



THE BILL OF ATTAINDER CLAUSE IN THE U.S. CONSTITUTION:

Origin, Evolution, and Reflection

—From **Huawei v U.S**

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Introduction

Since 2018, the United States has leveraged state power and resorted to "legal means" to suppress Chinese company Huawei Technologies Co., Ltd. (hereinafter referred to as "Huawei"), a leading player in high-tech sectors such as 5G. In the legislative branch, the U.S. Congress passed *The National Defense Authorization Act for Fiscal Year 2019*, which not only bars U.S. government agencies from buying Huawei equipment and services, it also bars them from contracting with or awarding grants or loans to Huawei's customers.¹ The executive branch also took action against Huawei; the U.S. Department of Commerce added Huawei and over 150 of its affiliated companies to the Entity List.² As for the judicial branch, the United States requested that Canada arrest Huawei's Chief Financial Officer Meng Wanzhou during her transit through Vancouver,³ and filed criminal charges against her, requesting her extradition from Canada.⁴

In the face of all-round suppression from the U.S., Huawei filed a constitutional lawsuit in the U.S. District Court for the Eastern District of Texas in March 2019⁵, alleging that Section 889 of *The National Defense Authorization Act for Fiscal Year 2019* (hereinafter referred to as "NDAA Section 889 of NDAA") targets and punishes Huawei, violates the Bill of Attainder Clause in the U.S. Constitution, and thus requested the Court to declare the Act unconstitutional.⁶

It is both reasonable and necessary for Huawei to defend its legal rights by filing the lawsuit challenging the constitutionality of Section 889 of NDAA, citing the Bill of Attainder Clause as the core legal basis of the challenge. First, according to the U.S. Constitution, after a bill is debated and passed by the House and the Senate, it is submitted to the President for approval. Once signed, the legislative process is completed. During this process, parties who may be affected by the bill are not endowed with the procedural rights to plead or be heard. As a result, Huawei is not entitled to seek relief directly from the U.S. Congress other than to challenge the constitutionality of the legislation at issue by filing a constitutional lawsuit. This makes Huawei's countermeasures against this act of Congress significantly different from its

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¹ See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §889, 132 Stat. 1636, 1917 (2019).

² Commerce Department Further Restricts Huawei Access to U.S. Technology and Adds Another 38 Affiliates to the Entity List, <https://www.commerce.gov/news/press-releases/2020/08/commerce-department-further-restricts-huawei-access-us-technology-and>

³ Daisuke Wakabayashi & Alan Rappeport, Huawei CFO is Arrested in Canada for Extradition to the U.S., N.Y. *TIMES* (Dec. 5, 2018), <https://www.nytimes.com/2018/12/05/business/huawei-cfo-arrest-canada-extradition.html> [https://perma.cc/WM42-YC8M].

⁴ Press Release, U.S. Dep't of Justice, Chinese Telecommunications Conglomerate Huawei and Huawei CFO [Wanzhou Meng Charged with Financial Fraud](https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huaweicfo-wanzhou-meng-charged-financial) (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huaweicfo-wanzhou-meng-charged-financial> [https://perma.cc/5FTX-HJTC]. Meng was charged with bank fraud, wire fraud, and their accompanying conspiracies. Superseding Indictment at 10-20, United States v. Huawei Techs. Co., No. 1:18-CR-00457 (E.D.N.Y. filed Jan. 24, 2019).

⁵The plaintiffs in this case are Huawei Technologies Co., Ltd. and its subsidiary Huawei Technologies USA, Inc., and the defendants are the United States, Secretary of Agriculture, Acting Secretary of the Interior, and several other federal government secretaries. See Complaint, Huawei Technologies USA, Inc. v. United States, No. [4:19-cv-00159\(E.D. Tex. 2019\)](https://www.wsj.com/public/resources/documents/huawei.pdf?mod=article_inline), https://www.wsj.com/public/resources/documents/huawei.pdf?mod=article_inline; see also Motion for Summary Judgment, Huawei Technologies Co., Ltd. v. United States, No. 4:19-cv-159-ALM(E.D. Tex., May 28, 2019).

⁶ In addition, Huawei made another two claims: Section 889 of NDAA violates the Due Process Clause by effectively branding Huawei a tool of the Chinese government, denying it any opportunity or legal process to confront the charges against it. By enacting this rule, U.S. Congress acted as a legislator, prosecutor and jury at the same time, which violated the principle of separation of powers established by the Vesting Clauses. Wilson C. Freeman, Huawei v. United States: The Bill of Attainder Clause and Huawei's Lawsuit Against the United States, Congressional Research Service, 7-5700 www.crs.gov LSB10274.

countermeasures to the U.S. administrative and judicial actions. Second, prohibiting the legislature from enacting bills of attainder is an important clause in the U.S. Constitution. It is one of the fundamental institutional safeguards for maintaining the U.S. constitutional order and ensuring the separation of powers.⁷ There are as many as 5 judicial precedents where the U.S. Supreme Court ruled that the alleged legislations were unconstitutional on the grounds of the Bill of Attainder Clause⁸. Therefore, Huawei cut to the point and challenged the congressional legislation on the grounds that it violated this clause.

However, in February 2020, the District Court ruled against Huawei. Citing the "two-pronged test,"⁹ the judge held that Section 889 of NDAA satisfied the "specificity" element, yet did not impose a "punishment", and therefore was not a bill of attainder.¹⁰ The plaintiffs in both this case and the similar case of *Kaspersky v. United States* were rejected by the court, which are of particular theoretical significance.¹¹ In recent years, the U.S. Congress has frequently enacted particularized legislations against specific targets on the grounds of national security, and the justice system has repeatedly endorsed the constitutionality of such legislation. Does this mean that American courts' interpretation of the Bill of Attainder Clause has deviated from the once long-held position of the Supreme Court? Is this a departure from the original intention of the Framers, who banned bills of attainder in the U.S. Constitution? Will this weaken or even undermine the constitutional function of the Bill of Attainder Clause? Will the U.S. constitutional order based on the separation of powers be affected? Such questions have attracted attention and prompted discussion in academic circles.¹²

This book traces the origin of bills of attainder, then examines the historical background and considerations of the Framers who wrote the Bill of Attainder Clause into the U.S. Constitution. On this basis, the book outlines the landmark judicial precedents set by the U.S. Supreme Court on bills of attainder, then refines and summarizes the constitutional functions of the clause. Finally, the book analyzes the reasoning behind the District Court's decision in *Huawei v. United States* and evaluates the possible impact of this case.

⁷ John J. Cavaliere II., "The Bill of Attainder Clauses: Protections from the Past in the Modern Administrative State," *Ave Maria Law Review* 12, no. 1 (Winter 2014):149-172, p.149.

⁸ See *Brown*, 381 U.S. 437 (1965); *Lovett*, 328 U.S. 303 (1946); *Pierce v. Carskadon*, 83 U.S. 234(1872); *Cummings v. Missouri*, 71 U.S. 277 (1867); *Ex parte Garland*, 71 U.S. 333 (1866).

⁹ See below for the content of this test.

¹⁰ Memorandum Opinion and Order, *Huawei Technologies USA, Inc. et al v. United States of America, et al*, No.4:19-cv159-ALM (E.D. Tex., Feb. 18, 2020), pp.16-51.

¹¹ In 2017, amid concerns that Kaspersky was using its antivirus software to help the Russian government infiltrate U.S. networks and steal sensitive information, the U.S. Department of Homeland Security issued a directive to the federal government to stop using Kaspersky's software within 90 days. Subsequently, *The National Defense Authorization Act for Fiscal Year 2017* established a rule prohibiting the use of Kaspersky products by the U.S. government and its affiliated agencies. In December 2017, Kaspersky filed a lawsuit in the DC Court against the U.S. Department of Homeland Security, alleging that the U.S. government violated the U.S. Constitution's prohibition against Congress passing bills of attainder and the Due Process Clause in both *The U.S Administrative Procedure Act* and the U.S. Constitution, and deprived Kaspersky of the right to complain through due process. However, both the DC Court and the Court of Appeals ruled against Kaspersky, mainly on the grounds that the U.S. federal legislation and the Department of Homeland Security's ban on Kaspersky was to protect U.S. networks from Russian intrusion, which was a preventive measure, not a punitive one, and therefore constituted sufficient legality and was not unconstitutional. *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 454 (D.C. Cir. 2018).

