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The Relationship Between the Bill of Attainder Clause, The Use of Sanctions as a Regulatory Tool For Foreign Trade, and Corporate Personhood

Alina Veneziano

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THE RELATIONSHIP BETWEEN THE BILL OF ATTAINDER CLAUSE, THE USE OF SANCTIONS AS A REGULATORY TOOL FOR FOREIGN TRADE, AND CORPORATE PERSONHOOD

Alina Veneziano*

The Chinese-based telecommunications giant, Huawei Technologies, has sued the U.S. government contending that the sanctions imposed upon it via legislation violate the Bill of Attainder Clause of the U.S. Constitution. Even though a district court has recently denied Huawei's motion for summary judgment, this case presents an interesting question and under-examined issue as to whether the Bill of Attainder Clause applies to corporations in the first place. The Supreme Court has never affirmatively stated whether corporations can sue under the Clause. Lower courts have assumed that it does apply, though some have ruled against the corporate plaintiff on other grounds. With the exception of the Second Circuit, no other court decision has found a violation of the Bill of Attainder Clause in favor of the corporate entity. This article departs from prior case law and scholarship by urging against the extension of the Bill of Attainder Clause to the corporate entity and is the first to present sustained arguments based on history, Supreme Court language, defamation law, state and federal regulatory powers, and foreign affairs to show that the Clause ought not be extended in this respect. While acknowledging that the Second Circuit has found a violation of the Clause in favor of the corporate entity, this article criticizes the Second Circuit's holding as flawed and incomplete. Specifically, this article argues primarily that the Bill of Attainder Clause protects only personal dignitary interests. First, it discusses that the history of the Clause indicates an individual-rights standpoint. Second, it illuminates how all Supreme Court opinions that have found a violation of the Bill of Attainder Clause have dealt with the natural person—either individually or as a part of an ascertainable group. Third, even though corporations can sue for defamation, it argues that corporations cannot be analogized to individuals in this manner because the only cognizable injury a corporation can sustain is injury to its business and economic interests. Fourth, it asserts that because the corporation is subject to both state and federal regulation by virtue of incorporation, it surrenders some of its privacy. This article secondarily argues that corporate extension of the Bill of Attainder Clause will impede national security interests and foreign policy in three respects: by interfering with Congress' ability to (1) sanction properly, (2) regulate foreign trade, and (3) respond swiftly to foreign policy issues such as threats to U.S. intelligence and cybersecurity. Thus, as will be demonstrated, the Bill of Attainder Clause of the U.S. Constitution cannot be maintained by corporations because it only protects the personal dignitary interest of individuals and cannot be maintained due to Congress' interests in preventing interference with foreign relations.

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I. PRESENTING THE HUAWEI CASE AND U.S. BILL OF ATTAINDER CLAUSE

A. INTRODUCTION

This article examines the relationship between the Bill of Attainder Clause in the U.S. Constitution,¹ legislative sanctions, and corporate personhood for bill of attainder claims.² It is written in light of the recent sanctions imposed by the 2019 National Defense Authorization Act (“NDAA”) against Huawei Technologies and the subsequent lawsuit filed by Huawei against the U.S. government. Huawei’s lawsuit alleged that certain provisions of the NDAA constitute a violation of the Bill of Attainder Clause. In February 2020, a district court judge denied Huawei’s motion for summary judgment and granted the government’s motion for summary judgment.³ This Article discusses the very interesting and unsettled issue as to whether the protections of the Bill of Attainder Clause are applicable to corporations. It ultimately concludes that the Clause is not applicable to the corporate entity based on history, precedent, and differences in injury and regulation between the natural person and the corporate entity as well concerns regarding foreign relations and Congress’ duties to regulate and respond to sensitive foreign policy issues.

This Article proceeds in the following manner: Part I introduces the situation with Huawei Technologies (“Huawei”), the events leading up to the indictments against Huawei and some of its officers, as well as the subsequent complaint and motion for summary judgment filed by Huawei against the U.S. government, which was later denied. Part I closes with a brief summary of the Bill of Attainder Clause, the status of corporate bill of attainder claims in the courts, and commentaries within the academic community, all of which largely assume that corporate bill of attainder claims are permissible.

Part II analyzes the opinion from the Second Circuit in *Consolidated Edison v. Pataki*. This opinion is significant because it is the first decision to find a violation of the Bill of Attainder Clause in favor of the corporate entity. Part III presents the main argument of this article, namely that the Bill of Attainder Clause protects only personal dignitary interests. This Part criticizes the two holdings of *Consolidated Edison* as erroneous by failing to consider history and precedent as well as incomplete by declining to discuss how corporate injury and regulation are distinct from that of a natural person. First, it discusses how the history of the Clause and Supreme Court decisions—which have all found violations of the Clause only with respect to individuals—both support an individualized approach. Second, it demonstrates how

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¹ See U.S. CONST. art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed.”)

² This article does not delve into analyses of punitive intent versus non-punitive regulation and instead presumes punitive intent in the 2019 NDAA in light of the Huawei case. This article investigates the initial and most pressing issue of whether the Bill of Attainder Clause is properly applicable to the corporate entity.

³ See Memorandum Opinion and Order, *Huawei Technologies Co., Ltd. v. United States*, No. 4:19-cv-159-ALM (E.D. Tex., Feb. 18, 2020).

the inherent differences between the natural person and the corporation—such as injuries sustainable and state and federal regulation—prevent comparable treatment regarding bill of attainder claims.

Part IV offers a subsidiary argument that supports the conclusion that the Bill of Attainder Clause is not applicable to corporations. This argument contends that Congress must retain the flexibility needed to respond to foreign security issues. Therefore, Congress' ability to sanction, regulate foreign commerce, and respond to sensitive foreign policy issues must not be hindered. Part IV concludes that extending the protections of the Bill of Attainder Clause to the corporate entity would complicate these purposes. Part V reiterates the conclusion that this Article promotes: that the personal dignitary interests protected by the Clause and Congress' duty to defend national security interests and respond to foreign policy issues mandate that the Bill of Attainder Clause not extend to corporations.

B. THE INDICTMENTS AND THE COMPLAINT

In 2019, two indictments were returned against Huawei, charging it with theft of trade secrets conspiracy, obstruction of justice, and conspiracy to defraud the United States, among other charges.⁴ Huawei filed its complaint in March 2019 in the U.S. District Court for the Eastern District of Texas and subsequently a motion for summary judgment in May 2019.⁵ Huawei's claim argues that Section 889 of the National Defense Authorization Act ("NDAA") of 2019, which prohibits the use of Huawei equipment and certain telecommunications services by U.S. government agencies, is unconstitutional.⁶ Specifically, Huawei relies on three arguments to support its position that Section 889 of the 2019 NDAA is unconstitutional.

First, as its main argument, Huawei argues that the Act violates the Bill of Attainder Clause of the U.S. Constitution by targeting it for punishment.⁷ Second, Huawei contends that the Act violates due process of law by severely curtailing its ability to do business and by branding it a tool of the Chinese government.⁸ Lastly, Huawei asserts that Section 889 violates the Constitution's vesting clause and separation of powers by legislatively adjudicating Huawei as guilty rather than leaving this issue to either the Executive or the Judiciary.⁹

⁴ See Indictment, *United States v. Huawei Technologies Co., Ltd.*, No. 2:19-cr-00010-RSM (W.D. Wash., Jan. 16, 2019), <https://www.justice.gov/opa/press-release/file/1124996/download>; see also Superseding Indictment, *United States v. Huawei Technologies Co., Ltd.*, Cr. No. 18-457 (S-2) (AMD) (E.D.N.Y., Jan. 24, 2019), <https://www.justice.gov/opa/press-release/file/1125021/download>.

⁵ 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; 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), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/a06cf0ee-d366-41f9-8ead-147f6a0513bb/note/04dd5695-718f-45fd-9eb8-a94ab8c6bc03.pdf#page=1>.

⁶ See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636, 1917 (2019).

⁷ See Complaint, *Huawei*, No. 4:19-cv-00159, at *3.

⁸ *Id.*

⁹ *Id.*

In February 2020, the district court judge denied Huawei's motion for summary judgment. Nevertheless, the issue of the Bill of Attainder Clause's applicability remains a critical topic for debate.

C. THE U.S. BILL OF ATTAINDER CLAUSE

This article examines the crux of Huawei's argument: the alleged violation of the Bill of Attainder Clause.¹⁰ Huawei's claim raised the question of whether the Bill of Attainder Clause applies to corporations in the first place. Article I, Section 9 reads as follows: "No Bill of Attainder or ex post facto Law shall be passed."¹¹ The text of the Clause does not mention "person" or "individual," nor does it reference any intended recipient of its protections against attainder.¹² Because the text of the Clause is of no avail, Supreme Court precedent must be consulted. But here, too, the Supreme Court has never ruled on the applicability of the Bill of Attainder Clause to corporations.¹³ With the exception of one opinion from the Second Circuit, the circuit courts have not found a violation of the Bill of Attainder Clause in favor of the corporate entity. Instead, these lower courts—excluding the Second Circuit—have largely assumed that the Clause is applicable to the corporate entity,¹⁴ though have ruled against the corporate plaintiff on other grounds.¹⁵ Additionally, scholarship from the academic

¹⁰ This article examines the threshold question of whether the U.S. Bill of Attainder Clause is applicable to corporations such as Huawei. Huawei's additional claims asserting violations of the Due Process and Vesting Clauses are not the subject of this article and are only indirectly addressed.

