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How Supreme Court Precedent Sheds Light on Corporate Bill of Attainder Claims

By: Alina Veneziano, LL.M.; JD*

I. INTRODUCTION

The propriety of big-tech corporations to receive constitutional rights to the same extent as a natural person is heavily debated. This topic has become especially apparent in light of the *Huawei* case, where Huawei Technologies sued the United States claiming that its ban on Huawei products was unconstitutional¹ because it violated the U.S. Bill of Attainder Clause. The Bill of Attainder Clause prohibits the legislature from passing a law that declares an individual or group of individuals guilty of a crime without a judicial trial.² In response, the U.S. government claimed that Huawei products posed a national security risk to the intelligence of U.S. systems, which was precisely the reason it banned Huawei products in the 2019 National Defense Authorization Act.³

To better understand how and under what circumstances the Bill of Attainder Clause applies to a corporate entity, an examination of how the Supreme Court has extended other constitutional guarantees to corporations is warranted. The Supreme Court has extended certain constitutional

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¹ Complaint, *Huawei Tech. Co., Ltd. v. United States*, 440 F. Supp.3d 607 (E.D. Tex. 2019) (No. 4-19-cv-00159).

² U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law will be passed.”).

³ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636 (2018).

guarantees to corporations such as the criminal jury trial guarantee. In some cases, the Court has declined to extend other guarantees including the right against self-incrimination. However, issues regarding Bill of Attainder claims' applicability to corporations have yet to come before the Court. The reason for the Court's decision that some constitutional guarantees are inapplicable to corporations is because those guarantees are considered individual and personal rights, and therefore cannot be asserted by corporations.

This brief article urges that corporate Bill of Attainder claims cannot be applicable to corporations because such claims are not personal rights and cannot be relied upon by corporate entities. Part II outlines which constitutional rights are applicable to corporations, which are not, and which are undecided. Part III analogizes the approach the Supreme Court has used for other constitutional guarantees for corporations and applies it to the Bill of Attainder Clause. Part IV presents the conclusion.

II. THE SUPREME COURT'S ANALYSIS REGARDING CORPORATE EXTENSIONS OF CONSTITUTIONAL GUARANTEES

The Judicial Branch has experienced difficulty deciding corporate Bill of Attainder claims due to the artificial nature of the corporation.⁴ Nevertheless, this difficult task rests solely with the Judiciary.⁵ Here, the Court has adopted an approach of *selective incorporation* regarding the extension of constitutional guarantees to the corporate entity. Examples of constitutional provisions that the Court has extended to the corporation include the Contract Clause,⁶ the Takings Clause,⁷ the Sixth Amendment

⁴ See Charles O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1348 (1979).

⁵ See *id.*

⁶ See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

⁷ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

criminal jury trial guarantee,⁸ the Fourth Amendment freedom from unreasonable searches and seizures,⁹ the Fifth¹⁰ and Fourteenth¹¹ Amendment Due Process Clauses, the Fourteenth Amendment Equal Protection Clause,¹² the Fifth Amendment protection against double jeopardy,¹³ and the First Amendment rights to religious freedoms¹⁴ and free speech.¹⁵ Certain constitutional guarantees that the Court has held to be inapplicable to the corporation include the Privileges and Immunities Clause in Article IV¹⁶ and the Fifth Amendment right against self-incrimination.¹⁷ The Supreme Court has not directly ruled on the right to grand jury indictment for corporations, but lower courts have held that this guarantee is not applicable to them.¹⁸ Similarly, the Supreme Court has never decided whether the Eighth Amendment applies to corporations and has refused to do so where the outcome of the case did not turn on such a determination.¹⁹

⁸ See *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); see also *Muniz v. Hoffman*, 422 U.S. 454 (1975).

⁹ See generally *Hale v. Henkel*, 201 U.S. 43 (1906); see also *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

¹⁰ See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); see also *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893).

¹¹ See *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26 (1889).

¹² See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); see also *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

¹³ See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977).

¹⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹⁵ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

¹⁶ See *Bank of Augusta v. Earle*, 38 U.S. 519 (1839); see also *Paul v. Virginia*, 75 U.S. 168 (1868).

¹⁷ See *Braswell v. United States*, 487 U.S. 99 (1988); see also *Hale v. Henkel*, 201 U.S. 43, 75 (1906); *Wilson v. United States*, 221 U.S. 361 (1911).

¹⁸ *United States v. Macklin*, 389 F.Supp. 272, 273 (S.D.N.Y. 1975) (“The corporate defendants . . . are not subject to any term of imprisonment if convicted of the charges against them. Accordingly, the charges against them are not ‘infamous’ within the meaning of the fifth amendment.”).

¹⁹ *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (“We shall not decide whether the Eighth Amendment’s prohibition on excessive fines

When analyzing when, why, and under what circumstances a specific constitutional guarantee ought to extend to the corporate entity, the Court separates the purpose of each constitutional provision. It then analyzes the propriety of corporate extension of that provision.