¹² See eg., Alina Veneziano, "The Relationship between the Bill of Attainder Clause, the Use of Sanctions as a Regulatory Tool for Foreign Trade, and Corporate Personhood," *Journal of Legislation* 46, no. 2 (2019): 276-302; Alina Veneziano, "What is the Huawei Case Really About? Sanctions to Regulate Technology?" *Journal of International & Comparative Law* Harrison A. Newman, "Corporations under the Bill of Attainder Clause," *Duke Law Journal* 69, no. 4 (January 2020): 923-958.

I. The English Origins of Bills of Attainder

The use of bills of attainder originated in the English Parliament in the late Middle Ages. Such bills were used by English rulers as a legal instrument for suppressing political dissidents. The North American colonies inherited bills of attainder from the English Law around the time of the American Revolutionary War, and resorted such bills to suppress the Tories, a term that at the time referred to those loyal to the British Empire. After a careful reflection on history, the Framers included in the U.S. Constitution a prohibition against the use of bills of attainder. Therefore, in order to develop an in-depth understanding of such bills in the context of the U.S. Constitution, we must investigate the origins of this legal instrument.

(i) Historical Implications of Bills of Attainder

Although it is impossible to find out exactly when the first bill of attainder was passed by the English Parliament, we do know that by the time of the Tudor and Stuart dynasties, such bills were already a common tool for resolving political rebellions and attacking dissidents. During this time, bills of attainder were issued to punish various targets, from members of the clergy who protested royal extravagance to rebel soldiers, and even the wives of Henry VIII.¹³

The English term "attaint" originally meant "disgrace" or "stain," and the original meaning of "bill of attainder" was an act enacted for declaring a tainted subject guilty of treason or some other felony. The legal consequences were death penalty and the deprivation of the subject's right to property and the inheritance right of his/her heirs.¹⁴ The King or the Parliament could resort to such legislation to put their political opponents to death in a convenient manner, without the need for a lengthy trial. In addition to bills of attainder, the English Parliament often enacted bills of pains and penalties,¹⁵ which were the same in nature as bills of attainder, but imposed lighter penalties, including imprisonment, confiscation of property, deportation, disinheritance, etc., rather than imposing a death penalty on the subject. Therefore, the application of such bills "only" inflicted "pains and penalties".¹⁶ Due to their similar nature, bills of pains and penalties were later folded into a broadened definition of bills of attainder.¹⁷

From the 16th to the 18th centuries, this kind of act "that impose[d] a punitive sanction upon either named individuals and groups or a sufficiently well-described but unnamed person or group of persons, without any of the procedural safeguards commonly associated with a

¹³ Andrew Kim, "Falling from the Legislative Grace: The Acorn Defunding and the Proposed Restraint of Congress' Appropriations Power through the Bill of Attainder Clause," *American University Law Review* 60, no. 3 (February 2011): 643-690, p.646.

¹⁴ Jacob Reynolds, "The Rule of Law and the Origins of the Bill of Attainder Clause," *St. Thomas Law Review* 18, no. 1 (Fall 2005): 177-206, p.182.

¹⁵ Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 *Hasting Constitution Law Quarterly* 767, 768 (Summer 1978). P.768.

¹⁶ Raoul Berger, "Bills of Attainder: A Study of Amendment by the Court," 63 *Cornell Law Review*, 355, 374 (1978), p.357.

¹⁷ *Ex parte Garland*, 71 U.S. 333 (1866), at 377.

complete judicial trial"¹⁸ became an instrument of political persecution of the English nobility.

(ii) Typical Bills of Attainder in English History

There is a considerable number of prominent historical figures who were sentenced to death under bills of attainder in English history, such as Thomas Cromwell (1540), Catherine Howard (1542), and Thomas Wentworth (1641).¹⁹ Among them, the bill of attainder against Thomas Wentworth is the most typical case.

In the 1620s, Thomas Wentworth was a major figure in the House of Commons and had a reputation for disrespecting the King. In the later years however, as his political power and influence continued to decline, he resigned from the House of Commons and made peace with the King, becoming a devout supporter of the throne. Soon afterwards, the King appointed him the Earl of Strafford. John Pym, the effective leader of opposition to the King in Parliament, pushed hard for political reforms to rein in the sovereign power after taking control of the Parliament, and identified Thomas Wentworth as the main obstacle. Then, under Pym's leadership, the English court brought criminal charges against Wentworth on the grounds of treason. During the trial, Thomas and his lawyers forcefully rebutted the alleged crimes, and the criminal charges against him were rejected. Pym then resorted to a bill of attainder, which passed both the House of Commons (204-59) and the House of Lords (26-19), and was sent to Charles I for approval. Charles I was forced to sign the bill, and Thomas Wentworth was beheaded.²⁰

This case was a manifestation of the exercise of the judicial power by the legislative branch, namely the English Parliament, through bills of attainder. As F.W. Maitland stated, a bill of attainder is an act enacted by the Parliament that executes or punishes a person without any trial. It is not a judicial proceeding, and is instead implemented through the authority of the King or the House of Lords and Commons.²¹

It is generally believed that the last bill of attainder to be passed by the English Parliament was the bill against John Fenwick in 1696. Sir Fenwick was a devout supporter of James II and was involved in a series of political campaigns to murder William III. After William III took the reign, the English Parliament issued a bill of attainder which sentenced John Fenwick to death.²²

Thus, bills of attainder in England can be regarded as "negative assets" of English law, as they are the Parliament's legal instruments for the abuse of legislation. Such bills bear witness to

¹⁸ M. Jackson Nichols; Jackson S. Nichols; Matthew Buckner, "Bill of Attainder: Old Wine in New Bottles," *North Carolina Central Law Review* 36, no. 2 (2014): 278-294, p.279.

¹⁹ M. Jackson Nichols; Jackson S. Nichols; Matthew Buckner, "Bill of Attainder: Old Wine in New Bottles," *North Carolina Central Law Review* 36, no. 2 (2014): 278-294, p.280.

²⁰ Jacob Reynolds, "The Rule of Law and the Origins of the Bill of Attainder Clause," *St. Thomas Law Review* 18, no. 1 (Fall 2005): 177-206, p.189-190.

²¹ F.W. Maitland, *The Constitutional History of England: A Course of Lecture Delivered*, the Cambridge University Press, 1950, p.217.

²² Leonard Levy, *Origins of the Bill of Rights*, Yale University Press, 1999, p.70.

a dark age in English history, and are contrary to modern principles of the rule of law.²³ U.S. Supreme Court Justice Joseph Story concluded: "In England, the passage of a bill of attainder by Parliament was most common during the periods of rebellion, extreme submission to the throne, and political riot. These were times when all peoples were most likely to forget their obligations and trample upon the rights and freedoms of others."²⁴ This is the truth that explains everything.

II. The Historical Background and Considerations of the Framers Regarding the Bill of Attainder Clause in the U.S. Constitution

During the American Revolutionary War, bills of attainder were used by the independence-seeking political elites of the North American colonies as legal instruments to purge and persecute Tories. After the war ended, the Framers agreed that the new constitution should explicitly ban the use of bills of attainder. In order to understand the Bill of Attainder Clause in the U.S. Constitution, it is worth exploring the historical background behind the Founding Fathers' dramatic change in attitude toward such bills.

(i) Historical Background

In the North American colony of New England, the bill of attainder had not been applied for many years until the time of the American Revolutionary War, during which many bills of attainder were passed. During this period, Maryland, New York, Massachusetts, Pennsylvania, Vermont, and other colonies passed bills of attainder or bills of pains and penalties against Tories and other Anglophiles. Historical data show that in 1776 alone, in Pennsylvania and New York, over 490 and over 1000 people respectively were convicted of treason and sentenced to death or other severe punishment. In 1778, Thomas Jefferson led the Virginia Legislature to pass a bill of attainder to sentence Josiah Phillips, a famous Anglophile, to death.²⁵

However, shortly after the victory of the Revolutionary War, the disruption to the rule of law and human rights by the bills of attainder began to weigh on the minds of Thomas Jefferson and other Framers, who quickly turned to oppose such bills. The general explanation for this change of attitude is that the Framers were very sensitive to the question of bills of attainder and had complicated feelings about such legal instruments, because they knew that if they had not won the Revolutionary War, they would have been severely punished by such bills enacted by

²³ Jacob Reynolds, "The Rule of Law and the Origins of the Bill of Attainder Clause," *St. Thomas Law Review* 18, no. 1 (Fall 2005): 177-206, p.194.