¹¹ See U.S. CONST. art. I, § 9 (There is also an equivalent prohibition for states in U.S. Const. art. I, § 10: "No State shall . . . pass any bill of attainder.")

¹² *Id.*

¹³ See *SBC Communications v. FCC*, 154 F.3d 226, 234 n.11 (5th Cir. 1998) (noting that "the Court has yet to reach th[is] question directly").

¹⁴ Opinions and briefs pay scant attention to the question of whether the Bill of Attainder Clause applies to corporations and largely presume that it is applicable to the corporate entity. See *Kaspersky Lab, Inc. v. United States Dept. of Homeland Security*, 909 F.3d 446, 453–54 (D.C. Cir. 2018) (noting that the D.C. Circuit has "previously assumed without deciding" the Clause's applicability to corporations and because the government did not argue that the Clause only protects individuals and because there are no arguments to the contrary, "we shall continue to assume that the Bill of Attainder Clause extends to corporations"); see also *ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2010) (recognizing that "[a]lthough the Supreme Court has never had occasion to rule on the issue," the Second Circuit has previously held that the scope of the clause includes corporations); see also *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 347 (2d Cir. 2002) (noting that the "applicability of the Bill of Attainder Clause to corporations remains unsettled in every circuit" but because the Supreme Court has intimidated at its extension without discussion and because several Courts of Appeals "have expressly assumed [it] without deciding that the Clause is applicable to corporations," the court noted that the Bill of Attainder clause "is one of the constitutional rights enjoyed by corporations."); see also *BellSouth Corp. v. FCC* ("BellSouth II"), 162 F.3d 678, 684 (D.C. Cir. 1998) (noting that, as in *BellSouth I*, both parties assume that the Clause protects corporations and individuals and that "we make the same assumption here"); see also *BellSouth Corp. v. FCC* ("BellSouth I"), 144 F.3d 58, 63 (D.C. Cir. 1998) (stating that "[it] assume[s], as do the parties, that the Bill of Attainder Clause protects corporations as well as individuals" and noting that the "clause's coverage clearly seems to include at least closely held corporations, where an attainder would fall on a narrowly circumscribed, easily identified group of flesh-and-blood people," but "[g]iven the parties' shared assumption, we will not explore the issue further"); see also *SBC Communications*, 154 F.3d 234 n.11 (5th Cir. 1998) (observing that even if it is assumed that the Bill of Attainder applies to corporations, the claimant's argument fails but acknowledging that the answer to this issue "does seem likely").

¹⁵ These decisions generally rule against the plaintiff on other reasons, obviating any need to decide whether the Clause applies to corporations. See *Kaspersky*, 909 F.3d at 460 (holding the provision was not a

community reflects the common consensus that the Bill of Attainder Clause *does* apply to corporations.¹⁶ Thus, the Second Circuit stands as a notable exception on this issue and is the subject of the next section.

II. THE SECOND CIRCUIT'S OPINION IN *CONSOLIDATED EDISON V. PATAKI*

A. FACTS

In 2002, the Second Circuit in *Consolidated Edison Company of New York v. Pataki*¹⁷ became the only court to find a violation of the Bill of Attainder Clause in favor of the corporate entity.¹⁸ Consolidated Edison Company (“Con Edison”)—a provider of electrical power to New York City—experienced a power outage from a defective generator, of which it was aware.¹⁹ The New York legislature passed a law in response to the power outage at one of Con Edison's power plants.²⁰ Among some of the key provisions in the law were legislative findings that all operators of nuclear facilities have “a high duty of care to protect the health, safety and economic interests of its customers” and that by continuing to operate steam generators known to be defective and therefore increasing the risk of radioactive release, “Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and

bill of attainder violation “given the reasonable balance between the burden imposed by section 1634 and the nonpunitive national security objective it furthers”); *see also* *ACORN*, 618 F.3d at 142 (holding that the “statements by a handful of

legislators are insufficient to establish—by themselves—the clearest proof of punitive intent necessary for a bill of attainder”); *see also* *BellSouth II*, 162 F.3d at 680 (holding that the provision is not a bill of attainder “because it does not inflict ‘punishment’ on BellSouth”); *see also* *BellSouth I*, 144 F.3d at 67 (holding that the “distinction drawn by Congress seems quite understandable without resort to inferences of punitive purpose,” precluding a finding of a bill of attainder violation); *see also* *SBC Communications*, 154 F.3d at 242–44 (holding that there was no bill of attainder violation since the provision was not punitive “because they do not impose a perpetual bar,” “because they serve a nonpunitive purpose: attempting to ensure fair competition in the markets,” “because neither their terms nor their legislative history demonstrates the ‘smoking gun’ evidence of punitive intent,” and “because they were part of a larger quid pro quo” representative of a “compromise on a massive issue of public policy”). *See infra*, Part III.D. for an elaboration of the facts and holdings of these opinions.

¹⁶ *See* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 112 (2014) (observing that even though a corporation is created by law, it operates to accomplish important goals of individuals and furthers the public good); *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, 309 (2000) (noting that because the Bill of Attainder Clause acts as a safeguard against legislative determinations of guilt and because corporations are subject to criminal law, “it is only natural that the prohibition against legislative punishments be applicable to corporations”); *see also* Thomas Lee, *Constitutional Law-Bill of Attainder-Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder*, 112 HARV. L. REV. 1385, 1388 (1999) (promoting an approach that would extend the Bill of Attainder Clause only to “protect political minorities from targeted punishment by majoritarian legislatures” but that the Clause should not protect corporations “from particularized economic legislation”); *see also* JOHN T. MULLIGAN, LAW OF CORPORATIONS 7 (1913) (contending that a corporation is merely “a collection of many individuals, united into one body . . . with capacity of acting in many respects as an individual”).

¹⁷ *See generally* *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338 (2d Cir. 2002).

¹⁸ *Id.* at 355.

¹⁹ *Id.* at 343–44.

²⁰ *Id.* at 343.

economic interests of its customers.”²¹ It continued by declaring that “it would not be in the public interest for the company to recover from ratepayers any costs” relating to the power outage.²² Specifically, “the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility.”²³

Con Edison brought an action in the District Court for the Northern District of New York, seeking a declaratory judgment and injunctive relief barring enforcement of the statute based on violations of the Bill of Attainder Clause of Article I, Section 10,²⁴ amongst other claims.²⁵ The District Court held that the New York legislature passed a Bill of Attainder because “the legislature took it upon itself to determine the [Con Edison’s] guilt and to impose the sanction it deemed appropriate,” which demonstrated the legislative intent to punish.²⁶ The Second Circuit affirmed.²⁷

The Second Circuit relied on the Supreme Court’s definition of a bill of attainder as set forth in *Nixon v. Administrator of General Services*.²⁸ The Court in *Nixon* stated that a statute can be a bill of attainder only if: (1) it “determines guilt and inflicts punishment,” (2) “upon an identifiable individual,” and (3) “without provision of the protections of a judicial trial.”²⁹ The Circuit immediately concluded that factor (3)—no protections of a judicial trial—is “incontrovertible” in that the bill was passed using the legislative process without the protections of a judicial trial.³⁰ Thus, only two factors were at issue for the Second Circuit: whether Con Edison is “an ‘individual’ that may invoke the protection of the Clause” and whether the legislative provision “determines guilt” and “inflicts punishment.”³¹ The Second Circuit answered both questions in the affirmative.

B. FIRST HOLDING: CORPORATIONS ARE INDIVIDUALS FOR BILL OF ATTAINDER CLAIMS

The Second Circuit analyzed the Clause’s applicability to corporations as individuals first. After listing which constitutional rights are applicable and inapplicable to corporations, it noted that the Supreme Court had reasoned that the distinction between rights that can be asserted by corporations and those that cannot is because “certain ‘purely personal’ guarantees . . . are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been

²¹ *Id.* at 344.

²² *Id.*

²³ *Id.*

²⁴ See U.S. CONST. art. I, § 10.

²⁵ See *Consol. Edison, 292 F.3d* at 345 (These other claims raised by Con Edison included violations of the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, the Supremacy Clause, and the Contracts Clause of Article I, Section 10. But because this article is focused solely on the connection—if any—between the Bill of Attainder Clause(s) and corporations, the analysis of *Con Edison* is limited to the Bill of Attainder claim.)

²⁶ See *Consol. Edison Co. of New York, Inc. v. Pataki, 117 F. Supp.2d 257, 265–71* (N.D.N.Y. 2000).

²⁷ See *Consol. Edison, 292 F.3d* at 345.

²⁸ See generally *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

²⁹ See *Consol. Edison, 292 F.3d* at 346 (quoting *Nixon*, 433 U.S. at 468).

³⁰ See *Consol. Edison, 292 F.3d* at 346.

