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Sanctions Legislation and the Bill of Attainder Clause

Article I, Section 9, of the Constitution prohibits Congress from enacting bills of attainder. The Supreme Court has described a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977).

How might this constitutional provision relate to sanctions legislation? In such legislation, Congress may identify specific individuals, entities, or discrete groups who would be subject to sanctions—particularly foreign nationals—and may authorize the executive branch to take action with respect to those entities or their assets. Sanctions may include restrictions on exports or imports, investments, foreign assistance, travel, diplomatic relations, or access to assets held in the United States or to the U.S. financial system. Bill of attainder analysis depends heavily on the facts in each case, and there is limited legal authority specific to bill of attainder review of sanctions. However, there are several reasons why courts may be unlikely to strike down sanctions legislation as a bill of attainder.

Covered Government Actions

First, it is not clear that the Bill of Attainder Clause applies to the imposition of sanctions by the President or an executive agency, or to legislation authorizing the executive branch to impose sanctions.

The Supreme Court has not considered whether the Bill of Attainder Clause applies to sanctions. However, multiple federal appeals courts have held that the Clause does not apply to executive agency action. In one case, the U.S. Court of Appeals for the Fifth Circuit rejected a bill of attainder challenge to the Office of Foreign Assets Control’s decision to place an individual on a list of Specially Designated Nationals pursuant to the Libyan Sanctions Regulations. The Fifth Circuit denied the challenge in part because “[n]o circuit court has yet held that the bill of attainder clause ... applies to regulations promulgated by an executive agency.” *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999).

To the extent sanctions legislation allows for discretionary implementation by the executive branch, courts may hold that the Bill of Attainder Clause does not apply because the Executive, not Congress, makes the final determination. Some sanctions legislation instead seeks to *require* the President to impose sanctions. Some Presidents have raised separation of powers concerns about those measures and asserted discretion to implement sanctions legislation, even when such legislation purported to require them to act. Legislation that seeks to compel the Executive to sanction

specific entities appears more susceptible to challenge on both bill of attainder and separation of powers grounds.

Scope of Protection

Second, it is possible that a court would find that the Bill of Attainder Clause does not protect the entities subject to sanctions legislation, or provides only limited protection.

Sanctions legislation sometimes targets corporations rather than (or in addition to) individuals. The Supreme Court has not decided whether the Bill of Attainder Clause applies to corporations. The appeals courts that have considered the issue have either held that the Clause applies to corporations, *e.g.*, *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002), or assumed that it does, *e.g.*, *Kaspersky Lab, Inc. v. U.S. Dept. of Homeland Sec.*, 909 F.3d 446, 543-54 (D.C. Cir. 2018). However, some decisions have suggested that the Clause may apply with less force to protect corporations as compared to individuals, *e.g.*, *Kaspersky Lab*, 909 F.3d at 461-62.

More fundamentally, as the Fifth Circuit has noted, it is “not clear whether ... a foreign national residing outside the U.S.” can bring a Bill of Attainder claim. *Paradissiotis*, 171 F.3d at 988. The Supreme Court has not considered that question. In other contexts, however, the Court has held that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Bill of Attainder Analysis

Third, assuming the Bill of Attainder Clause generally applies and protects the entities subject to sanctions, a court considering a constitutional challenge to sanctions legislation would still need to determine whether the specific law at issue was a bill of attainder. The Supreme Court has held that legislation constitutes a bill of attainder if it both (1) applies with specificity and (2) imposes punishment without trial. *Nixon*, 433 U.S. at 468-69. A bill imposing sanctions on a named individual, group, or corporation would likely satisfy the specificity requirement. However, specificity standing alone is never sufficient to support a finding that a law is a bill of attainder. If a law applies with specificity but does not impose punishment, courts will not strike it down as a bill of attainder.

The determination whether a law imposes punishment is complex and fact-based. In *Nixon*, the Supreme Court laid out three tests for assessing whether a law imposes punishment: (1) historical, (2) functional, and (3) motivational. Federal appeals courts have stated that none of the three tests is decisive, and not all three tests need to be satisfied for a law to be punitive.