²⁴ Joseph Story, *Commentaries on the Constitution*, §678, Nabu Press (2012); See [U.S.] Joseph Story, *Commentaries on the Constitution of the United States*, Translated by Mao Guoquan, Shanghai Sanlian Press, 2006, p.408.

²⁵ Jacob Reynolds, "The Rule of Law and the Origins of the Bill of Attainder Clause," *St. Thomas Law Review* 18, no. 1 (Fall 2005): 177-206, p.194.

the British Empire.²⁶

In fact, the dangers of enacting bills of attainder were well recognized by the Framers of the U.S. Constitution, and the judiciary in the early phase of the founding of the U.S.. In his *Commentaries on the Constitution of the United States*, Joseph Story offered a penetrating critique of the English Parliament's abuse of bills of attainder,²⁷ and a sober reflection on the widespread practice of bills of attainder in the North American colonies during the American Revolution War. He argued that bills of attainder "brought evils far beyond any conceivable benefit", and noted that in such cases, the legislature assumed the judicial function and declared a person guilty while this person was not protected by any ordinary procedure or trial, and the legislature satisfied itself with the evidence it had obtained, regardless of whether or not such evidence complied with the rules of evidence.²⁸ He concluded that in all these cases, the legislature exercised the supreme power of the sovereign. It was therefore entirely appropriate to regard the exercise of legislative power in this manner as irresponsible and arbitrary discretion. Such arbitrary power was governed only by its perceived political necessity and convenience, and was too often under the influence of irrational fear or arbitrary suspicion.²⁹

At the Constitutional Convention in Philadelphia in 1787, the clause prohibiting the legislature from enacting bills of attainder was not opposed by any of the delegates and was successfully incorporated into the U.S. Constitution. Article 1, Section 9 of the Constitution states, "No bill of attainder or ex post facto Law shall be passed"; and Section 10 states, "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."³⁰

(ii) Legislative Considerations

It is generally accepted that, in the context of the 1787 U.S. Constitution, which had not yet incorporated the Bill of Rights,³¹ prohibiting federal and state legislatures from passing bills of attainder was intended to ensure the separation of powers and to preserve private rights, particularly to prevent the usurpation of judicial power by legislative power, i.e., to prevent trial by legislature.³² This was explained at length by the Framers in *The Federalist Papers*.

In *The Federalist Papers*, No. 47, Madison emphasized the importance of the separation of powers to the operation of the U.S. Constitution, noting that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."³³ Of the legislative, executive and judicial powers, he was particularly worried about the legislative power, which was in a strong position: "... in a representative republic ... the

²⁶ Jane Welsh, Note, The Bill of Attainder Clause: An Unqualified Guarantee of Process, 50 Brook Law Review, 77, 84 (1983).

²⁷ Joseph Story, *Commentaries on the Constitution*, §678, Nabu Press (2012).

²⁸ *Id.*, §695.

²⁹ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-138 (1810).

³⁰ The Constitution of the United States, Art. 1.

³¹ The delegates to the Constitutional Convention argued that it was unnecessary for the federal constitution to embody a bill of rights since all North American states already incorporated bills of rights in their constitutions. Later, under the pressure of the bourgeois democrats and the influence of the French bourgeois revolution in 1789, the U.S. Congress passed 10 constitutional amendments on September 25, 1789, as a supplement to the U.S. Constitution, which came into effect on December 15, 1791, after being ratified by nine of the then existing states.

³² *United States v. Brown*, 381 U.S. 437, 442 (1965).

³³ [U.S.] Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Commentary on the Constitution of the United States*, translated by Yin Xuan, Yilin Publishing House, 2016, at 322.

legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude...; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."³⁴ In No. 44, Madison was more specific about the dangers of bills of attainder and the considerations behind the Constitution's clause to prohibit legislatures from passing bills of attainder: Bills of attainder ... are contrary to the first principles of the social compact, and to every principle of sound legislation... Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents.³⁵

In No. 84, Hamilton noted, "The most considerable of the remaining objections is that the plan of the convention contains no bill of rights.... I answer, that the Constitution proposed by the convention contains, as well as the constitution of [New York] State, a number of such provisions." To argue this point, Hamilton then referred to the provisions of the U.S. Constitution that protect the rights of individuals and wrote specifically that Article 1, Section 9, Clause 3: "No Bill of Attainder or ex post facto Law shall be passed." He then quoted Blackstone: "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation."³⁶ In No. 78, which is about the judicial power, Hamilton quoted Montesquieu: "I agree that 'there can be no liberty if the power of judging be not separated from the legislative and executive powers '" Thus, he suggested: By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice.³⁷

The Framers' considerations behind incorporating the Bill of Attainder Clause into the Constitution were later articulated and endorsed by John Marshall, the Chief Justice of the Supreme Court of the U.S., who in 1810, in an obiter dictum in *Fletcher v. Peck*, stated that "the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment."³⁸ Marshall deplored the abuse of legislative power, noting that the power of the legislature over the lives and fortunes of individuals is expressly restrained by the inclusion of a bill of attainder clause in the

³⁴ *Id.*, at 331-332.

³⁵ *Id.*, at 302.

³⁶ *Id.*, at 584-585.

³⁷ *Id.*, at 529.

³⁸ *Fletcher v. Peck*, 10 U.S.(6 Cranch.) 87(1810), at 138 (dictum).

Constitution.³⁹ In essence, the prohibition on bills of attainder specified in the U.S. Constitution is intended to guarantee the necessary restraint that the judicial power has over the legislative power to avoid the infringement of individual rights by the legislative power.

Thus, based on the tragedy of the English Parliament's abuse of bills of attainder and the serious harm to the rule of law and human rights caused by the legislative trials conducted by the Tories during the American Revolutionary War, the Framers fully recognized that the inclusion of a bill of attainder clause in the Constitution would be a critically important part of achieving a constitutional order underpinned by the separation of powers. For this reason, no delegate at the Constitutional Convention in Philadelphia objected to the inclusion of such a provision, and the provision was unanimously approved and enshrined in the Constitution.⁴⁰

III. Supreme Court Jurisprudence on the Bill of Attainder

Historically, the Supreme Court's review of bills of attainder occurred mainly during "chaotic times" in U.S. history,⁴¹ particularly during the Civil War, the Cold War, and the Watergate scandal. During the post-Civil War period of national reconstruction and the pre-Cold War period in the face of the Soviet Union's rise to power, the U.S. ruling elite, sensing a strong threat to national security, frequently enacted targeted and specific legislation that became the subject of judicial review by the Supreme Court as to whether the legislation was a bill of attainder. In the Watergate scandal, the primary goal of Congress was to prevent the President from abusing his executive power, and in order to counter the impeachment investigation by Congress, Nixon resorted to judicial procedures by filing a constitutional lawsuit, citing the Bill of Attainder Clause, thus making the Supreme Court's attitude crucial to maintaining the separation of powers and checks and balances. A review of these landmark cases will provide insight into the bills of attainder in the context of the operation of the U.S. Constitution.

(i) Litigations against Bills of Attainder after the Civil War

The U.S. Constitution took effect in 1789, and it was not until the period of national reconstruction following the end of the American Civil War that the first lawsuits over the prohibition against bills of attainder were filed. During the Reconstruction period, the Supreme Court invoked the Bill of Attainder Clause from the Constitution in three cases and ordered related legislation unconstitutional, the first two of which were directly related to the North-South confrontation of the Civil War.

³⁹ *Ibid.*

⁴⁰ Madison recalled that no delegates objected to the Constitution's inclusion of the Bill of Attainder Clause, and that the relevant debate was only over whether the provision was to include *ex post facto* laws. The Avalon Project at Yale Law School, The Debates in the Federal Convention of 1787, reported by James Madison: August 22, available at https://avalon.law.yale.edu/18th_century/debates_822.asp, last visited on 1 Feb. 2021.

⁴¹ John J. Cavaliere II., "The Bill of Attainder Clauses: Protections from the Past in the Modern Administrative State," *Ave Maria Law Review* 12, no. 1 (Winter 2014):149-172, p.153.