³¹ *Id.*

limited to the protection of individuals” and that whether the right is personal depends on its “nature, history, and purpose.”³²

The Second Circuit acknowledged that the applicability of the Clause to corporations “remains unsettled in every circuit” but observed subtle and brief indications from the Supreme Court that could indicate corporate applicability.³³ For instance, in *United States v. Lovett*, the Supreme Court alluded to this possibility by stating that “legislative acts, no matter what their form, that apply either to named individuals or to *easily ascertainable members of a group* in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.”³⁴ Additionally, in *Plaut v. Spendthrift Farm*, the Court indicated, in dicta, that the Clause may target a “single individual *or firm*.”³⁵ Further, in *South Carolina v. Katzenbach*, the Supreme Court stated that the Clause gives “protections for individual persons *and private groups*, those who are peculiarly vulnerable to nonjudicial determinations of guilt.”³⁶ The Second Circuit immediately foreclosed the issue that there could be a difference between corporations and private groups by reasoning that the mere reference to *private groups* by the Court in *Katzenbach* “plainly contemplates protection for some entities in addition to individual natural persons.”³⁷ Because of these indications, the court concluded that the Clause is not a “purely personal” guarantee and is, therefore, “one of the constitutional rights enjoyed by corporations.”³⁸

In making this conclusion, the Second Circuit contended that the “historical function” of the Clause has been to safeguard the “procedural protections of the judicial process” and is, therefore, associated with the “right to procedural due process.”³⁹ It also contended that cases where the Supreme Court refused to apply constitutional rights to corporations involved “competing state interests in regulating corporate conduct and investigating corporate wrongdoing,” thus mandating some degree of “transparency.”⁴⁰ For instance, the Supreme Court, in *Wilson v. United States*, refused to extend the Fifth Amendment privilege against self-incrimination to corporations based on the “visitatorial power”⁴¹ that the state retains in the corporation after incorporation. Also, the Court, in *United States v. Morton Salt*, determined that corporations enjoy narrower rights to privacy due to the state’s “legitimate right” in ensuring corporate behavior comports with “the law and the public interest.”⁴² But the Second Circuit distinguished these cases from the one at hand by noting that although New York has an interest in investigating and regulating the malfeasance of corporations, “it has no interest in inflicting punishment for such malfeasance on the corporation’s shareholders through the legislative process,” especially where there was

³² *Id.* at 347 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778–79 n.14 (1978)).

³³ *Id.*, 292 F.3d at 347.

³⁴ *Id.* at 346 (quoting *United States v. Lovett*, 328 U.S. 303, 315 (1946)) (emphasis added).

³⁵ *Id.* at 347 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)) (emphasis added).

³⁶ *Id.* at 347 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)) (emphasis added).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 348.

⁴¹ *Id.* (quoting *Wilson v. United States*, 221 U.S. 361, 382–84 (1911)).

⁴² *Id.* (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

an existing administrative procedure to follow to vindicate the alleged wrongdoing such as the “prudence review process.”⁴³

C. SECOND HOLDING: THE PROVISION DETERMINES GUILT AND
INFLECTS PUNISHMENT

Turning next to “guilt,” the Second Circuit noted that in order to find a violation of the Bill of Attainder Clause, the provision must have a “retrospective focus”—meaning it must “define[] past conduct as wrongdoing and then impose[] punishment on that past conduct.”⁴⁴ The Circuit had no problem concluding that the New York legislature considered Con Edison guilty, as evidenced by the statute’s focus on “conduct related to a single, past incident . . . as the basis for the sanction it imposes.”⁴⁵ Regarding the court’s analysis of “punishment,” it went through the three factors articulated by the Supreme Court in *Nixon* to determine if the provision was punitive: “(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’; and (3) whether the legislative record ‘evinces a [legislative] intent to punish.’”⁴⁶

For the traditional or historical factor, the Second Circuit listed examples of punitive *per se* punishments such as “imprisonment, banishment, and the punitive confiscation of property . . . [and] a legislative enactment barring designated individuals or groups from participation in specified employments or vocations.”⁴⁷ The court determined that the only traditional punishment implicated here is the “punitive confiscation of property” because the provision “clearly deprived Con Ed of a property interest” of “approximately \$250 million that it would otherwise have been able to obtain from its customers.”⁴⁸ However, the court noted that the “deprivation” here is not the same as a “confiscation,” so it instead did “not decide whether [the provision] imposes a traditional attainder.”⁴⁹ Regarding the functional factor, the Second Circuit noted several nonpunitive purposes, such as “prevent[ing] Con Ed’s ratepayers from being forced to bear costs that the legislature viewed as negligently incurred,” “deter[ring] similar conduct by Con Ed and other public utilities in the future,” regulating monopolies which “do[] not face the same incentives to minimize costs as does an actor in a competitive market,” and “deter[ring] negligent conduct with an eye toward protecting public health.”⁵⁰ However, the court noted that the “type and severity of burdens imposed”⁵¹ by this provision “leads us to a different conclusion.”⁵² Because “it is undisputed that Con Ed would have been allowed to pass

⁴³ *Id.*

⁴⁴ *Id.* at 349. See also *Nixon*, 433 U.S. at 472–73.

⁴⁵ See *Consol. Edison*, 292 F.3d at 349.

⁴⁶ *Id.* at 350 (quoting *Nixon*, 433 U.S. at 473, 475–76, 478).

⁴⁷ *Id.* at 351 (quoting *Nixon*, 433 U.S. at 473–74).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 351–52.

⁵¹ *Id.* at 352 (quoting *Nixon*, 433 U.S. at 475).

⁵² *Id.* at 353.

through to ratepayers the costs of covering power demand while replacing the generators during a scheduled outage,” the court concluded that nothing “other than punishment can justify forcing Con Ed to absorb those same costs after the accidental outage.”⁵³ Further, because there were alternatives available that did not include forcing Con Edison to absorb all costs, “the legislature piled on a burden that was obviously disproportionate to the harm caused,” and therefore, punitive intent was clearly demonstrated.⁵⁴ Lastly, the court observed several instances of a legislative intent to punish under the motivational factor, such as statements by legislators. Examples include “Con Edison has done a terrible thing” or that Con Edison “should certainly be penalized.”⁵⁵ Therefore, the provision was a “punitive” measure.⁵⁶

D. CONCLUSION

Thus, a violation of the Bill of Attainder Clause was affirmed in favor of Con Edison, making this holding from the Second Circuit the first time a judicial opinion has found a violation of the Clause in favor of the corporate entity.⁵⁷ There have been no further decisions by the appellate courts, or any other court, that have found a violation of the Clause for corporations.

In summary, the Second Circuit in *Con Edison* upheld the violation of the Bill of Attainder Clause in favor of the corporate entity based on two reasonings: first, by holding that the Clause was applicable to corporations and, second, by holding that the provision at issue demonstrated the requisite retroactive imposition of guilt and punishment required to find a bill of attainder. Its first holding determined that the intended recipients of the Bill of Attainder Clause extends to corporations. Its second holding reasoned that the congressional intent by the New York legislature in the statutory provision that forced Con Edison to absorb the costs of the power outage it caused was a bill of attainder. Sections A and B of Part III of this article set forth arguments as to why the first holding of *Con Edison* is clearly erroneous. Sections C and D of Part III demonstrate how the second holding of *Con Edison* is an incomplete analysis of this issue. Part IV then presents an alternative argument as to why corporate extension of the Bill of Attainder Clause is a hazardous decision.

⁵³ *Id.*

⁵⁴ *Id.* at 354.

⁵⁵ *Id.* at 355–56.

⁵⁶ *Id.* at 355.

⁵⁷ *Id.* at 356.

III. THE BILL OF ATTAINDER CLAUSE PROTECTS ONLY PERSONAL DIGNITARY INTERESTS

A. THE HISTORY OF THE BILL OF ATTAINDER CLAUSE DEMONSTRATES AN INDIVIDUAL-BASED STANDPOINT

English law, early commentaries, the Revolutionary era, and the U.S. Founding Fathers have all understood attainder as a tool used against natural persons. First, beginning in the sixteenth century, the English monarchy used attainder to execute individuals who had been disloyal to the Crown.⁵⁸ Second, commentaries by jurists, such as William Blackstone, have described attainder as a “sentence of death.”⁵⁹ Blackstone asserted that an aggregate corporation “is not liable . . . to attainder” for “[i]t cannot be executor or administrator, or *perform any personal duties* . . . for it cannot take an oath . . . cannot be seized of lands . . . for such kind of confidence is foreign to the ends of its institution.”⁶⁰ Additionally, Justice Joseph Story defined attainder as a form of “capital punishments upon *persons* supposed to be guilty of high offences . . . without any conviction in the ordinary course of judicial proceedings.”⁶¹ Third, attainder had been used by the thirteen colonies during the Revolutionary War to confiscate the estates of Tories who had remained loyal to England.⁶² Lastly, the Framers of the U.S. Constitution—having understood attainder from English law as “parliamentary acts sentencing named *persons* to death without the benefit of a judicial trial”⁶³—saw its use as “dangerous” and capable of turning the liberty of free people and government into a “mockery of common sense.”⁶⁴ They sought to prevent attainder in the new American nation, and the records of the Federal Convention reveal that the prohibition on bills of attainder in the U.S. Constitution was agreed to unanimously.⁶⁵

This desire by the Founding Fathers to prevent bills of attainder in U.S. jurisprudence demonstrates a focus on protecting the individual from the original consequences of attainder. The Second Circuit, in *Consolidated Edison*, acknowledged the same in its opinion by quoting Supreme Court dicta, in *First National Bank of Boston v. Bellotti*, which stated that whether a right is personal

⁵⁸ See Thomas Babington Macaulay, *The History of England from the Accession of James the Second Passim* (The Aldine Press, 1848) (discussing early instances of attainer within the history of England such as the attainder of Cromwell during the reign of Henry VIII, the attainder of the late King Richard III, and the act of attainder passed in 1688 by the Parliament of James II).

