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Legal Sidebar

# *Huawei v. United States*: The Bill of Attainder Clause and Huawei's Lawsuit Against the United States

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On March 6, 2019, Chinese electronics manufacturing and telecommunications giant Huawei Technologies Co. (Huawei) filed a lawsuit against the United States, challenging the constitutionality of a law that restricts federal agencies from doing business with the company. The law in question identifies Huawei and Chinese telecommunications company ZTE by name, prohibiting executive agencies from using Huawei's (or ZTE's) products and from contracting with entities that use such products. Although Huawei's complaint against the United States makes several arguments, they primarily argue that the law's restrictions amount to an unconstitutional "bill of attainder."

Article I, Section 9, Clause 3 of the Constitution (the Bill of Attainder Clause) states: "No Bill of Attainder or ex post facto Law shall be passed." According to the Supreme Court, a bill of attainder is "a legislative act which inflicts punishment without a judicial trial." But the Bill of Attainder Clause does not mean that Congress is forbidden from passing a law that singles out a particular individual, firm, or group for special treatment. Huawei is hardly the first company to be identified in a law by name for unfavorable treatment. As the Supreme Court explained in the 1977 case *Nixon v. Administrator of General Services*, "the Bill of Attainder Clause serves as an important bulwark against tyranny, [but] it does not do so by limiting Congress to the choice of legislating for the universe, legislating only benefits, or not legislating at all." Indeed, it is rare for courts to determine that even specifically targeted burdens in a law impose an unconstitutional bill of attainder. Accordingly, the Huawei lawsuit illustrates the legal issues that the courts may face in evaluating when particular legislation might present a bill of attainder.

This Sidebar first reviews the historical basis for the prohibition on bills of attainder, and the Supreme Court's treatment of this prohibition. Next, this Sidebar considers a few recent cases from the lower courts involving statutes similar to the one challenged by Huawei, discussing how those courts handled those challenges. Finally, this Sidebar reviews the particulars of Huawei's complaint. As is explained in more detail below, the key question in the Huawei litigation is whether the congressional enactment at issue was intended to "punish" Huawei. The case law on that issue presents a difficult burden for Huawei, which must generally show that the law lacked a legitimate nonpunitive purpose.

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**Historical Background and Supreme Court Precedent.** Parliamentary acts sentencing individuals or groups of individuals to death were common in sixteenth, seventeenth, and eighteenth century England. Known as "bills of attainder," death and lesser punishments (sometimes known as "bills of pains and penalties") were also used during the American Revolution by the legislatures of the Thirteen Colonies to punish individuals who remained loyal to England. In light of this history and the fear that a politically motivated legislature could impose criminal sanctions on an individual without procedural safeguards according through the judicial process, at the Constitutional Convention, the framers unanimously elected to ban the practice at the federal and state level in Article I of the Constitution.

The Constitution does not define "bill of attainder," but in the earliest cases addressing the Bill of Attainder Clause, the Supreme Court extended it well beyond legislative death penalty. For example, in the post-civil war case *Cummings v. Missouri*, the Court addressed a challenge to a Missouri law that required individuals wishing to hold any public or private office to take an oath essentially stating that they had never given any support or sympathy to the Confederacy during the Civil War. The Court concluded that this law amounted to a bill of attainder. First, the Court observed that the oath had nothing to do with establishing qualifications for the covered offices—rather, the purpose of the oath was to identify persons who had supported the rebellion. The Court then concluded that the Bill of Attainder Clause extended beyond the death penalty to other "punishments," including "[d]isqualification from the pursuits of a lawful avocation." Because the Missouri law both targeted individuals and sought to "punish" them, it was found to be unconstitutional.

The Court again considered the Bill of Attainder Clause in *United States v. Lovett*, decided in 1946. That case arose out of efforts in the late 1930s and early 1940s to investigate federal employees thought to be "subversive" and suspected of advocating the "overthrow of our constitutional form of Government." These efforts led to investigations by the Appropriations Committee of the House and ultimately to three specific persons being named in an Appropriations Act, stating that "no salary or compensation" should be paid to the three. The Supreme Court held that this provision was an unconstitutional bill of attainder. Like the law in *Cummings*, the Appropriations Act "was designed to apply to particular individuals" and to punish them without a judicial trial. The Court would later apply the principles from *Cummings* and *Lovett* to strike down a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union.