In *Ex parte Garland*,⁴² the Supreme Court ruled that the federal legislation which required attorneys practicing in federal courts to swear that they had never supported the Confederate States of America (CSA) was unconstitutional. The Supreme Court stated that the exclusion of a particular individual from any profession or normal sideline of life based on past conduct should be considered a punishment for such past conduct. All such legislation is in the nature of a bill of pains and penalties, making it a bill of attainder in the broad sense, and the passage of such a bill is therefore prohibited by the Constitution.⁴³

On the same day, the Supreme Court rendered its verdict on *Cummings v. Missouri*.⁴⁴ In this case, the Court reviewed the constitutionality of a provision in the 1865 amendment to the *Missouri Constitution*. The provision provided that clergy were allowed to vote in religious groups, preach, or hold property in trust only if they took an express oath that they had never participated in a rebellion and would always remain loyal to Missouri and the United States. Many Missourians had supported the CSA during the Civil War, and they now faced a choice between either taking a false oath under this amendment and facing the penalties of perjury, or refusing to take the oath and consequently being unable to serve in religious groups.

The Supreme Court's interpretation of the U.S. Constitution's Bill of Attainder Clause in this case is considered the classic definition: a bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. These bills are generally directed against individuals by name, but they may be directed against a whole class.⁴⁵ The Supreme Court further noted that the legislation in question required clergymen to take an oath to atone for their past conduct, which had no possible connection to their eligibility to exercise their profession and pursuits. Such legislation constitutes punishment without judicial trial and conviction, and is therefore unconstitutional.⁴⁶

It is important to emphasize that the Supreme Court has specifically rejected the narrow interpretation of a bill of attainder whereby "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all, and is therefore not a deprivation of rights."⁴⁷ In the decision of this case, Field, who drafted the majority opinion, noted that "the Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name."⁴⁸ Thus, the majority opinion in this case was that a perception of guilt not determined by a judicial decision is contrary to the basic traditions of the common law and constitutes punishment.⁴⁹

Six years later, in the case of *Pierce v. Carskadon*, the Supreme Court held legislation passed by the State of West Virginia to be unconstitutional, on the basis that it violated of the

⁴² *Ex parte Garland*, 71 U.S. 333 (1866).

⁴³ *Id.*, at 377.

⁴⁴ In this case, a Roman Catholic priest was imprisoned for refusing to take the oath of allegiance to the state of Missouri and the United States. *Cummings v. Missouri*, 71 U.S. 277, 332 (1866).

⁴⁵ *Id.*, at 323.

⁴⁶ *Id.*, at 329.

⁴⁷ *Id.*, at 320.

⁴⁸ *Id.*, at 325.

⁴⁹ *Id.*, at 331.

Bill of Attainder Clause.⁵⁰ Since this case was so similar in nature to *ex parte Garland* and *Cummings v. Missouri*, the Supreme Court's decision cited those cases directly, with little additional argument.⁵¹ After that, the Supreme Court did not hear another case involving a bill of attainder until the advent of the Cold War.

(ii) Cases Addressing the Bill of Attainder Clause during the Cold War

Soon after the end of World War II, the world entered a Cold War period, during which the U.S. and the Soviet Union vied for supremacy. It was against this historical background that the Supreme Court decided *United States v. Lovett* and *United States v. Brown* in 1946 and 1961 respectively, two cases related to the Bill of Attainder Clause.

As early as the 1930s and early 1940s, the U.S. government was already investigating federal employees suspected of involvement in communist activities and subverting the government. Believing that alleged subversives held key positions in the federal government and were gaining influence, the U.S. Congress passed the *Urgent Deficiency Appropriation Act* of 1943.⁵² The Act provided that no salary or other compensation shall be paid to persons or members of organizations who advocated armed or violent overthrow of the U.S. government out of any monies then or thereafter appropriated. In particular, Section 304 specified that no appropriations could be used to pay salaries, refunds, or official reimbursements to Lovett and two other individuals, and prohibited the three from ever engaging in any government work, except as jurors or soldiers, unless they were again appointed by the President with the advice and consent of the Senate.⁵³ Lovett then filed a bill of attainder suit to seek judicial relief and eventually resorted to the Supreme Court.

The Supreme Court held that, by finding Lovett and two others guilty of "engaging in acts of subversion against the Government of the United States" and barring them from holding public office based on Section 304 of the *Urgent Deficiency Appropriation Act*, Congress had inflicted punishment on them without a judicial trial, meaning that the Act was a bill of attainder, and therefore prohibited by the Constitution.⁵⁴ The Supreme Court ruled that Section 304 of the Act was unconstitutional and that the three individuals were entitled to compensation and to hold public office. It is important to emphasize that in *United States v. Lovett*, the Supreme Court re-emphasized the position of *Cummings v. Missouri*: In the context of a bill of attainder,

⁵⁰ *Pierce v. Carskadon*, 83 U.S.234(1872).

⁵¹ *Id.*, at 235.

⁵² The Urgent Deficiency Appropriation Act of 1943, Pub.L.No.78-132, §304, 57 Stat. 431, 450(1943).

⁵³ The three men were Goodwin B. Watson, William E. Dodd Jr., and Robert Morss Lovett. Congressman Martin Dies Jr. spoke at the House of Representatives on February 1, 1943, alleging that nine federal employees were members of communist fronts and asking Congress to exclude their salaries from appropriations. Members of Congress were divided over how to respond to Dies' claims, with some believing Dies' allegations to be true and supporting his motion, and others opposing it as a repeat of the British "Star Chamber". Subsequently, a special congressional commission of inquiry found that the three had engaged in acts of subversion against the U.S. government. *United States v. Lovett*, 328 U.S.303(1946), at 450.

⁵⁴ *United States v. Lovett*, 328 U.S.303(1946), at 316.

punishment is broadly defined and can be embodied in many different forms of legislation.⁵⁵

The 1950s saw the rise of McCarthyism. In 1959, Congress passed a bill making it a federal crime for a Communist Party member to serve as a union leader.⁵⁶ In 1961, Archie Brown, a Californian union leader and member of the Communist Party USA, was criminally charged under the *Urgent Deficiency Appropriation Act* and sentenced to six months in prison. Brown then filed a constitutional lawsuit arguing that the act was an unconstitutional bill of attainder, which was eventually heard by the Supreme Court, leading to the famous case of *United States v. Brown*.

In that case, the Supreme Court ruled that the act in question was a bill of attainder and thus unconstitutional.⁵⁷ In the decision, in response to arguments that a bill of attainder should be narrowly construed, Chief Justice Earl Warren, who wrote the majority opinion, recalled the history of the abuse of bills of attainder in England. Citing the discussion on separation of powers in *The Federalist Papers* No. 47 and 48, he wrote: "in a representative republic... where the legislative power is exercised by an assembly... which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions... barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments."⁵⁸ Warren emphasized: "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical prohibition, but rather as an implementation of the separation of powers. The fact that Congress imposed a criminal injunction specifically against the Communist Party, rather than establishing universally applicable rules, is, in the opinion of this Court, sufficient to constitute a bill of attainder."⁵⁹ On this basis, the verdict of the case emphasized that the Bill of Attainder Clause was intended not as a narrow, technical prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.⁶⁰

U.S. v. Lovett and *U.S. v. Brown* took place in the context of the Cold War. Out of a strong sense of insecurity, the U.S. Congress sought to maintain national security by imposing punishments on specific targets through targeted legislation. Although the U.S.-China relationship today is different from the U.S.-Soviet relationship during the Cold War, the U.S. Congress' legislation to punish Huawei on the grounds of national security bears many similarities to these two cases. It is important to emphasize that in both cases, the Supreme Court reaffirmed its principled position that the Bill of Attainder Clause should be interpreted broadly, in order to strongly uphold the American constitutional order underpinned by separation of

⁵⁵ Andrew Kim, "Falling from the Legislative Grace: The Acorn Defunding and the Proposed Restraint of Congress' Appropriations Power through the Bill of Attainder Clause," *American University Law Review* 60, no. 3 (February 2011): 643-690, p.652.

⁵⁶ Labor-Management Reporting and Disclosure Act of 1959, Pub.L.No.86-257, §504, 73 Stat. 519, 537(codified as amended at 29 U.S.C. §504(2006)).