⁵⁹ See 1 William Blackstone, *Commentaries on the Laws of England* (1765) (reprinted in *Founders' Constitution*, William Blackstone, *Commentaries* 4:373–79, vol. III 343–45 (Philip B. Kurland & Ralph Lerner eds., 1987)).

⁶⁰ *Id.* at 464 (emphasis added).

⁶¹ See Joseph Story, *Commentaries on the Constitution of the United States* §§ 1338–39 (1833) (reprinted in *Founders' Constitution*, Joseph Story, *Commentaries on the Constitution* 3: §§ 1338–39 1833, vol. III 353–54 (Philip B. Kurland & Ralph Lerner ed., 1987)) (emphasis added).

⁶² See Charles H. Wilson Jr., *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CAL. L. REV. 212, 216 (1966).

⁶³ See *BellSouth I*, 144 F.3d at 62 (emphasis added).

⁶⁴ *United States v. Brown*, 381 U.S. 437, 444 (1965).

⁶⁵ See James Madison, *Records of the Federal Convention* 2:375, in 3 *FOUNDERS' CONSTITUTION* 347 (Philip B. Kurland & Ralph Lerner eds., 1987).

“depends on [its] nature, history, and purpose.”⁶⁶ Here, the historical meaning of the term cannot be based on anything other than an individual-based standpoint as a “purely personal” guarantee.⁶⁷

B. SUPREME COURT DECISIONS FINDING BILL OF ATTAINDER VIOLATIONS HAVE ALL INVOLVED INDIVIDUALS

On only five occasions has the Supreme Court invalidated laws under the Bill of Attainder Clause.⁶⁸ All cases involved the interests of an individual or *group* of individuals. Starting in the 1860s, after the Civil War, the Supreme Court in *Ex parte Garland*, *Cummings v. Missouri* and the companion case *Pierce v. Carskadon*, invalidated provisions requiring individuals take loyalty oaths prior to employment asserting that they never supported the Confederate Government.⁶⁹ In *Ex parte Garland* and *Pierce*, the federal law requiring this oath was directed at “every person elected or appointed to any office of honor or profit under the government of the United States.”⁷⁰ The provision in the state constitution requiring the oath in *Cummings* was directed at anyone seeking a professional license and extended to “every person holding . . . any of the offices.”⁷¹

About a century later, the Supreme Court found violations of the Bill of Attainder Clause in *United States v. Lovett*⁷² and *United States v. Brown*,⁷³ decided in 1946 and 1965, respectively. In *Lovett*, a special subcommittee of the Appropriations Committee had determined that Watson, Dodd, and Lovett—government workers—were charged with engaging in “subversive activity” and were therefore not entitled to payment for their federal work.⁷⁴ The Supreme Court held the provision “was designed to apply to *particular individuals*” and operated “‘as a legislative decree of perpetual exclusion’ from a chosen vocation.”⁷⁵ About two decades later, the Supreme Court in *Brown* invalidated a section of the Labor-Management Reporting and Disclosure Act as a bill of attainder.⁷⁶ That Section “conditioned a union’s access to the National Labor Relations Board upon the filing of affidavits by all of the union’s officers attesting that they were not members of or affiliated with the Communist Party.”⁷⁷ *Brown*—an “open and avowed Communist”—had been elected to the Executive Board and was subsequently charged with violating this Section.⁷⁸ The Court noted that the

⁶⁶ See *Consol. Edison*, 292 F.3d at 347 (2002) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79 n.14 (1978)).

⁶⁷ See *Bellotti*, 435 U.S. at 778 n.14 (quoting *United States v. White*, 322 U.S. 694, 698-701 (1944)).

⁶⁸ 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).

⁶⁹ See generally *Cummings*, 71 U.S. at 277; see also generally *Ex parte Garland*, 71 U.S. at 333; see also companion case *Pierce*, 83 U.S. at 234.

⁷⁰ *Ex parte Garland*, 71 U.S. at 374 (emphasis added); see also *Pierce*, 83 U.S. at 239.

⁷¹ See *Cummings*, 71 U.S. at 317.

⁷² See generally *Lovett*, 328 U.S. at 303.

⁷³ See generally *Brown*, 381 U.S. at 437.

⁷⁴ See *Lovett*, 328 U.S. at 305, 310-11.

⁷⁵ *Id.* at 316 (quoting *Ex parte Garland*, 71 U.S. at 377).

⁷⁶ See *Brown*, 381 U.S. at 438-40.

⁷⁷ *Id.* at 439.

⁷⁸ *Id.* at 440.

Clause ought to be “read in light of the evil the Framers had sought to bar,” the evil of which is “legislative punishment, of any form or severity, of specifically *designated persons or groups*.”⁷⁹ In finding a violation of the Bill of Attainder Clause in *Brown*, the Supreme Court held that the provision “designates in no uncertain terms the *persons* who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability.”⁸⁰

Thus, all five cases where the Supreme Court has found a violation of the Bill of Attainder Clause involved an individual or group of individuals—whether named or clearly ascertainable. Specifically, the provisions struck as bills of attainder in these cases “stigmatized [the claimant’s] reputation and seriously impaired their chance to earn a living.”⁸¹ However, corporations do not “earn a living;” instead, the creation of a corporation is “necessary, when it is for the advantage of the public,” to carry out those rights of the public by maintaining perpetual succession as “artificial persons,” as Blackstone had stated.⁸²

The Second Circuit in *Consolidated Edison*, however, relied on language from Supreme Court opinions, such as the Court’s reference in *Katzenbach* to “individual persons *and private groups*,”⁸³ to conclude that the Supreme Court must have contemplated protections under the Clause in addition to individual natural persons.⁸⁴ But the Second Circuit failed to explain how this reference to “groups” automatically includes the corporate entity. It also failed to explain why “groups” does not include anything other than the corporate entity. To the contrary, the language in Supreme Court decisions dealing with “groups” are really about *individuals* who are part of an ascertainable group.

In *American Communications Association v. Douds*, the Supreme Court, in a plurality decision in 1950, described the prior decisions that had found violations of the Clause as involving “the proscription of certain occupations to a group classified according to belief and loyalty.”⁸⁵ The claimant in *Douds* was a union.⁸⁶ The Court noted that the provision in *Douds* prohibiting “members of those groups identified in [the provision]” from serving as union leaders unless they “renounce the[ir] allegiances” was enacted to protect the public from Communism.⁸⁷ Additionally, in *Communist Party of the United States v. Subversive Activities Control Board*,⁸⁸ the Supreme Court defined attainder as the singling out of an individual for punishment “whether the individual is called by name or *described in terms of conduct which,*

⁷⁹ *Id.* at 447 (emphasis added).

⁸⁰ *Id.* at 450 (emphasis added).

⁸¹ See *Lovett*, 328 U.S. at 314.

⁸² See Blackstone, *supra* note 59, at 464 (William Blackstone had also written on the differences between the natural person and the corporate entity. It is interesting that Blackstone placed the chapter “Of Corporations” under the First Book titled “of the Rights of Persons” as opposed to the Second Book titled “of the Rights of Things.” But he then goes on to qualify this classification by noting that corporations were created to carry on the rights of people—rights that people cannot accomplish because they are mortal).

⁸³ See *Katzenbach*, 383 U.S. at 324 (emphasis added).

⁸⁴ See *Consol. Edison*, 292 F.3d at 347.

⁸⁵ See *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 413 (1950) (referring to the Court’s earlier holdings in *Lovett*, *Ex parte Garland*, and *Cummings*).

⁸⁶ *Id.* at 387.

⁸⁷ *Id.* at 414.

⁸⁸ See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

because it is past conduct, operates only as a designation of particular persons.”⁸⁹ Thus, the “terms of conduct” denotes the characteristics of the group and leads to the “designation of particular persons” within that group. Further, in *Nixon v. Administrator of General Services*, the Supreme Court recounted prior Supreme Court decisions finding violations of the Clause for both (1) individuals, such as *United States v. Lovett*,⁹⁰ which barred named individuals from government employment and (2) groups, such as *United States v. Brown*⁹¹ and *Cummings v. Missouri*,⁹² which barred Communist Party members from offices in labor unions and clergymen from ministry without taking a loyalty oath, respectively.⁹³ Therefore, more often than not, history shows that the claimants asserting bill of attainder claims have been individuals as members of groups. None have compared the corporate entity to a “group.”

Instead, the corporation is more comparable to the duties and characteristics of a *state*. For instance, even though the Second Circuit relied on the language in *Katzenbach* regarding “individual persons and private groups,”⁹⁴ the Court in *Katzenbach* also observed some limits of the term *person*. It cautioned that the word “person” cannot be expanded to include states, as the state “does [not] have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government.”⁹⁵ This suggests a special status vested in states as distinct from “individual persons and private groups”—something that can be compared to corporations.⁹⁶

Without more, however, the Second Circuit was simply in error to conclude that *Katzenbach*’s reference to “private groups” “plainly contemplates protection for some entities in addition to individual natural persons,”⁹⁷ especially in light of Supreme Court decisions describing groups. The more logical reasoning is that the term “group”—as interpreted in dicta by the Supreme Court—only refers to individuals as a part of a collection of persons, such as federal court officers,⁹⁸ medical professionals,⁹⁹ convicted felons,¹⁰⁰ members of the Communist Party,¹⁰¹ labor unions,¹⁰² clergy members,¹⁰³ or even males,¹⁰⁴ as some examples. Thus, this

⁸⁹ *Id.* at 86 (emphasis added).