Although these cases all concluded that Congress had inflicted "punishment" under the Bill of Attainder Clause, none attempted to craft a general theory to distinguish between forms of permissible regulation and unlawful punishment. The Court finally took a step in this direction in the 1977 case *Nixon v. Administrator of General Services*. In that case, Congress had passed a law that required the Administrator of General Services to take possession of tape recordings and documents involving the Nixon Administration and to promulgate regulations governing public access to the materials. Former President Nixon challenged this law as unconstitutional on multiple grounds, including under the Bill of Attainder Clause. President Nixon argued that the law was a bill of attainder because it singled him out by name and deprived him of his property based on his supposed misconduct. In an opinion by Justice Brennan, the Court reviewed the history of bills of attainder and concluded that a bill of attainder must have three elements: (1) the law must specifically target individuals or groups, (2) it must inflict punishment, and (3) it must lack a provision for judicial trial. In the case of President Nixon, the Court held that these elements were not met.

Most importantly, *Nixon* set forth three potential avenues for determining whether a law inflicts punishment within the meaning of the Clause. First, the Court looked to history—deprivations "traditionally judged to be prohibited by the Bill of Attainder Clause," such as death, banishment, punitive confiscation of property, and the employment bar at issue in *Cummings*. Second, the Court proposed a functional test—whether the law, "in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." Finally, *Nixon* considered evidence of

Congress' motivations—whether the "legislative record evinces a congressional intent to punish." With respect to the law at issue, the Court found none of these factors were met: the law did not impose a burden traditionally associated with punishment, the legitimate and nonpunitive justifications for Congress' action, such as historical recordkeeping and facilitating criminal prosecution were "readily apparent," and nothing in the legislative record suggested that Congress was "encroaching on the judicial function."

**Recent Case Law on the Bill of Attainder Clause.** Several recent cases from the federal appellate courts illustrate when particular statutory burdens amount to "punishment." The first of these, *SBC Communications v. FCC*, was decided by the Fifth Circuit in 1998—the same Circuit which will hear any appeal in Huawei's lawsuit. *SBC Communications* involved a challenge to certain provisions of the Telecommunications Act of 1996, which placed a host of restrictions on 20 specific former subsidiaries of AT&T known as Bell Operating Companies (BOCs). Reviewing the entire history of the Bill of Attainder Clause as well as the *Nixon* factors, the court concluded that the Telecommunications Act failed to inflict any "punishment" on the BOCs. Despite the similarity of the restrictions to the employment bar in *Cummings*, and "isolated references" in congressional debate to the BOCs' bad behavior, the nonpunitive purposes served by the law, which sought to "ensure fair competition in the [telecommunication] markets" by limiting the BOC's ability to use AT&T's anticompetitive techniques, and the legislative record as a whole (which reflected these numerous non-punitive justifications), demonstrated to the court that the challenged provision was not driven by punitive intent.

In 2010, the Second Circuit addressed the Bill of Attainder Clause in *ACORN v. United States*. *ACORN* concerned Congress' response to a scandal involving embezzlement, fraud, and other crimes at the non-profit organization, ACORN. As a result of the scandal, the 2010 Consolidated Appropriations Act specifically excluded ACORN and its "affiliates, subsidiaries, and alli[es]" from federal funding. The law also directed the Government Accountability Office to audit the federal funds already received by ACORN to determine if any had been misused. The Second Circuit unanimously determined that these restrictions failed to amount to punishment under *Nixon*'s three-part test. First, on the historical test, the court concluded that "[t]he withholding of appropriations . . . does not constitute a traditional form of punishment." Second, the court considered the functional test and looked at the severity of the burden imposed in light of the law's punitive purposes. The court accepted that Congress was motivated by a desire to ensure that government funds were not misspent and that the provision was not so overinclusive or underinclusive to suggest that this purpose was not legitimate. Finally, on the motivational test, although ACORN cited evidence from the legislative record assailing ACORN as "criminal" and demonstrating some "punitive intent," the court held that such a "smattering" of legislators' opinions did not amount to the required "unmistakable evidence" necessary to override the court's analysis under the other prongs of the test.