⁵⁷ *United States v. Brown*, 381 U.S.437(1965).

⁵⁸ *Id.*, at 443.

⁵⁹ *Id.*, at 442.

⁶⁰ *Id.*, at 445.

powers.

(iii) Case Addressing the Bill of Attainder Clause Triggered by the Watergate Scandal

The Federal Supreme Court again considered the Bill of Attainder Clause in *Nixon v. Administrator of General Services* (hereinafter referred to as the Nixon case), a case arising out of the Watergate scandal.⁶¹ Watergate was the first real constitutional crisis in modern American history. As President of the United States, Nixon's actions posed a severe challenge to the constitutional principle of separation of powers. To prevent Nixon from destroying crucial tapes, Congress passed the *Presidential Recordings and Materials Preservation Act* in 1974, which required Nixon to turn over to the General Services Administration (GSA) all tapes and documents related to Watergate and to determining whether the government had abused its power. The act also included specific provisions for public disclosure of many materials.⁶² President Nixon argued that the act was a bill of attainder because it singled him out by name and deprived him of his property based on his supposed misconduct. He took the case to the Supreme Court.

The Court reviewed the history of bills of attainder and concluded that a bill of attainder must have two elements: The act must specifically target individuals or groups, and it must inflict punishment. The Supreme Court further suggested three tests for determining whether a "punishment" has been imposed: the historical test, the functional test, and the motivational test. The "historical" test requires the Court to examine the definition of bills of attainder in the history of both England and the United States. The "functional" test looks to determine if there are non-punitive, regulatory or remedial legislative purposes that are advanced by the new legislative "burdens imposed". Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decision-makers. The "motivational" test inquires into "whether the legislative record evinces a congressional intent to punish. However, after setting forth the three tests, the Supreme Court emphasized that the constitutionality of the act in question should be considered in a comprehensive and balanced manner when applying these criteria, and that an act need not satisfy all three criteria in order to be characterized as a constitutionally prohibited bill of attainder.⁶³

The Supreme Court was undecided as to whether the challenged act satisfied the first element, except to mention that while it specifically mentioned Nixon by name, it also explicitly applied to all his successors, which constituted "a legitimate class of one".⁶⁴ The Supreme Court focused its argument on whether the *Presidential Recordings and Materials Preservation Act*

⁶¹ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

⁶² The agency was later renamed the National Archives. *Presidential Recordings and Materials Preservation Act*, Pub.L.No.93-526, § 101, 88 Stat.1695,1695(1974).

⁶³ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), at 475-476.

⁶⁴ *Id.*, at 472.

satisfied the historical, functional, and motivational tests, and concluded that it did not satisfy any of the three and therefore could not be characterized as imposing punishment.

First, the Supreme Court reviewed bills of attainder in the past, and held that Congress, by lodging the president's materials in the GSA's custody, did not "inflict punishment" within the historical meaning of bills of attainder. Nixon's argument that the recordings and materials were his personal property and therefore the Act constituted a taking of his property was rejected by the Supreme Court on the ground that Section 105 of the Act allowed the court to award him equitable compensation. Second, the Supreme Court held that the Act is "one of nonpunitive legislative policymaking" because Congress emphasized that the placement of the President's materials in the custody of the GSA was in the public interest. Moreover, the Supreme Court noted that Congress did not attack or condemn President Nixon's conduct as punishable, either in the legislative history or in the provisions of the Act. Rather, Congress merely expressed the importance of the Act to the public interest. Therefore, the Supreme Court held that there was no evidence of the Act showing an intent to punish Nixon personally.⁶⁵

In the Nixon case, the Supreme Court systematically articulated a "two-pronged test" for determining what constitutes a bill of attainder: The act must specifically target individuals or groups, and it must inflict punishment. The Supreme Court then proposed a "three-test doctrine" in judging the punishment prong of the test, which examined whether a legislative punishment was constituted from historical, functional, and motivational perspectives. This case had a significant impact on subsequent litigation involving the Bill of Attainder Clause.⁶⁶ To date, nine federal circuits have applied the judgment over the Bill of Attainder Clause handed down in this case, including the Fifth Circuit (the jurisdiction of *Huawei v. United States*) and the District of Columbia Circuit (the Court of Appeals in *Kaspersky v. United States*).⁶⁷

Objectively speaking, the "two-pronged test" and the "three-test doctrine" established by the Supreme Court in this case have effectively limited the laxity of the definition of a bill of attainder, but it is important to emphasize that the particularities of this case should be fully considered. "The Nixon case was part of the Watergate scandal and, together with *United States v. Nixon*,⁶⁸ constituted an important decision in resolving this constitutional crisis. In that particular historical context, there was a dangerous situation in the United States in which the President's abuse of executive power threatened the American constitutional order built on separation of powers. Thus, the Supreme Court's ruling in this case on the Bill of Attainder Clause was not focused on preventing judicial power from being usurped by legislative power, but on constraining the president's abuse of executive power. On this premise, the Supreme

⁶⁵ *Id.*, at 479-81.

⁶⁶ In 1984, the Supreme Court applied the interpretation of the Bill of Attainder Clause established in *Nixon v. Administrator of General Services* in another case, and held that the challenged legislation did not constitute a bill of attainder. The Supreme Court has not heard lawsuits addressing the clause since then. Selective Serv. Sys. Minn. Pub. Interest Research Grp., 468 U.S. 841, 843 (1984).

⁶⁷ See *Elgin v. U.S. Dep't of the Treasury*, 641 F.3d 6, 21 (1st Cir. 2011); *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002); *Garner v. U.S. Dep't of Labor*, 221 F.3d 822, 826 (5th Cir. 2000); *Brookpark Entm't, Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991); *Dehainaut v. Pena*, 32 F.3d 1066, 1070 (7th Cir. 1994); *Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999); *Sea river Mar. Fin. Holdings v. Mineta*, 309 F.3d 662, 668-69 (9th Cir. 2002); *Taylor v. Sebelius*, 189 Fed. Appx. 752, 758 (10th Cir. 2006); *Little v. City of N. Miami*, 805 F.2d 962, 966 (11th Cir. 1986); *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 923 (D.C. Cir. 2013).

⁶⁸ *United States v. Nixon*, 418 U.S. 683 (1974).

Court effectively limited the presidential prerogative through a relatively narrow interpretation of the Bill of Attainder Clause, thereby achieving the restoration of the separation of powers and checks and balances that the U.S. Constitution was designed to ensure.

The Supreme Court's interpretation of the Bill of Attainder Clause in this case was significantly different from its considerations in ordinary lawsuits addressing the clause: The former aims to prevent abuse of executive power, while the latter focuses on preventing judicial power from being usurped by legislative power. Therefore, in this case, the Supreme Court interpreted the clause in a relatively restrictive manner, while in other cases it interpreted it expansively. Of course, behind the two different interpretations is the Supreme Court's consistent legal rationale and self-positioning as the guardian of justice, carefully upholding the American constitutional order underpinned by the separation of powers principle.

IV. Constitutional Functions

The functions of the bill of attainder in the text and implementation of the U.S. Constitution can be seen from its historical basis and the precedent set by related Supreme Court rulings. In a nutshell, the core functions of the Bill are to maintain the separation of powers, to guarantee fairness and justice, and to safeguard private rights.

(i) Maintaining the separation of powers and safeguarding constitutional order

The separation of powers is the cornerstone of the Constitution. It's basically designed to ensure that there will always be checks and balances on the conduct of the three major institutions of the state — the legislature, the executive, and the judiciary. These checks and balances are vested in constitutional clauses.⁶⁹ In the view of those Framers, in the government of a Republic, the exercise of legislative power does not require the participation of executive power and judicial power, so it is necessary to put constraints on it. As James Madison put it, "But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."⁷⁰ Therefore, Article 1, Sections 9 and 10 of the Constitution, which concern legislative power, state: "No Bill of Attainder or ex post facto Law shall be passed", with the intention of preventing the expansion of legislative power and, in particular, its usurpation of judicial power.

⁶⁹ Vesting Clauses are three provisions in the U.S. Constitution, namely the Article I, Section I, Clause 3, the Article II, Section 1 and the Article III, Section 1, which vest the powers in the Congress, the President, and the Federal judiciary of the United States. The Constitution thus explicitly creates a separation of powers among the three branches of the federal government and establishes checks and balances on their conduct.