⁹⁰ See generally *Lovett*, 328 U.S. 303 (1946).

⁹¹ See generally *Brown*, 381 U.S. 437 (1965).

⁹² See generally *Cummings*, 71 U.S. 277 (1867).

⁹³ See *Nixon*, 433 U.S. 425, 473–74 (1977).

⁹⁴ See *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 347 (2002) (emphasis added) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)).

⁹⁵ See *Katzenbach*, 383 U.S. at 323–24 (referring to the Bill of Attainder Clause, amongst some of these protections that the state does not have standing to assert against the government).

⁹⁶ See discussion *infra* Part III.C. (on the treatment given to corporations under defamation law), Part III.D. (of the corporation’s limited privacy rights due to interests in state and federal regulation of corporations).

⁹⁷ See *Consol. Edison Co.*, 292 F.3d at 347.

⁹⁸ See generally *Ex parte Garland*, 71 U.S. 333 (1866).

⁹⁹ See generally *Dent v. West Virginia*, 129 U.S. 114 (1889).

¹⁰⁰ See generally *Hawker v. New York*, 170 U.S. 189 (1898).

¹⁰¹ See generally *United States v. Brown*, 381 U.S. 437 (1965); see also *Flemming v. Nestor*, 363 U.S. 603 (1960).

¹⁰² See generally *Am. Comm’n Ass’n v. Douds*, 339 U.S. 382 (1950).

¹⁰³ See generally *Cummings v. Missouri*, 71 U.S. 277 (1866).

¹⁰⁴ See generally *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841 (1984).

demonstrates that the Court's references to "groups" describe ascertainable, specified persons.¹⁰⁵ Because a corporation is not a "group" in this respect—as the Second Circuit had determined—the Bill of Attainder Clause cannot apply to corporations based on this reasoning, and the Second Circuit was in error to do so.

C. CORPORATIONS—AS BUSINESS ASSOCIATIONS—CAN ONLY SUSTAIN ECONOMIC INJURIES IN DEFAMATION CASES, NOT INJURIES TO PERSONAL DIGNITY

A corporation does not possess personal dignitary interests and, while they can sue for defamation, the only cognizable injury a corporation can suffer is injury to its economic and business interests. The Second Circuit in *Consolidated Edison Co. v. Pataki* failed to account for or even discuss the inherent differences between a natural person and a corporation.¹⁰⁶ These differences in types of sufferable injuries bear reconciliation. Section C discusses corporate defamation and, consequently, the injuries a corporation can sustain.

With respect to corporations, William L. Prosser's Handbook of the Law of Torts notes that "[a] corporation is regarded as having no reputation in any *personal* sense, so that it cannot be defamed by words."¹⁰⁷ Nevertheless, it has the "prestige and standing in the business in which it is engaged" such that language that affects its character may be actionable.¹⁰⁸ Further, the Restatement (Third) of Torts defines defamation of a corporation as the publication of a statement that "tends to prejudice [the corporation] in the conduct of its trade or business or to deter third persons from dealing with it."¹⁰⁹

New York Times v. Sullivan is the seminal Supreme Court case establishing the standard for defamation plaintiffs.¹¹⁰ In *Sullivan*, decided in 1964, an elected official sued for libel in connection with an advertisement in defendant's newspaper.¹¹¹ The Court held that public officials may not recover damages for a defamatory falsehood unless he or she proves that the statement was made with "actual malice."¹¹² In the consolidated cases *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the

¹⁰⁵ As an example of a recent circuit case from the D.C. Circuit that found a violation of the Bill of Attainder Clause in favor of a natural person based on a marred reputation, see *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003). The Act at issue in *Foretich* allowed the daughter to choose whether she wanted to see her father, whom her mother had accused of sexually abusing the child over the father's repeated and vehement denials. *Id.* at 1224. The D.C. Circuit, in invalidating this provision, held that a violation of the Bill of Attainder Clause will be found where there is an "extraordinary imbalance between the burden imposed and the alleged nonpunitive purpose" and if it appears that the provision does not support the alleged purpose of Congress, and if the legislative means do not appear rationally to further that alleged purpose." *Id.* at 1223. The D.C. Circuit also asserted that the violation of the Clause imposed upon the father the "opprobrium of being branded" with a serious offense and "inflict[ed] significant and costly injury to [his] reputation." *Id.* at 1220, 1223.

¹⁰⁶ *Consol. Edison Co. v. Pataki*, 292 F.3d 338 (2d Cir. 2002).

¹⁰⁷ See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 745 (4th ed. 1971) (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ See Restatement (Third) of Torts § 561 (Am. Law Inst. 1987).

¹¹⁰ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹¹¹ *Id.* at 256.

¹¹² *Id.* at 279–80.

Court extended the standard to “public figures.”¹¹³ The Court, in a plurality opinion in *Rosenbloom v. Metromedia*, held that the *Sullivan* standard even applies to a private person if the defamatory statement concerned a “subject of public or general interest.”¹¹⁴ However, three years later in *Gertz v. Robert Welch, Inc.*, the Supreme Court drew two distinctions between public figures and private individuals.¹¹⁵ First, public officials and public figures can better “counteract false statements,” compared to individuals who are “therefore more vulnerable to injury.”¹¹⁶ Second, those involved in “public affairs” inevitably “run[] the risk of closer public scrutiny.”¹¹⁷ The Court’s distinction between the types of claimants is based on differences in status and power.

The Supreme Court has not specified whether nor to what extent the “public figure” as per *Gertz* or “public interest” as per *Rosenbloom* standard is applicable to corporations in corporate defamation cases. Therefore, it has been the lower courts that have tried to flesh out the connection between corporate defamation suits and standards of proof. Lower courts have used either the *Rosenbloom* or *Gertz* standard with corporate plaintiffs in defamation cases. As an example of the former, the D.C. District Court in *Martin Marietta v. Evening Star Newspaper* followed *Rosenbloom*’s “public interest” test and held that a corporate claimant in a defamation suit must prove that the statement was made with actual malice whenever the statement involves “matters of legitimate public interest.”¹¹⁸ It noted that when individuals assume positions of public importance, “they sacrifice their private lives.”¹¹⁹ Corporations, on the other hand, do not have private lives to begin with and, consequently, must be denied full protection from libel.¹²⁰ The corporate entity “never has a private life to lose.”¹²¹ Thus, the interests the Court in *Gertz* sought to protect, on the other hand, were those of “a highly personal nature” and not those associated with corporate activity.¹²² As an example of a lower court utilizing *Gertz*’s “public figure” test for the corporate plaintiff, the District Court for the Southern District of New York in *Reliance Insurance Co. v. Barron's* held that the corporate plaintiff was a public figure because it was a “large corporation with more than a billion dollars in assets,” there had been “great public interest” in its activities in recent years, and its “shares [were] traded on the New York Stock Exchange.”¹²³ Therefore, its industry was “a field subject to close state regulation.”¹²⁴ Thus, because the corporate plaintiff had assumed the “prominence in the affairs of society,” it had to prove actual malice.¹²⁵

¹¹³ See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967).

¹¹⁴ See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (plurality opinion).

¹¹⁵ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹¹⁶ *Id.* at 344.

¹¹⁷ *Id.*

¹¹⁸ See *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 956 (D.D.C. 1976).

¹¹⁹ *Id.* at 955.

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

¹²² *Id.*

¹²³ See *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (corporate claimant was in the insurance industry).

¹²⁴ *Id.*

¹²⁵ *Id.* at 1347, 1350 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

Nevertheless, even if the standard under defamation law for the corporation can be analogized to the individual, the injury cannot be. Again, it has been the lower courts that have articulated the “injury” of a corporation in defamation suits and the damages available. For instance, the D.C. District Court noted that corporate defamation occurs “only by imputation about its financial soundness or business ethics.”¹²⁶ It may only recover actual damages in the form of lost profits.¹²⁷ This difference in corporate treatment reflects something logically and factually distinct from the defamation of a natural person. Consequently, the D.C. District Court in *Martin Marietta* noted that a corporate libel action is not “a basic of our constitutional system.”¹²⁸ The D.C. Circuit has also been vocal on its stance as to the difference between corporate and individual reputation.¹²⁹ It recently acknowledged that the “brand of infamy or disloyalty” is most applicable to “flesh-and-blood humans,” even though corporations may derive substantial financial value from their products’ reputation.¹³⁰ To a corporation, the D.C. Circuit noted, reputation is an “asset” to be “cultivate[d], manage[d], and monetize[d]”¹³¹ Therefore, when dealing with the scope of a constitutional guarantee, any analogy between situations where the claimant is an individual to one where the claimant is a corporation “must necessarily take into account this difference.”¹³²

In *Con Edison*, both Con Edison and the Second Circuit conceded that Con Edison lost money in being unable to pass the costs on to its ratepayers. In fact, the court determined that the provision “clearly deprived Con Ed of a property interest” that cost the corporation “approximately \$250 million that it would otherwise have been able to obtain from its customers.”¹³³ Because Con Edison could not pass these costs on to its customers, it had to internalize the increased costs of about \$ 250 million.¹³⁴ In other words, Con Edison had to absorb the costs itself and hence suffered an injury of \$250 million, which led the corporation to file suit in the District Court for the Northern District of New York.¹³⁵ Therefore, this injury in the form of financial loss cannot be equated to a dignitary harm that “stigmatize[s] [its] reputation,” as Supreme Court language has dictated.¹³⁶

Thus, consensus within the Supreme Court and the lower courts has long reflected the several distinctions between the corporate versus individual status and also between the corporate versus individual recovery in defamation suits. And although injury to the economic interests of a corporation may be actionable via defamation law, it cannot be maintained under the Bill of Attainder Clause because corporations cannot suffer personal, dignitary interests. For instance, the Second Circuit admitted that Con

¹²⁶ See *Golden Palace, Inc. v. Nat’l Broad. Co., Inc.*, 386 F. Supp. 107, 109 (D.D.C. 1974).