Most recently, in November 2018, the D.C. Circuit decided *Kaspersky Lab, Inc. v. DHS*. *Kaspersky* involved a lawsuit by Russian cybersecurity company Kaspersky Lab challenging the constitutionality of a provision within the National Defense Authorization Act for Fiscal Year 2017, which forbade government agencies from using any "hardware, software or services" developed by Kaspersky Lab. Significantly, after reviewing the case law, the court observed that, of the three *Nixon* factors, "the most important" was the functional test. Under that test, the court explained that the inquiry primarily focuses on determining when a law is disproportionate or exceedingly specific; either one is an indicator of punishment. With respect to Kaspersky Lab, the court noted that Congress had heard substantial expert testimony that Kaspersy Lab's ties to Russia could jeopardize the integrity of federal computers. Given this threat, the court observed that Congress' removal of Kaspersky's systems from federal networks "represent[ed] a reasonable and balanced response." To pass the functional test, Congress' answer to this threat did not have to be "precisely calibrated;" it only had to avoid "piling on . . . unnecessary burdens." On the historical test, the court had no problem distinguishing Kaspersky's "punishment" from Supreme Court cases like *Cummings* and *Lovett*—Kaspersky was not a "flesh and blood" person, but rather a

corporation which faced only the loss of some revenue. According to the court, this harm did not amount to the sort of punishment which was historically proscribed by the Bill of Attainder Clause. Finally, on the motivational test, the court was unable to identify any evidence from the legislative record that the law was punitive—much less the "unmistakable" evidence that was required, given the "obvious constraints on the usefulness of legislative history."

**Was Huawei Subject to a Bill of Attainder?** As numerous commentators have opined, the above precedent bodes ill for Huawei's lawsuit. The facts bear a resemblance to *ACORN* and *Kaspersky*: Under the National Defense Authorization Act for Fiscal Year 2018, federal agencies are prohibited from procuring Huawei equipment or services or contracting with entities that use Huawei equipment or services. This provision appears similar to the burden that was imposed and upheld in *Kaspersky*, where the government was prohibited from using Kaspersky Lab software. Huawei's complaint is, in some ways, different than the cases discussed above—the restriction is harsher than that upheld in *Kaspersky*, as it also extends to government contractors, and the legislative record contains a handful of comments suggesting punitive intent, also not present in *Kaspersky*, but seemingly present in *ACORN*. Nonetheless, on the whole, the statute appears similar to those that courts have previously upheld.

As the D.C. Circuit explained in *Kaspersky*, the "most important" factor is the functional factor. Similarly, the Fifth Circuit—which sets the governing law for Huawei's case—summarized its analysis of the law in *SBC Communications* in a similar fashion, stating that *Nixon* stands for the proposition that "if legislation has a legitimately nonpunitive function, purpose, and structure it does not constitute punishment for purposes of the Bill of Attainder Clause." In Huawei's case, the government is likely to argue that the nonpunitive purpose of the law is the same as the nonpunitive purpose that was upheld in *Kaspersky*—protecting the security of government systems from foreign interference. The legislative record over the past few years contains repeated concerns from Congress that Huawei would use their telecommunications equipment to facilitate Chinese spying. Similar evidence was found to be persuasive in *Kaspersky*; and even though the statute at issue in Huawei's lawsuit extends beyond government agencies to government contractors, it is not clear that this difference is constitutionally meaningful. The breadth of the law could suggest that Congress' security concern is more substantial and simply required a broader response relative to the law at issue in *Kaspersky*. The fact that the law does not simply apply to Huawei—it also applies to ZTE—may reinforce the argument that the statute is one of "general applicability" and reflects a concern other than simply punishing Huawei. In this sense, a court may view the law burdening Huawei, like the statute in *Kaspersky*, as "prophylactic, not punitive."

Similarly, on the other *Nixon* factors, Huawei may have an uphill battle. On the historical test, it appears unlikely that a court will find that the bar on government use of Huawei equipment falls within the traditional understanding of legislative punishment—Huawei is a corporation, which, like Kaspersky Lab, faces only a loss of revenue. Although Huawei attempts to cast the law as intending to "put them out of business," and the restriction the law poses does represent a substantial financial burden on the company, there is a significant conceptual gap between this burden and the employment bar for "flesh and blood" individuals that was proscribed in *Cummings.* On the motivational factor, Huawei's complaint emphasizes comments from the legislative record suggesting punitive intent. For example, Huawei cites comments from one Senator stating an intent to impose "fitting punishment . . . to give them the death penalty; that is, to put them out of business in the United States." In another example cited in the complaint, Huawei cites a comment from a Member of Congress calling Huawei a "bad apple" "owned by the Chinese government." But like the cases discussed above, a "smattering" of legislative comments appears unlikely to convince a court that there was "unmistakable" congressional intent to punish. Rather, a court reviewing this complaint is likely to view the legislative record as a whole, including the evidence suggesting that Congress was attempting to adopt a legitimate protective measure. As a result, Huawei's lawsuit faces a number of substantial hurdles.

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