⁷⁰ [US] Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, translated by Xuan Yin, Yilin Press, 2016, p. 331.

With regard to judicial power, Article 3 of the Constitution limits judicial power to "cases and controversies" within federal capacity, whereby the distinction between judicial and legislative power is defined. First, unlike legislative power, judicial power lies in the application of law to resolve particular controversies. Second, as controversies are defined to have been submitted, the judicial power is confronted with conduct that has occurred and is therefore retroactive.⁷¹ It can be seen that the limit imposed on legislative power by the Bill of Attainder Clause in Article 1 of the Constitution echo the limit imposed on judicial power in Article 3. In other words, legislative power, in contrast to judicial power, should be used to create generally applicable laws, and not to target specific individuals or entities. Furthermore, legislative power is intended to regulate future conduct, and therefore decisions by the legislature are not to be applied retroactively.

In short, Article 3 of the Constitution is intended to prevent the judiciary from eroding the powers conferred on the legislature by Article 1, while the Bill of Attainder Clause is intended to prevent the legislature from encroaching on the power exclusively conferred on the judiciary. As articulated in Article 3, the courts may decide only "cases and controversies", and "cases and controversies" may be decided only by courts. In 1810, Justice Marshall articulated the separate roles of the legislature and judiciary thusly: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments".⁷²

The five precedents in which the Supreme Court ruled that the laws at issue had amounted to a bill of attainder all affirmed that the constitutional function of the Bill of Attainder Clause was to maintain the separation of powers. In the *Nixon* case, in which the Supreme Court held that the law at issue was not a bill of attainder, the court's purpose was still to maintain the balance between the legislative, executive and judicial branches.

(ii) Guaranteeing fairness and justice and protecting private rights

According to John Rawls' *A Theory of Justice*, it is only when decisions are made behind a "veil of ignorance" that those decisions can be unbiased, thereby realizing the ideal of "justice as fairness".⁷³ Therefore, in the process of making laws, only when a legislature is unable to know the specific subjects to be influenced, can they make fair legislative decisions without being impacted by their own values and interest. Prohibiting bills of attainder can prevent the legislature from targeting specific subjects, and guide them to instead make general rules. When legislators are unaware of whom the legislation will impact, this has the effect of making them more concerned about the potential influence of that legislation, and will help them to make fair decisions and avoid being swayed by their own biases and vested interests.⁷⁴

⁷¹ See Arnold, *The Symbols of Government* 178 (1935).

⁷² *Fletcher v. Peck*

⁷³ John Rawls, *A Theory of Justice*, translated by He Huaihong, He Baogang and Liao Shenbai. China Social Science Press, 1988, 12

⁷⁴ Akhil Reed Amar, "Attainder and Amendment 2: Romer's Rightness", 95 *Michigan Law Review*, 203 (1996), p.210.

In addition, in terms of the exercise of legislative and judicial power, the prohibition of bills of attainder as an instrument of trial by legislature is a pre-condition for protecting the right of due process. Under the U.S. Constitution, the judicial system applies general legal rules to specific individuals. In this process, the exercise of judicial power is restricted by many constitutional procedures, such as Article 3 of the Constitution, the due process clauses in the Fifth and Fourteenth Amendments, and the procedural guarantees of criminal proceedings provided by the Sixth Amendment. In addition, the right to defend oneself at trial and the requirement that the criminal prosecution provides proof "beyond a reasonable doubt" also contain the exercise of judicial power, especially to ensure the fairness and justice of the conviction procedure.⁷⁵ Unlike the exercise of judicial power, the exercise of legislative power is significantly less procedurally constrained. Under the U.S. Constitution, the legislative process begins with a motion, followed by debate by Congress, after which it is put to a vote. However, individuals who may be affected by the legislation do not have the opportunity to participate or the statutory right to be heard at any point in this process. Moreover, congressional decisions are not made in the same way as a litigation outcome is reached; they just need to be "reasonable".⁷⁶

The Constitution assumes that legislators are behind a "veil of ignorance" and can be intrinsically trusted, and for this reason, it puts fewer procedural restrictions on the exercise of legislative power than it puts on the exercise of judicial power. However, when Congress singles out and punishes specific entities, as is the case when a bill of attainder is passed, the "veil of ignorance" is lifted. In this case, if the exercise of legislative power is still placed outside the procedural restrictions and the standards of proof that contain judicial power, then the functional design and procedural implementations of legislative and judicial power may be mismatched.

Bills of attainder not only allow the legislature to circumvent procedural restrictions posed by the U.S. Constitution and other laws, they also reduce the standard of proof from being "beyond a reasonable doubt" to being "reasonable", and this jeopardizes the working mechanism of the U.S. Constitution: Congress can use bills of attainder to explicitly modify the legislative path and secretly modify the judicial system, so as to exercise both legislative and judicial power. This was the Framers' biggest concern.

Finally, in terms of the entities exercising legislative and judicial power, the Bill of Attainder Clause is essential to preventing the abuse of power by legislators to achieve their political goals, and is of special significance to the protection of private rights. Under the U.S. Constitution, motions are proposed by individuals and then the Congress votes on whether to pass legislation, but Congress members may be influenced by the interests of their political parties, their personal likes and dislikes, their values, and political motivations. In most cases, legislators' personal positions on a legislative proposal have been formed before the proposal is debated by Congress. After voting on a bill, individual members of Congress are not liable for the subsequent impact of the legislation.

⁷⁵ Notes and Comments, "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause", 72 Yale Law Journal, 330 (1962), p.349.

⁷⁶ Notes and Comments, "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause", 72 Yale Law Journal, 330 (1962), p.349.

In contrast, in the American judicial system, a justice's decision can set a precedent, and therefore, justices exercise their power more cautiously. In addition, the preemptory challenge used in jury selection will reject any persons whose interests or bias are related to the case, so trials may proceed without being impacted by personal interests and prejudices. It was out of such considerations that the Framers believed that politically independent judges and jurors were better placed than members of Congress to assume the responsibility of determining the guilt of a particular individual and, if necessary, to impose punishment.⁷⁷ In response, Thomas M. Cooley, an American jurist, pointed out: "Every one must concede that a legislative body, from its numbers and organizations, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited; the very class of cases most likely to be prosecuted by this mode."⁷⁸

V. Logic of Judicial Reasoning in *Huawei v. United States* and its assessment

The Trump administration labeled China a major "strategic competitor" of the United States, asserting that China was challenging the international status and national interests of the U.S. in areas such as international security and the economy⁷⁹. Since then, PRC-US relations have fallen to their lowest point since their establishment of diplomatic relations. It was against this background that the US Congress drafted Section 889 of the NDAA. Combining the previous analysis of the history, precedents and constitutional functions of the Bill of Attainder Clause, analyzing and evaluating the outcome of the *Huawei v. United States* case is of great significance to the study of the latest developments in how the Bill of Attainder Clause in the U.S. Constitution is interpreted. It is also valuable to examine the hidden role of the judiciary in maintaining U.S. foreign policies, and to identify trends in how the Constitution is interpreted.

(i) Logical of Judicial reasoning

As Texas is in the jurisdiction of the Fifth Circuit, and that court has adopted the standard for the bill of attainder established in the *Nixon* case,⁸⁰ the District Court for the Eastern District of Texas, which heard the *Huawei v. United States* case, pointed out that to decide whether the Section 889 of the NDAA is a bill of attainder is to be determined by applying the "two-pronged test". As Section 889 had obviously violated the generality requirement by singling out Huawei,

⁷⁷ John J. Cavaliere II, "The Bill of Attainder Clauses: Protections from the Past in the Modern Administrative State", *Ave Maria Law Review* 12, no. 1 (Winter 2014):149-172, p.153.

⁷⁸ Thomas M. Cooley, *Constitutional Limitations*, Little, Brown & Co., 1890, p.314.

⁷⁹ White House, *National Security Strategy of the United States of America*, December 2017, <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>, p2, 2019-06-07.

⁸⁰ See *SBC Commc'ns, Inc. v.FCC*, 154 F.3d 226, 233 (5th Cir. 1998).

the district court focused on the question of whether the challenged legislation was being used to punish Huawei. The court is also examining the history, function, and motivation behind the NDAA, in accordance with the "three-test doctrine".