¹²⁷ See *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985).

¹²⁸ See *Martin Marietta Corp.*, 417 F. Supp. at 955 (quoting *Gertz*, 418 U.S. at 341).

¹²⁹ See *infra*, Part IV.A for a more in-depth discussion of *Kaspersky Lab, Inc. v. U.S. Dept. of Homeland Security*.

¹³⁰ *Kaspersky Lab*, 909 F.3d at 463.

¹³¹ *Id.* at 461.

¹³² See *BellSouth II*, 162 F.3d at 684.

¹³³ See *Consol. Edison*, 292 F.3d at 351.

¹³⁴ *Id.* at 344–45.

¹³⁵ *Id.* at 345.

¹³⁶ See *Lovett*, 328 U.S. at 314.

Edison’s monetary loss could not be maintained under *Nixon*’s traditional or historical punishment factor.¹³⁷ It is further unlikely that such injury could be found under either *Nixon*’s functional or motivational factors. Thus, corporate “injury” in terms of financial loss is not comparable to the individual “punishment” that the Bill of Attainder Clause seeks to guard against. Therefore, the failure of the Second Circuit to clarify how the only injury Con Edison sustained—in the form of financial losses—is comparable to the type of punishment prohibited by the Bill of Attainder Clause.

D. BECAUSE CORPORATIONS ARE SUBJECT TO STATE AND
FEDERAL REGULATION, THE PROTECTIONS OF THE BILL OF
ATTAINDER CLAUSE TO THE CORPORATE ENTITY IS NOT
REASONABLE

Corporations possess specialized privileges due to their corporate status that mandate a certain degree of regulation from state and federal regulatory bodies. The legitimate state and federal interests in regulating corporate conduct require that the corporation have less privacy rights than a natural person. Extension of the Bill of Attainder Clause to the corporation would not advance those interests and would be unreasonable. This Section discusses the implications, first, of state regulation of corporations and, second, of federal regulation of corporations. It then discusses the effects of state and federal regulation upon the corporation’s rights, such as privacy.

First, a corporation is limited by the powers granted to it in its charter and by the right of the state of its incorporation to regulate it. In 1819, the Supreme Court described a corporation as an “artificial being . . . existing only in contemplation of law” and “possess[ing] only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”¹³⁸ In 1950, the Supreme Court in *United States v. Morton Salt Co.* stated that “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”¹³⁹ Thus, privacy rights differ substantially. The Court in *Morton Salt* further noted that corporations are not equal with individuals in the enjoyment of a right to privacy because corporations are “endowed with public attributes . . . have a collective impact upon society . . . derive the privilege of acting as artificial entities,” and are allowed to “engag[e] in interstate commerce.”¹⁴⁰ And, as the Court reasoned, with these “[f]avors” from the government come “an enhanced measure of regulation.”¹⁴¹

The Second Circuit in *Con Edison* acknowledged this as well, noting that corporations have been denied constitutional protections by the Supreme Court in instances where “competing state interests in regulating corporate conduct and

¹³⁷ See *Consol. Edison*, 292 F.3d at 351 (“We need not resolve this close question to conclude that [the provision] is nonetheless a bill of attainder. Accordingly, we do not decide whether [the provision] imposes a traditional attainder and turn instead to the next component of the test.”).

¹³⁸ See *Tr. of Dartmouth C. v. Woodward*, 17 U.S. 518, 536 (1819).

¹³⁹ See *United States v. Morton Salt Co.* 338 U.S. 632, 652 (1950).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

investigating corporate wrongdoing” and “transparency” were at stake.¹⁴² The Second Circuit had even listed several legitimate state purposes in the provision that *Con Edison* attacked, such as preventing ratepayers from absorbing the costs, deterring similar conduct, regulating monopolies, and protecting public health.¹⁴³ However, it disregarded these above-listed nonpunitive purposes. Instead, the Second Circuit distinguished Supreme Court holdings that discussed the state’s retained “visitation power”¹⁴⁴ over corporations and the state’s “legitimate right”¹⁴⁵ in regulating corporate behavior by holding that the New York legislature was “inflicting punishment” and ignoring the administrative process to follow to vindicate the alleged wrongdoing.¹⁴⁶ However, language from the Supreme Court indicates that courts are sometimes unable or unwilling to get involved since to do so would be to interfere with the rights of states to regulate and investigate corporations in their jurisdiction. The failure of the Second Circuit in *Con Edison* to address this fact and reasoning from prior Supreme Court opinions was erroneous and makes the holding in *Con Edison* incomplete.

Second, corporations are also subject to federal regulation. A corporation is in a unique position to use its special corporate privileges to commit unlawful acts. It is obligatory upon the U.S. government to adopt standards and regulatory measures to ensure that corporations within U.S. jurisdiction are not abusing their power. Recognizing this, courts have upheld various legislative provisions against corporations, even claims asserting violations of the Bill of Attainder Clause because of Congress’ power to regulate corporations. Excluding the Second Circuit’s opinion in *Consolidated Edison v. Pataki*,¹⁴⁷ there are six cases from the Supreme Court and courts of appeals regarding the connection between corporations, bill of attainder claims, and legislative provisions that allegedly impair the corporation’s business activities, though to different extents.¹⁴⁸ All involve a corporation that had alleged a violation of the Bill of Attainder Clause. The remainder of Section D outlines these decisions, emphasizing the duty of Congress to regulate corporations through legitimate legislation and the courts’ reflection of that duty in their holdings.

The 2016 Supreme Court case *Bank Markazi* concerned a congressional provision that made a particular set of assets available to satisfy the judgments of individuals who had claims against Iran for its role in supporting state-sponsored terrorism.¹⁴⁹ The Supreme Court held that the provision was “an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper.”¹⁵⁰ The bill of attainder claim was therefore

¹⁴² See *Consol. Edison*, 292 F.3d at 348.

¹⁴³ *Id.* at 351–52.

¹⁴⁴ See *Wilson v. United States*, 221 U.S. 361, 382–84 (1911).

¹⁴⁵ See *Morton Salt*, 338 U.S. at 652.

¹⁴⁶ See *Consol. Edison*, 292 F.3d at 348.

¹⁴⁷ See *supra* Part II for the complete analysis of *Consolidated Edison v. Pataki*.

¹⁴⁸ See generally *Kaspersky Lab, Inc. v. U. S. Dep’t of Homeland Security*, 909 F.3d 446 (D.C. Cir. 2018); *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); *ACORN*, 618 F.3d 125, 136 (2d Cir. 2010); *BellSouth II*, 162 F.3d 678 (D.C. Cir. 1998); *SBC Communications*, 154 F.3d 226 (5th Cir. 1998); *BellSouth I*, 144 F.3d 58 (D.C. Cir. 1998).

¹⁴⁹ See *Bank Markazi*, 136 S. Ct. at 1320.

¹⁵⁰ *Id.* at 485.

unsuccessful.¹⁵¹ In addition to this Supreme Court holding, lower courts have also heard issues of corporate bill of attainder claims and have all based their holdings in some respect on the legitimate purposes of Congress in enacting the legislative provision at issue.

Three opinions concerning corporate bill of attainder claims, all decided in 1998, challenged certain provisions of the Telecommunications Act of 1996. The D.C. Circuit issued two of these opinions, both concerning the same parties but asserting violations of different provisions of the Telecommunications Act: *BellSouth I* and *BellSouth II*.¹⁵² First, in *BellSouth I*, BellSouth Corporation challenged Section 274 of the Telecommunications Act of 1996 as a bill of attainder because it limited the ability of its Bell operating companies (“BOCs”) to provide electronic publishing.¹⁵³ Second, in *BellSouth II*, BellSouth Corporation brought another action against the Federal Communications Commission (“FCC”) claiming that Section 271 prevented them from providing in-region long distance telephone service without satisfying statutory criteria.¹⁵⁴ The D.C. Circuit held that the provision at issue in *BellSouth I* represented a “conventional response to commonly perceived risks of anticompetitive behavior.”¹⁵⁵ Further, the provision in *BellSouth II* was a “rational and nonpunitive congressional enactment that serves to open telecommunications markets” and to prevent monopolies, which is “no different than numerous regulatory measures aimed at particular industries that have never been held to inflict punishment.”¹⁵⁶ In addition, the Fifth Circuit decided in *SBC Communications v. FCC* that certain provisions of the Telecommunication Act—which placed restrictions on twenty subsidiaries—were bills of attainder.¹⁵⁷

In 2010, the Second Circuit’s opinion in *Acorn Institute, Inc. v. United States* involved a corporation that was legislatively barred from receiving federal funding after it allegedly engaged in tax evasion, voter fraud, etc., and subsequently alleged that this provision was a bill of attainder.¹⁵⁸ The only reference the Second Circuit made to *Consolidated Edison v. Pataki*—also from the Second Circuit—was an acknowledgment that “[a]lthough the Supreme Court has never had occasion to rule on the issue, we have held that the scope of the ‘specification of the affected persons’ element includes corporate entities.”¹⁵⁹ Nevertheless, there was no violation of the Clause in *Acorn* and the Circuit instead determined that the provision was a legitimate exercise by Congress to carry out its spending powers by “suspend[ing] federal funds to an organization that has admitted to significant mismanagement”¹⁶⁰ The most recent corporate bill of attainder case was also from the D.C. Circuit—*Kaspersky Lab, Inc. v.*

¹⁵¹ *Id.* at 478 n.14.