For instance, the Court in *Dartmouth College* held that the Contracts Clause applies to corporations. In so holding, Chief Justice Marshall noted that the corporate entity is “an artificial being, invisible, intangible, and existing only in contemplation of law.”²⁰ It possesses only those rights in the charter conferred upon it by the state, and even though the corporate entity is immortal, it possesses no more political power or no more of a political character than would a natural person.²¹ Among some of these powers that effectuate the purpose of the Contracts Clause include the ability to “manage [the corporation’s] own affairs, and to hold property.”²² On this point, commentaries have observed that the Contracts Clause promotes “voluntary private relations,” and because corporations have purposes that are means to ends—some of which involve private contracting—it would be illogical to deny corporations the power conferred via their charters to achieve those ends by refusing to extend the guarantees of the Contracts Clause.²³ In other words, the purpose of the Contracts Clause is not an individualistic one. Confining its protections only to natural persons would not serve to effectuate its purpose to ensure voluntary private relationships and contracting.

Where there is no reason why the constitutional guarantee at issue needs to be limited to natural persons to effectuate the guarantee’s purpose, that guarantee should also be applicable to corporations. Similarly, there was no

applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals.”).

²⁰ See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

²¹ *Id.*

²² *Id.*

²³ William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1504–05 (1989).

distinction drawn as to why the Fourth Amendment guarantee against unreasonable searches and seizures should be different for individuals compared to corporations. The Court in *Marshall v. Barlow's Inc.* noted that “the Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes” and that to hold otherwise, “would belie the origin of that Amendment, and the American colonial experience.”²⁴ At times, the Supreme Court did not even entertain arguments on whether there should be a distinction between individuals and corporations regarding some constitutional guarantees. In *Santa Clara County*, for example, the Court noted that it did not want to hear arguments on whether the Equal Protection Clause of the Fourteenth Amendment applies to corporations since “[w]e are all of opinion that it does.”²⁵ Similarly, the purpose of the First Amendment’s freedom of speech is to promote the spread of ideas and protected speech without fear of punishment. In *Citizens United*, the Court asserted that “[c]orporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”²⁶ The speaker of the communication is irrelevant when considering the protections provided by the First Amendment’s freedom of speech clause.

A similar approach can be observed with respect to rights that the Supreme Court has refused to extend or to acknowledge as applicable to corporations. For example, the purpose of the Privileges and Immunities Clause in Article IV is to guarantee citizens the same rights and protections under the law no matter where they are in the United States. In *Bank of Augusta v. Earle*, the Court observed how corporate extension here would not serve this purpose. “[C]orporations are neither persons nor partners, but

²⁴ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978).

²⁵ *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

²⁶ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

artificial bodies politic, created by act of state”²⁷ The Court continued by stating that “[t]he only rights [a corporation] can claim are the rights which are given to it.”²⁸ Thus, corporate extension of this guarantee to give the corporate entity both the privileges and liabilities entitled to citizens²⁹ would not advance the purpose of the Privileges and Immunities Clause due to these special privileges of corporations. It would also be inconsistent with the corporation’s special privileges, as the Court observed, for the corporate entity to have both the privileges and the liabilities—such as obligations—entitled to citizens.³⁰

Additionally, the Fifth Amendment protection against self-incrimination has not been extended to corporations because to do so would not serve the purpose of this provision, which is to “respect[] a private inner sanctum of individual feeling and thought” by forbidding intrusion “to extract self-condemnation.”³¹ The Court has noted that the purpose of preventing compulsory self-disclosure of information is to protect “individual civil liberties,” and therefore could not have been intended “to protect economic or other interests of [the corporate entity] so as to nullify appropriate governmental regulations.”³² Lastly, to briefly comment on the Eighth Amendment, its purposes are to prohibit excessive fines, physical torture, and certain jail conditions. Even though the Court has left open the question of applicability of this Amendment to corporations,³³ it has noted that the basic purpose of the Eighth Amendment is “nothing less than the dignity of

²⁷ *Bank of Augusta v. Earle*, 38 U.S. 519, 584 (1839).

²⁸ *Id.* at 587.

²⁹ *Id.* at 586.

³⁰ *Id.* (“If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens,” an approach inconsistent with the corporation’s special privileges.)

³¹ *Bellis v. United States*, 417 U.S. 85, 91 (1974) (quoting *Couch v. U.S.*, 409 U.S. 322, 327 (1973)).

³² *United States v. White*, 322 U.S. 694, 700 (1944).

³³ *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989).

man.”³⁴ Further, it is obvious that a corporation cannot be held in jail pending trial nor physically tortured due to the corporation’s lack of a physical body and ability to perceive pain and cruelty. Thus, the speaker of the statement is relevant for purposes of the Fifth Amendment’s protection against self-incrimination.