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Historical Test

The historical test deems a statute to be punitive if it is one of a limited set of legislative actions that were held to be bills of attainder from before the Founding through the mid-20th century. At English common law, a bill of attainder was legislation imposing the death penalty without a judicial trial. That definition later expanded to include “bills of pains and penalties” that imposed other forms of criminal punishment without trial, including banishment, imprisonment, or confiscation of property. In the 19th and 20th centuries, American courts further expanded the category to include employment bans that prevented specific individuals or members of discrete groups from holding certain jobs. *E.g.*, *Cummings v. Missouri*, 71 U.S. 277 (1866); *United States v. Lovett*, 328 U.S. 303 (1946).

Recent decisions of the federal appeals courts have applied the historical test narrowly. For example, in one case, a Russia-based cybersecurity company brought a bill of attainder challenge to a statute that barred the U.S. government from using any of the company’s products or services. The D.C. Circuit rejected the challenge, holding that the ban on federal contracting with the company was not analogous to prior cases involving individual employment bans. *Kaspersky Lab*, 909 F.3d at 460-63.

Perhaps the best-known form of sanctions is freezing the assets of designated entities. A targeted person might argue that this is similar to historical property confiscation. However, asset freezing is a temporary measure, and targeted persons may have some use of frozen assets. It thus appears likely that courts would distinguish asset freezing from historical bills of attainder, which permanently confiscated the property of targeted persons and often prevented property from passing to their heirs.

Challengers might also argue some sanctions are similar to banishment or employment bans. However, courts would likely distinguish measures preventing a foreign national from traveling to the United States from historical actions expelling targeted persons from their home country. Likewise, under *Kaspersky Lab* and similar precedents, it appears unlikely that federal courts would deem sanctions legislation equivalent to historical employment bans.

Functional Test

The functional test is generally the most important of the three tests for punishment. This test considers “whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.” *Nixon*, 433 U.S. at 475-76. The functional test serves to prevent formalistic evasion of the Bill of Attainder Clause, recognizing that there may be measures that were not historically recognized as punishments that are nonetheless impermissibly punitive.

If a legitimate, nonpunitive legislative purpose exists and a challenged law reasonably serves that purpose, courts generally find that the law is not punitive. For instance, the D.C. Circuit held that a statute prohibiting the U.S. government from using products or services from a Russia-based cybersecurity company served a nonpunitive interest

in promoting “the security of the federal government’s information systems.” *Kaspersky Lab*, 909 F.3d at 457.

Judicial examination of whether a bill reasonably furthers a particular purpose is necessarily fact-based and could include consideration of both a bill’s text and its legislative history. Sanctions legislation may either seek to respond to past conduct deemed harmful to U.S. foreign policy or national security interests, to halt ongoing conduct, or to prevent it in the future. To the extent sanctions legislation serves only to punish past actions, courts are more likely to find it to be punitive. To the extent a law reasonably serves a forward-looking purpose, such as limiting resources that may be used to support future unlawful activity, deterring traffic in illegal drugs or other contraband, or otherwise protecting national security, courts may be more likely to deem it nonpunitive.

Motivational Test

The third and final test for punishment considers whether the legislature that enacted a challenged law was motivated by an intent to punish the targeted entities. Courts applying this test examine the bill’s text and legislative history to determine whether lawmakers expressed punitive intent. If the historical and functional tests are not satisfied, the motivational test standing alone does not compel a finding that a law is punitive unless the reviewing court finds “unmistakable evidence of punitive intent.” *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 855 n.15 (1984). Moreover, isolated statements by a few lawmakers generally do not suffice to show a general legislative intent to punish.

Application of the motivational test is necessarily fact-specific. However, lawmakers can mitigate possible concerns in this area by avoiding statements of punitive intent in legislation or during legislative debate.

Conclusion

As a general matter, review of whether legislation is punitive for purposes of the Bill of Attainder Clause is deferential, and federal courts rarely strike down laws as bills of attainder.

It is also possible that courts would be particularly hesitant to invoke the Clause in the context of sanctions. Historically, the Supreme Court has held that the conduct of foreign relations is a political question that the Constitution entrusts to Congress and the Executive, “and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). In more recent cases, the Court has shown greater willingness to consider issues related to foreign relations, *e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189 (2012). Still, in this context, a reviewing court might afford particular deference to the political branches’ decisions.

Ultimately, bill of attainder analysis is highly fact-dependent. Moreover, sanctions legislation may raise other legal issues on a case-by-case basis. Congressional clients considering specific legislative proposals are encouraged to contact CRS for additional information.

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