From a historical perspective, Huawei believes Section 889 has punished the company in the following three ways: (1) Section 889 of the NDAA portrays Huawei as disloyal to the United States, and this has damaged its reputation. This is similar to the *Cummings v. Missouri* case. (2) It prohibits U.S. government agencies from purchasing equipment and services from Huawei, and from entering into contracts with, or providing financing and loans to, third parties that purchase Huawei equipment or services, even if these transactions do not affect or are not related to the U.S. government. Such prohibitions are industry bans that prevent Huawei from serving the U.S. government and also from engaging in the industry of its choice. Similar conditions can be found in the cases of *Ex parte Garland* and *United States v. Lovett*. (3) Section 889 purports to expel Huawei from the United States for its "past wrongdoing". From a historical perspective, this is an act of deportation.

All of Huawei's claims have been rejected by the district court, for the following reasons: First, Section 889 of the NDAA shows that the federal government's decision to prohibit the use of its funds to purchase Huawei's equipment and services, despite the potential cost to Huawei, does not satisfy the historical meaning of punishment. Second, Section 889 does not constitute an industry ban on Huawei because it only prohibits U.S. federal government agencies from purchasing its equipment and services. Huawei describes itself as "a global leader in communications technology and services" and other potential customers around the world are free to purchase Huawei products. Perhaps entities associated with the federal government will be affected by Section 889 and will avoid purchasing Huawei products and services, but this indirect effect does not constitute an industry ban. To say the least, even if such indirect effects were to be considered, Section 889 of NDAA would not prohibit Huawei from engaging in the industry of its choice, because Huawei could still do business with other U.S. companies and individuals, and its business in 169 other countries and regions of the world would not be affected. Third, Section 889 does not fall within the historical meaning of "deportation". Deportation has traditionally been associated with the denial of civil rights, not merely the restriction of a person's free decision of where to go or where to stay, and it often destroys a person's social, cultural and political existence.⁸¹ Section 889 of the NDAA does not deny Huawei's civil rights, nor does it permanently bar Huawei from doing business in the United States. Thus, the district court found that the historical implications of deportation were not satisfied.

From the perspective of function, Huawei believes that the legislation in question does not have a clear legislative purpose. According to the *Nixon* standards, it should be regarded as punitive legislation against Huawei. As noted above, in the *Nixon* case, the Supreme Court held that "where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the

⁸¹ *Sea River Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 673 (9th Cir. 2002).

decisionmakers."⁸²

Instead of accepting Huawei's view, the district court upheld the U.S. government's claim that although the legislation in question did not clearly state its legislative purposes, it did in fact have two main purposes: first, enhancing national information security by protecting federal agencies from cyber threats posed by China and, second, ensuring that federal taxes are not used to build up or enhance Chinese cyber threats to the United States. The court also cited *Kaspersky v. United States*, holding that the purposes of both laws were legitimate, and that the applicability of Section 889 of the NDAA was clear, limited, and appropriate, and not permanent.

In terms of motivation, Huawei has argued that when the bill was debated, several lawmakers indicated the punitive intent of the legislation, such as, Senator Tom Cotton, who said that "the only fitting punishment would be to give them the death penalty; that is, to put them out of business in the United States", and Senator Marco Rubio, who called Huawei a "Trojan horse" that "shouldn't be in business in the United States in any capacity."⁸³ Thus, Congress, by passing the NDAA, displayed its intent to punish Huawei.

The district court disagreed, citing the Second Circuit's position in *ACORN v. United States*,⁸⁴ holding that the statements of a few lawmakers do not represent the legislative intent of Congress as a whole. At the same time, Section 889 of the NDAA does not completely prohibit Huawei from doing business in the U.S., so the argument made by Huawei does not constitute a "smoking gun" for proving that Congress has the intent to punish it.⁸⁵

Therefore, the court rejected Huawei's claims, stating that "[B]ecause Section 889 passes muster on the historical test, the functional test, and the motivational test, the Court finds that Huawei has failed to meet its burden to show that Section 889 is an unconstitutional bill of attainder".⁸⁶

The logic behind the district court's decision in this case can be summed up as follows:

First, in principle, it largely followed the "two-pronged test" established in the *Nixon* case.

Second, it obviously focused on the second prong, that is, whether Section 889 of the NDAA imposes penalties on Huawei, and 35 pages are devoted to elaborating on this question.

Third, in determining whether it constitutes punishment, it provides a restrictive interpretation of the "three-test doctrine" first articulated in the *Nixon* case, cites the precedents of other circuit and federal district courts, and has rejected Huawei's claims in their entirety. It held that Section 889 of the NDAA does not constitute punishment and therefore is not a bill of attainder.

⁸²*Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), at 475-476.

⁸³ Complaint, *Huawei Techs. USA, Inc. v. United States*, No. 4:19-cv-00159 (E.D. Tex. filed Mar. 6, 2019), pp.48-51.

⁸⁴ *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010), at 141.

⁸⁵ Memorandum Opinion and Order, *Huawei Technologies USA, Inc. et al v. United States of America, et al*, No. 4:19-cv159-ALM (E.D. Tex., Feb. 18, 2020), pp.16-51.

⁸⁶ *Id.*, at 51.

(ii) Assessment of the Decision

In the case of *Huawei v. United States*, Huawei did not appeal the decision of the district court, and the case came to an end. Judging from the decision, the district court appears to have completely followed the "two-pronged test" and the "three-test doctrine" established in the *Nixon* case. It seems to conform to the common law tradition of following precedents, and thus has received support of some American scholars.⁸⁷ However, based on the above study of the Bill of Attainder Clause, it is submitted that there are significant flaws in the logic and reasoning of the decision in this case.

First, as mentioned above, the Bill of Attainder Clause plays an important role in the Constitution of the United States — the role of upholding the principle of separation of powers to defend the constitutional order, and protecting fairness and justice to ensure the rights of individuals. Therefore, the Supreme Court has repeatedly rejected the idea of interpreting the Bill of Attainder Clause in a narrow sense, emphasizing that the Constitution's Bill of Attainder Clause is not intended to impose narrow technical restrictions, but to ensure the implementation of separation of powers.⁸⁸ Regarding the circumvention of the Bill of Attainder Clause for any reason, the Supreme Court was concerned that "if the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."⁸⁹ Thus, the principle of strict restrictive interpretation is contrary to the intention of the Framers of the U.S. Constitution when they included the Bill of Attainder Clause in the Constitution, and to the principle of interpretation emphasized by the United States Supreme Court.

It should also be noted that, as mentioned earlier, although the "two-pronged test" and the "three-test doctrine" established by the Supreme Court in the *Nixon* case objectively restricted the loose definition of the Bill of Attainder Clause, the particularity of the *Nixon* case should be fully considered. That is, the Supreme Court's finding about the Bill of Attainder Clause focused on preventing the president from abusing executive power, which is fundamentally different from the general focus of the Bill of Attainder Clause, including in *Huawei v. United States*, which is preventing the legislative body from usurping judicial power. Therefore, even if the criteria and methods for defining the bill of attainder in the *Nixon* case can be followed, its particularity must also be considered.

However, in *Huawei v. United States*, the district court not only completely failed to consider the particularity of the *Nixon* case, it also applied and interpreted the "three-test doctrine" more strictly, and even notably deviated from the Supreme Court's position in the *Nixon* case in some respects. Specifically, from the historical perspective, *United States v. Lovett*

⁸⁷ See e.g., Alina Veneziano, "The Relationship between the Bill of Attainder Clause, the Use of Sanctions as a Regulatory Tool for Foreign Trade, and Corporate Personhood," *Journal of Legislation* 46, no. 2 (2019): 276-302; Alina Veneziano, "What is the Huawei Case Really About? Sanctions to Regulate Technology?" *Journal of International & Comparative Law; Harrison A. Newman, "Corporations under the Bill of Attainder Clause,"* *Duke Law Journal* 69, no. 4 (January 2020): 923-958.

⁸⁸ *United States v. Brown*, 381 U.S.437(1965), at 445.