Thus, in analyzing whether a constitutional provision applies to corporations, the Supreme Court has adopted a broad trend of determining the essential purpose of each constitutional provision.³⁵ This phenomenon is significant because it focuses on the constitutional right at issue. In other words, the Court is not as concerned with *who* or *what* the constitutional right was historically applied to or against as it is with the “historical purpose of the provision and [then] whether corporate protection serves that purpose.”³⁶ Thus, two questions need to be answered: (1) what is the basic purpose of the Bill of Attainder Clause?; and (2) does extension of that guarantee to the corporate entity serve that purpose?

III. APPLYING THE SUPREME COURT’S APPROACH TO THE BILL OF ATTAINDER CLAUSE

Corporations can convey property, enter into contracts, and sue and be sued, just as an individual is able to do so. But while these rights work for corporations despite their claimed individual nature, there are some other

³⁴ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

³⁵ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (“Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”); see also Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 110–11 (2014) (arguing that constitutional analysis is not based on the “nature of different types of entities” so much as it is based on “examining the purposes of the particular constitutional right”); see also Karey P. Pond, *Constitutional Law—The Telecommunications Act of 1996: When Legislative Regulation Becomes Unconstitutional Punishment*, 22 W. NEW ENG. L. REV. 271, 307 (2000) (contending that “whether a corporation is entitled to the protection of a constitutional guarantee depends on the nature of the guarantee at issue.”).

³⁶ Pond, *supra* note 35, at 309.

individual rights that do not make sense for a corporation to possess such as the right to marry, the right to privacy, or the right to vote. But what about constitutional rights? Which constitutional rights make sense for individuals but not for corporations? For instance, as noted above, corporations enjoy a Fourth Amendment protection against unreasonable searches and seizures but do not have a Fifth Amendment protection against self-incrimination. Additionally, corporations have the constitutional protection against double jeopardy of the Fifth Amendment but not the protection against the excessive fines and cruel and unusual punishment clauses of the Eighth Amendment. The Court has made these determinations by examining the purpose of the relevant constitutional guarantees and then by asking whether those purposes would be consistent with extension of those guarantees to corporations.

What about the Bill of Attainder Clause of the U.S. Constitution? The purpose of the Bill of Attainder Clause is not analogizable to the purpose of the First Amendment's guarantee of free speech, which has been afforded to corporations. The essential purpose of the free speech guarantee is to foster the dissemination of protected speech to the public. Even though the corporation cannot speak, "its business requires individual speech."³⁷ But the human character of the disseminator is irrelevant for the essential purpose of the right to be manifested and fulfilled. This is not an example of a constitutional guarantee that is personal to each individual and is therefore not an individual right.

However, the purpose of the Bill of Attainder Clause is analogizable to the purpose of the Fifth Amendment right against self-incrimination. They are both individualistic rights. The Fifth Amendment's purpose is "that of protecting personal privacy."³⁸ But whose personal privacy? In 1944, the Supreme Court held that this privilege is a personal one and applies only to

³⁷ O'Kelley, *supra* note 4, at 1360.

³⁸ Fisher v. United States, 425 U.S. 391, 399 (1976).

“natural individuals,” and therefore, not to corporations.³⁹ In *Bellotti*, the Court analogized the privilege against compulsory self-incrimination to “‘purely personal’ guarantees” and noted that these guarantees were unavailable to corporations because the “historic function” limited protection to individuals.⁴⁰ Further, corporate Fifth Amendment rights would impair government investigations.⁴¹ As scholars have rightly observed, a corporation attempting to invoke the right against self-incrimination would be like an individual refusing to speak to the police under the Fifth Amendment right by claiming that their statement would incriminate someone else.⁴² Extension of the Clause to corporations would not fit with the approach the Supreme Court has used in determining which guarantees belong to corporations.

IV. CONCLUSION

The applicability of the Bill of Attainder Clause to corporations is a tricky issue. Huawei’s ability to claim and support its arguments based on a violation of this Clause is problematic because the Supreme Court has never addressed whether the Bill of Attainder Clause is applicable to corporate entities. But analyzing the Supreme Court’s precedent regarding which constitutional guarantees are applicable to corporations and why such rights are applicable reveals a simple analogy: if the constitutional guarantee in question is a personal, individualistic right, it does not belong to and cannot be relied upon by the corporate entity.

Therefore, to answering the two questions posed at the end of Part II: (1) the basic purpose of the Bill of Attainder Clause is to protect individuals from punishment and prevent legislative determinations of guilt; and (2)

³⁹ *United States v. White*, 322 U.S. 694, 698–99 (1944).

⁴⁰ *Bellotti*, 435 U.S. at 778 n.14.

⁴¹ See Garrett, *supra* note 35, at 130.

⁴² *Id.* (“One person cannot refuse to speak to police under the Fifth Amendment by asserting the potential to incriminate another person.”).

corporate extension of the guarantee of the Bill of Attainder Clause would not serve this purpose. Because of this, the Supreme Court should address, as soon as possible, that the Bill of Attainder Clause of the U.S. Constitution is a personal right that is wholly inapplicable to the corporate entity. Once the Supreme Court makes such a determination, Huawei's bill of attainder claim will be rightfully mooted.