¹⁵² See generally *BellSouth II*, 162 F.3d 678 (D.C. Cir. 1998); *BellSouth I*, 144 F.3d 58 (D.C. Cir. 1998).

¹⁵³ See *BellSouth I*, 144 F.3d at 60.

¹⁵⁴ See *BellSouth II*, 162 F.3d at 680.

¹⁵⁵ See *BellSouth I*, 144 F.3d at 65–66.

¹⁵⁶ See *BellSouth II*, 162 F.3d at 680, 685–86.

¹⁵⁷ See *SBC Communications*, 154 F.3d at 229.

¹⁵⁸ See *ACORN*, 618 F.3d at 129–30.

¹⁵⁹ *Id.* at 136 (quoting *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 349 (2002)).

¹⁶⁰ See *ACORN*, 618 F.3d at 137.

United States Dept. of Homeland Security.¹⁶¹ In 2018, Kaspersky Lab, a Russian-based corporation, challenged the 2018 NDAA, which banned the use of Kaspersky products by U.S. governmental agencies.¹⁶² The D.C. Circuit in *Kaspersky Lab, Inc.* upheld the legislation because Congress had the legitimate purpose of protecting the United States from the threats of Kaspersky products, making the legislation at issue “prophylactic, not punitive.”¹⁶³

Thus, all six holdings noted contained an analysis of Congress’ authority to regulate the corporate entity based on legitimate, federal regulatory purposes. The Second Circuit in *Consolidated Edison*, too, found multiple non-punitive purposes.¹⁶⁴ After noting these possible non-punitive purposes, the Second Circuit nevertheless concluded that nothing “other than punishment” can account for the New York legislature’s enactment.¹⁶⁵ Therefore, the Circuit held that the provision was a “burden that was obviously disproportionate to the harm caused.”¹⁶⁶ But the Second Circuit failed to distinguish the above cases with the legislative provision at issue in *Consolidated Edison*.¹⁶⁷ Specifically, the holdings in such cases are all representative of Congress’ obligation to regulate corporations, carry out its constitutional powers, or safeguard the nation from national security threats—none of which have found a violation of the Bill of Attainder Clause. The Second Circuit in *Consolidated Edison* was wrong to so easily gloss over and dismiss the legitimate reasons set forth by Congress for the provision’s enactment without an analysis. Thus, the Circuit’s cursory analysis was insufficient to justify a finding of punitive intent in *Consolidated Edison*.

IV. NATIONAL SECURITY INTERESTS AND FOREIGN TRADE POLICIES MANDATE THAT THE BILL OF ATTAINDER CLAUSE NOT EXTEND TO CORPORATIONS

Part IV presents an alternative argument as to why the Bill of Attainder Clause should not extend to corporations. Corporate standing under the Clause would interfere with national security interests and foreign trade policies in three main respects: (1) Congress’ ability to sanction; (2) Congress’ power to regulate foreign commerce and facilitate trade; and (3) the ability of the political branches to respond swiftly to sensitive foreign policy issues.

¹⁶¹ See *infra*, Part IV.A. for a more in-depth discussion of *Kaspersky Lab, Inc. v. U.S. Dep’t. of Homeland Sec.*, 909 F.3d 446 (D.C. Cir. 2018).

¹⁶² See *Kaspersky Lab*, 909 F.3d at 452–53.

¹⁶³ *Id.* at 458.

¹⁶⁴ See *Consol. Edison*, 292 F.3d at 351–52.

¹⁶⁵ *Id.* at 350.

¹⁶⁶ *Id.* at 354.

¹⁶⁷ Excluding the later-decided cases *Kaspersky*, *Bank Markazi*, and *ACORN*.

A. CONGRESS' ABILITY TO SANCTION

If Huawei could challenge the 2019 NDAA with a corporate bill of attainder claim, the courts could effectively become the final legislatures at determining when a corporation ought or ought not to be sanctioned. Such claims asserted by corporations would hinder the use of sanctions as an effective means of responding to national security threats against the United States and are more appropriately categorized as political issues not to be questioned by the Judiciary. Therefore, even if it is contended that the Bill of Attainder Clause applies to corporations, national security interests, like Congress' ability to effectively sanction, must be considered by the courts. Neither the denial of noncontractual benefits nor the severity of the punishment imposed can affect Congress' power to sanction. For instance, the Supreme Court in *Flemming v. Nestor* noted the provision disqualifying deportees from the receipt of Social Security benefits while they are not lawfully in this country is a "mere denial of a noncontractual governmental benefit" with "[n]o affirmative disability or restraint [] imposed."¹⁶⁸ Further, the Supreme Court in *Selective Service System v. Minnesota Public Interest Group* had observed that the "severity of a sanction is not determinative of its character as punishment" when deciding whether the provision at issue violates the Bill of Attainder Clause.¹⁶⁹

There is one case on point with sanctions and corporate bill of attainder claims: *Kaspersky Lab, Inc. v. United States Dept. of Homeland Security*.¹⁷⁰ The D.C. Circuit decided *Kaspersky* in 2018. In *Kaspersky*, a section of the 2018 NDAA—enacted by Congress—banned the use of Kaspersky products by governmental agencies after concerns that Kaspersky's ties to Russia were "a threat to the very systems [Kaspersky products] is meant to protect."¹⁷¹ The provision prohibiting the use of Kaspersky products read as follows: "No department, agency, organization, or other element of the Federal Government may use . . . any hardware, software, or services developed or provided, in whole or in part, by—(1) Kaspersky Lab . . ."¹⁷² Kaspersky—the Russian-headquartered cybersecurity corporation—sued alleging a violation of the Bill of Attainder Clause in the U.S. Constitution.¹⁷³ The D.C. Circuit began by noting that the analysis between natural persons and corporations will always be "strained at best" because there is little precedent on the Clause's applicability to corporations.¹⁷⁴ Nevertheless, the court "assume[d] that the Bill of Attainder Clause extends to corporations" and thereafter denied relief to Kaspersky because the provision was "necessary to protect federal computer systems from Russian cyber-threats."¹⁷⁵ The D.C. Circuit noted that even though "Congress can do more than identify threats approaching at a distance and wait patiently for those threats to cause empirically provable consequences," it was justified in not doing so based on the "magnitude of

¹⁶⁸ See *Flemming*, 363 U.S. 603, 617 (1960).

¹⁶⁹ See *Selective Service System*, 468 U.S. 841, 851 (1984).

¹⁷⁰ See generally *Kaspersky Lab, Inc. v. U.S. Dept. of Homeland Sec.*, 909 F.3d 446 (D.C. Cir. 2018).

¹⁷¹ See *Kaspersky Lab*, 909 F.3d at 451–52.

¹⁷² *Id.* at 452–53.

¹⁷³ *Id.* at 453.

¹⁷⁴ *Id.* at 462.

¹⁷⁵ *Id.* at 450, 454.

the harm” that an intrusion could have upon the United States by compromising its federal systems.¹⁷⁶ Therefore, the legislative provision in *Kaspersky* imposing the sanction was a “reasonable and balanced response”¹⁷⁷ by Congress based on national security threats even though alternative measures were available.

Here, continuing with the assumption that the Bill of Attainder Clause applies to corporations, securing and safeguarding the intelligence of the United States from foreign cybersecurity threats is a legitimate congressional purpose. The judiciary has no choice but to be convinced that such a provision’s passage was based on legitimate purposes. Therefore, it would be unreasonable for the judiciary to intervene. Futile searches into the hidden meaning and subjective intent behind the enactment of Section 889 of the 2019 NDAA is an impermissible endeavor. As the Supreme Court strongly asserted in *Flemming v. Nestor*, “[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.”¹⁷⁸ Here, Congress has set forth legitimate reasons for the legislation’s passage. Section 889 cites to “the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes.”¹⁷⁹ This must be accepted as sufficient and legitimate by the courts.

B. CONGRESS’ POWER TO REGULATE FOREIGN COMMERCE AND FACILITATE TRADE

Corporate bill of attainder claims represent an obstacle to congressional action to address foreign policy issues such as trade law. Should the protections of the Bill of Attainder Clause extend to corporations, Huawei could effectively challenge legislation that it feels unfairly disadvantages it. This could, in turn, affect the ability of the United States to respond to unfair trade practices of other foreign powers such as China by limiting Congress’ permissible methods—enacting legislation—to assert pressure campaigns against those foreign powers. In other words, the means utilized by Congress to deal with the unfair labor and trade practices of China would be impermissibly curtailed to the point where Congress is no longer able to swiftly react to foreign relations difficulties. For instance, China has for quite some time utilized a system of unfair trade practices, which includes “forced technology transfers and intellectual property theft.”¹⁸⁰ Therefore, applying the Bill of Attainder Clause to the corporate entity would frustrate this purpose and ability of Congress to promptly respond.