⁸⁹ *Cummings v. Missouri*, 71 U.S. 277 (1866) , at 325.

shows that prohibiting certain targets from contracting with government agencies through legislation is a bill of attainder. *United States v. Brown* shows that stigmatizing a particular target and seriously affecting its chances of earning a living is also a bill of attainder.⁹⁰ The district court holds that because Huawei is a corporation and it is different from an individual by nature, its constitutional rights are questionable.⁹¹ This view is clearly inconsistent with common jurisprudence and case law. In fact, even American academics who supported the court decision against Huawei are critical of this position.⁹² From the perspective of function, since the legislation in question does not contain a legislative purpose, and according to the Supreme Court's position in the *Nixon* case, it should be concluded that the legislation has a punitive purpose. The district court, however, departed entirely from this position and fully adopted the U.S. government's argument on the legislative purpose. From the perspective of motivation, the Supreme Court has repeatedly emphasized that the definition of punishment is broad and can be embodied by many different forms of legislation.⁹³ In this case, the purpose of the legislation is, undoubtedly, to punish Huawei. This is amply demonstrated by the statements of lawmakers during the legislative debate and the content of the joint letter from dozens of U.S. senators to the UK and other allies after the law was enacted, pressuring them to ban Huawei equipment.⁹⁴

Thus, the district court's conclusion that Section 889 of the NDAA does not pass any of the three tests is unreasonable and manifestly unfair. To say the least, even in the *Nixon* case, the Supreme Court emphasized that courts should consider the constitutionality of laws in a balanced way when applying these standards, and the law that is challenged does not need to pass all three tests in order to be regarded as a bill of attainder, and therefore prohibited by the Constitution.⁹⁵

In addition, the district court's reasoning logic in the decision was clearly flawed. In arguing whether Section 889 of the NDAA constitutes punishment, the local court cited as precedents the rulings of other circuit and district courts, such as *ACORN v. United States* or *Kaspersky v. United States*, while avoided mentioning the more relevant cases from the Supreme Court, such as *Cummings v. Missouri* or *United States v. Brown*. The rationality of such selective citation of precedents is questionable.

Thus, the district court's definition of the bill of attainder is contrary to its original meaning in both the U.S. Constitution and in the case law, and the reasoning logic of its decision is also obviously flawed.

⁹⁰ See M. Jackson Nichols; Jackson S. Nichols; Matthew Buckner, "Bill of Attainder: Old Wine in New Bottles," *North Carolina Central Law Review* 36, no. 2 (2014): 278-294, p.288; Alina Veneziano, "The Relationship between the Bill of Attainder Clause, the Use of Sanctions as a Regulatory Tool for Foreign Trade, and Corporate Personhood," *Journal of Legislation* 46, no. 2 (2019): p.289.

⁹¹ Memorandum Opinion and Order, *Huawei Technologies USA, Inc. et al v. United States of America, et al*, No. 4:19-cv159-ALM (E.D. Tex., Feb. 18, 2020), p.19.

⁹² Harrison A. Newman, "Corporations under the Bill of Attainder Clause," *Duke Law Journal* 69, no. 4 (January 2020): 923-958.

⁹³ Andrew Kim, "Falling from the Legislative Grace: The Acorn Defunding and the Proposed Restraint of Congress' Appropriations Power through the Bill of Attainder Clause," *American University Law Review* 60, no. 3 (February 2011): 643-690, p.652.

⁹⁴ Reuters Staff, U.S. senators want Britain to reconsider using Huawei equipment, <https://www.reuters.com/article/us-usa-security-huawei-tech-idUSKBN20R00R>; Jenny Leonard, U.S. Senators Push Investment Scrutiny of Allies Using Huawei, <https://www.bloomberg.com/news/articles/2020-03-04/u-s-senators-push-investment-scrutiny-of-allies-using-huawei>.

⁹⁵ *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), at 475-476.

Conclusion

History shows that, both in England and in the United States, bills of attainder are most often issued in "unusual times". As Joseph Story says, those are the times when the people involved are most likely to forget their obligations and trample on the rights and freedoms of others. It is because of this concern that the Framers of the U.S. Constitution included the Bill of Attainder Clause, in order to prevent the legislative body from usurping judicial power. In short, the Framers aim to prevent trial by legislature.

Since the implementation of the U.S. Constitution, the separation of powers and checks and balances carefully designed by the Framers have been generally maintained. Courts have played an important role by providing "judicial protection" to the Bill of Attainder Clause. Even during the post-Civil War Reconstruction era and during the Cold War when the U.S. and the Soviet Union competed for hegemony, the Supreme Court faithfully interpreted the Constitution's Bill of Attainder Clause and time and time again succeeded in preventing the evil that had concerned the Framers. As the Supreme Court emphasized, when interpreting the Bill of Attainder Clause, one must keep in mind the evil that the Framers wanted to prevent: legislative penalties, whatever their form or severity, levelled against specified persons or groups.⁹⁶

However, judging from the ruling of *Huawei v. United States*, the district court, for its part, has played a much weaker role in providing judicial protection against bills of attainder. Indications may be found in the role American judicial organs have taken in safeguarding national foreign interests. The U.S. Constitution details the separation of legislative, executive and judicial powers and checks and balances in the domestic power system, which are the essence of American political structure and power allocation. However, it seems there are no such checks and balances between the U.S. legislative, executive and judicial organs when it comes to issues related to safeguarding American foreign interests. On the contrary, the different branches of government have gradually come to rely on and support each other to a certain extent to safeguard the national interests of America.⁹⁷ However, it should be emphasized that it is really worth asking repeatedly whether it is in the national interests of the U.S. to use state power to suppress Huawei, and what practical and potential damage to the U.S. constitutional order will result from weakening the Bill of Attainder Clause and providing a constitutional green light to the Huawei attack.

Moreover, if the logic and method of interpreting the Bill of Attainder Clause adopted in this case are endorsed by more American courts, especially higher-level federal courts, the constitutional order carefully designed by the Framers will be jeopardized. In particular, the constitutional functions of the Bill of Attainder Clause, namely, preventing trial by legislature and safeguarding the separation of powers and rights of individuals, will be weakened. Therefore, even American scholars who predicted Huawei's defeat have to admit that the outcome of *Huawei v. United States* may be employed as a litmus test for the U.S.' rule of law

⁹⁶ United States v. Brown, 381 U.S.437(1965), at 447.

⁹⁷ See Huo Zhengxin, Extraterritorial Effect of Domestic Laws: Deconstruction of the U.S. Mechanism and Theories, *Tribune of Political Science and Law*, No. 2, 2020, at 185.

when it comes to dealing with China.⁹⁸

In the 1960s, McCarthyism was at its peak, and there was a trend of carrying out legislative punishment against the Communist Party. In the face of that situation, *Yale Law Journal* published a commentary systematically discussing the importance of the Bill of Attainder Clause to the constitutional order of the U.S., and comprehensively describing the harm of weakening and restrictively interpreting this clause. The article ends by saying that "yesterday it was the Prince of Wales⁹⁹, and today it is the Communists...We live in an age of anxiety. But so did the Framers of our Constitution. We would do well to heed their warning that, in calm and anxious ages alike..."¹⁰⁰ With this in mind, this article will conclude by revisiting Alexander Hamilton's admonition:¹⁰¹

“As I understand, a limited constitution is a constitution that sets out specific exceptions to the legislative power of Parliament. For example, Parliament shall not pass bills of attainder or ex post facto laws. In practice, court is the only body that can help maintain these restrictions. The responsibility of a court is to invalidate all legislation contrary to the declared intent of the Constitution. Without this function of the courts, the specific rights and privileges reserved for citizens by the Constitution would become a dead letter.”

⁹⁸ Noah Feldman, Huawei's Lawsuit Against U.S. Won't Win in Court, <https://www.bloomberg.com/opinion/articles/2019-03-12/huawei-technologies-v-u-s-constitutional-argument-won-t-work>

⁹⁹ The Parliament of England passed a bill of attainder targeting the Prince of Wales in 1701. Act for the Attender pf the Pretended Princes of Wales of High Treason, 13 Will.3, c. 3 (pub.) 1701.

¹⁰⁰ Notes and Comments, "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause", 72 *Yale Law Journal*, 330 (1962), p.367. Authors are not named according to the tradition of *Yale Law Journal*.

¹⁰¹ [U.S.] Alexander Hamilton, James Madison and John Jay, *The Federalist: A Collection of Essays, Written in Favour of the New Constitution*, translated by Yin Xuan, Yilin Press, 2016, at 529.