Napolitano
Neal (MA)
Nye
Oberstar
Obey
Olver
Ortiz
Pastor (AZ)
Payne
Perlmutter
Peters
Peterson
Pingree (ME)
Polis (CO)
Pomeroy
Price (NC)
Rahall
Rangel
Reyes
Richardson
Rodriguez
Rohrabacher
Ross
Rothman (NJ)
Roybal-Allard
Ruppersberger
Rush
Ryan (OH)
Salazar
Sánchez, Linda T.
Sarbanes
Schakowsky
Schiff
Schrader
Schwartz
Scott (GA)
Scott (VA)
Serrano
Sestak
Shea-Porter
Sherman
Shuler
Sires
Skelton
Slaughter
Snyder
Space
Speier
Spratt
Stark
Stupak
Sutton
Tanner
Tauscher
Taylor
Thompson (CA)
Tierney
Titus
Tonko
Towns
Tsongas
Van Hollen
Velázquez
Wasserman Schultz
Waters
Watson
Watt
Waxman
Weiner
Wexler
Wilson (OH)
Woolsey
Wu
Yarmuth
Young (AK)

NAYS—185

Aderholt
Akin
Alexander
Austria
Bachmann
Bachus
Bartlett
Bean
Biggert
Bilbray
Bilirakis
Bishop (UT)
Blackburn
Blunt
Boccieri
Boehner
Bono Mack
Boozman
Boustany
Brady (TX)
Bright
Broun (GA)
Brown (SC)
Brown-Waite, Ginny
Buchanan
Burgess
Burton (IN)
Buyer
Calvert
Camp
Campbell
Cantor
Cao
Capito
Carter
Cassidy
Castle
Chaffetz
Childers
Coffman (CO)
Cole
Crenshaw
Culberson
Davis (KY)
Deal (GA)
Diaz-Balart, M.
Donnelly (IN)
Dreier
Duncan
Ehlers
Ellsworth
Emerson
Fallin
Flake
Fleming
Forbes
Fortenberry
Foster
Foxx