In 2016, the Supreme Court stressed in *Bank Markazi v. Peterson* that legislation involving foreign affairs is “a domain in which the controlling role of the political

¹⁷⁶ *Id.* at 458 (“Congress’s decision to remove Kaspersky from federal networks represents a reasonable and balanced response. Section 1634 is prophylactic, not punitive.”).

¹⁷⁷ *Id.*

¹⁷⁸ See *Flemming*, 363 U.S. at 617.

¹⁷⁹ See 2019 NDAA § 889.

¹⁸⁰ See David Lawder and Susan Heavy, *U.S. Blacklists China's Huawei as Trade Dispute Clouds Global Outlook*, REUTERS (May 15, 2019), <https://www.reuters.com/article/us-usa-trade-china/us-blacklists-chinas-huawei-as-trade-dispute-clouds-global-outlook-idUSKCN1SL2DI>.

branches is both necessary and proper.”¹⁸¹ In pursuit of foreign policy objectives, the political branches have regulated foreign affairs by a variety of means and such measures have never constituted “invasions upon the Article III judicial power.”¹⁸² Therefore, as noted, Congress has the power to legislate against corporations that pose a threat to the national security and intelligence interests of the United States and it must do so to effectively respond to foreign threats such as trade law disputes.

C. THE ABILITY OF THE POLITICAL BRANCHES TO RESPOND SWIFTLY TO SENSITIVE FOREIGN POLICY ISSUES

The Huawei situation both coincides and is a direct consequence of the growing perceived threat from China. Congress determined that the use of Huawei products by federal agencies poses a threat to the cybersecurity of the United States and cited to possible Chinese influence, relying on national security reasons to justify its actions.¹⁸³ The U.S. government here is focused on the “increasingly authoritarian nature of the Chinese government” and “the fading line between independent business and the state.”¹⁸⁴ It has already responded to these perceived threats by increasing tariffs on Chinese goods, imposing investment restrictions, and indicting Chinese nationals accused of “hacking and cyberespionage.”¹⁸⁵ If Huawei could challenge these actions with a bill of attainder claim and potentially satisfy the Clause’s standards, the security and intelligence of the United States will be put at risk and, with it, the ability of the U.S. government to promptly react to sensitive policy issues by these foreign powers.

The Supreme Court has recognized that threats to national security are a legitimate reason for passing legislation to combat those concerns against the United States. For instance, in 2010 the Supreme Court was convinced that Congress was justified in passing the provision in *Holder v. Humanitarian Law Project* because Congress had made “specific findings regarding the serious threat posed by international terrorism.”¹⁸⁶ Similarly, in *Trump v. International Refugee Assistance Project*, decided seven years later, the Supreme Court emphasized that “[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and

¹⁸¹ *Bank Markazi*, 194 L. Ed. 2d 463, 485 (2016).

¹⁸² *Id.*

¹⁸³ See H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 112TH CONG., INVESTIGATIVE REP. ON THE U.S. NAT’L SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COS. HUAWEI AND ZTE, at vi, 45 (2012) (Here, U.S. investigations into Huawei have been extensive and ongoing for about a decade. In 2011, the House Permanent Select Committee on Intelligence concluded that “the United States could not trust its equipment and services in U.S. telecommunications networks.” The Report determined that “U.S. government systems, particularly sensitive systems, should not include Huawei . . . equipment, including in component parts” and that “government contractors—particularly those working on contracts for sensitive U.S. programs—should exclude . . . Huawei equipment in their systems.”).

¹⁸⁴ See David E. Sanger, Julian E. Barnes, et. al., *In 5G Race With China, U.S. Pushes Allies to Fight Huawei*, N.Y. TIMES, Jan. 26, 2019, <https://www.nytimes.com/2019/01/26/us/politics/huawei-china-us-5g-technology.html>.

¹⁸⁵ *Id.*; see also Lawder and Heavy, *supra* note 180 (Recently, the United States increased tariffs on about \$200 billion worth of Chinese imports to 25% and China retaliated by increasing tariffs on \$60 billion worth of U.S. products.).

¹⁸⁶ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29 (2010).

respondent, as well as the interests of the public at large.”¹⁸⁷ This mandates that Congress’ ability to act suitably and promptly not be hindered. Further, the Supreme Court in *Bank Markazi* had also stated that the political branches have a considerable measure of control over the nation’s foreign relations and have throughout history exercised such control “as exigencies arose.”¹⁸⁸ Any conclusion to the contrary fails to recognize the importance of remaining abreast of sensitive foreign policy changes and reacting accordingly.

Thus, based on the above, extending the protections of the Bill of Attainder Clause to the corporate entity would present severe obstacles with respect to Congress’ ability to sanction, regulate foreign commerce and trade, and quickly respond to foreign policy issues.

V. CONCLUSION

Huawei’s chief complaint against the U.S. government alleged violations of the Bill of Attainder Clause of the U.S. Constitution. This allegation raises interesting questions about the applicability of the Clause to corporations. The Supreme Court has never held that the Bill of Attainder Clause applies to corporations and lower courts have largely assumed it does. With the exception of the Second Circuit, the lower courts have ruled against the corporate claimant on grounds unrelated to the Clause. The Second Circuit’s decision in *Consolidated Edison* stands as a notable exception on bill of attainder claims brought by corporate claimants. Decided in 2002, the Second Circuit in *Consolidated Edison* held not only that corporations are protected by the Clause to the same extent as individuals, but also that the corporate claimant—Consolidated Edison—had sufficiently alleged that New York passed a bill of attainder. *Consolidated Edison* became the first court to find a violation of the Bill of Attainder Clause in favor of the corporate entity.

The prevailing assumption that the Clause applies to the corporate entity is unwarranted and bears re-examination. This article has argued that—contrary to the prevailing assumptions of the courts as well as the literature in the academic community—the Bill of Attainder Clause is not applicable to corporations. It has made two arguments: (1) the Bill of Attainder Clause protects only personal dignitary interests, and (2) national security interests and foreign trade policies mandate that the Bill of Attainder Clause not extend to corporations.

“Regarding the first argument, this article attacked both holdings of the Second Circuit’s opinion in *Consolidated Edison*.” *Consolidated Edison*’s first holding that the Clause protects corporations is flawed because the Second Circuit failed to consider the history of the Clause as well as prior Supreme Court decisions finding violations of the Clause, all of which have involved individuals. Specifically, the history of the Clause has revealed an individual-based standpoint rooted in death and banishment under English law and subsequently outlawed by the Founding Fathers in the U.S. Constitution to protect the liberty of U.S. society and U.S. government.

¹⁸⁷ See *Trump v. Int’l Refugee Assistance Project*, 198 L. Ed. 2d 643, 651 (2017) (quoting *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991)).

¹⁸⁸ See *Bank Markazi*, 194 L. Ed. 2d 485, 485 (2016).

Further, all five cases where the Supreme Court has found a violation of the Bill of Attainder Clause have involved the dignitary interests of an individual and legislation that impugned the individual's or group of individuals' reputation(s) with respect to their profession. Thus, this history and precedent demonstrate the original intent for the Clause to be invoked only for the protection of the natural person.

Consolidated Edison's second holding and analysis that the New York legislature passed a bill of attainder by targeting Con Edison for punishment is incomplete because the Second Circuit's analysis did not consider several distinguishing characteristics of the corporate entity such as corporate injury and corporate regulation. In other words, the only injuries a corporation can sustain are economic injuries and, because corporations are subject to both state and federal regulation, corporate extension of the Bill of Attainder Clause is unreasonable. Specifically, even though corporations can sue for defamation, they lack the ability to sustain damages for injury to their dignitary interests and can only suffer damages in the form of monetary loss. Further, the act of incorporation mandates that both state and federal regulatory agencies be involved in the affairs of the corporation, which inevitably requires that the corporation surrender some of its privacy. Thus, these distinguishing characteristics between the natural person and corporate entity lead to the conclusion that the Bill of Attainder Clause cannot apply to corporations.

Regarding the second subsidiary argument, this article presented an alternative theory as to why corporate extension of the Bill of Attainder Clause is irrational. Specifically, it contended that national security interests and foreign trade policies would negatively impact the United States in three respects: (1) Congress' ability to sanction, (2) Congress' power to regulate foreign commerce and facilitate trade, and (3) the ability of the political branches to respond swiftly to sensitive foreign policy issues. Specifically, Congress must retain the power to enact legislation and sanction unhindered by corporate protections under the Bill of Attainder Clause. Congress' power to regulate foreign commerce cannot be compromised by the ability of corporations to defeat legitimate legislation. Further, Congress must at all times be given the flexibility to respond to foreign issues, such as those raised by both Huawei's alleged cybersecurity threats as well as China's trade disputes with the United States. If Huawei were able to assert a violation of the Clause against the U.S. government, Congress' powers to sanction, regulate foreign commerce, and react to foreign policy issues would be hindered. Thus, corporate extension of the Bill of Attainder Clause would render the imperative of considering these international issues useless.

In conclusion, the Bill of Attainder Clause of the U.S. Constitution only protects the personal dignitary interests of the individual and corporate extension of the Clause cannot be maintained due to Congress' interests in preventing interference with foreign relations and sensitive foreign policy issues.