

**Corporations are "Persons" But Lack "Personal Rights": A Review of Statutory Construction and the Limits of Corporate Personhood Based on the United States Supreme Court Case of *Federal Communications Commission v. AT&T* (2011)**

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"Corporations are people, my friend," pronounced former Massachusetts governor Mitt Romney, as if it were a fact, during a campaign speech in Iowa. The audience's response? "No they're not."<sup>2</sup> Who is correct? Are corporations people?

"Corporate personhood" refers to the legal doctrine that affords legal rights of natural persons to corporations. A controversial and recent example is the well-known case of *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) ("Citizens United"), where the United States Supreme Court held that under the First Amendment, the government may not suppress political speech based on the identity of the speaker.<sup>3</sup> Therefore, "corporate speakers" can exercise the First Amendment "speech right" of donating funds to political campaigns. As a result of this highly-publicized case, some believe that corporations are presumptively entitled to rights belonging to natural persons. However, a more recent Supreme Court case demonstrates that this is not true. Corporate personhood has limits, and even after *Citizens United*, some rights remain unique to natural persons.

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<sup>2</sup> See Ian Millhiser, *Romney Defends Raising Retirement Age to Protect Corporate Tax Breaks: 'Corporations Are People, My Friend'* (2011), <http://thinkprogress.org/justice/2011/08/11/293843/romney-defends-raising-retirement-age-to-protect-corporate-tax-breaks-corporations-are-people/>.

<sup>3</sup> See generally *Citizens United v. FEC*, 130 S.Ct. 876 (2010); see also S.J. Res. 29, 112th Congress, 1st Session (Nov. 1, 2011), available at <http://www.scribd.com/doc/71154073/A-Constitutional-Amendment-to-Reform-Campaign-Finance> (Proposed constitutional amendment to overrule the *Citizens United* holding and allow the government to limit the amount of contributions and expenditures raised and spent on political campaigns).

In *Federal Communications Commission v. AT & T*, 131 S. Ct. 1177 (2011) ("AT & T"), the Supreme Court held that corporations do not have a personal privacy right under the Freedom of Information Act ("FOIA"). To arrive at this result, the Court analyzed the meaning of personal privacy, generally and in the context of the statute, by relying on layperson colloquialisms in addition to a variety of other sources. Subsequent cases outside of the FOIA context – ranging from those involving Fourth Amendment privacy issues to insurance coverage disputes – have relied on *AT & T* for the general proposition that corporations lack personal rights.

*Federal Communications Commission v. AT & T*

*AT & T* arose under FOIA, which requires federal agencies to make documents available upon request unless a statutory exemption applies. FOIA Exemption 7(C) is sometimes referred to as the "personal privacy" exemption because it prevents the disclosure of documents where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (2009). The issue in *AT & T* was whether a corporation can claim this "personal privacy" exemption in order to prevent the disclosure of information. The Court answered in the negative, reversing the lower court decision.

After AT & T participated in an FCC-administered program to enhance access to advanced telecommunications and information services for schools and libraries, AT & T voluntarily reported that it may have overcharged the government. *AT & T*, 131 S. Ct. at 1180. The FCC investigated, following which, competitors of AT & T submitted a FOIA request seeking documents pertaining to the investigation. *Id.* The FCC withheld responsive documentation – not on the basis of a personal privacy right of AT & T, which it had determined did not apply to corporations – but to protect the personal privacy of *employees* of AT & T. *Id.*

at 1180. The FCC also withheld information to protect trade secrets and commercial and financial information of AT & T based on a different exemption. *Id.* at 1180-81; 5 U.S.C. § 552(b)(4) (2009) (protects a company's trade secrets and commercial or financial information).

#### Third Circuit Court of Appeals

AT & T appealed to the Third Circuit Court of Appeals, and the court agreed with AT & T that the personal privacy exemption applies to corporations. *AT & T v. FCC*, 582 So. 3d 490, 496 (3d Cir. (FCC) 2009). In its analysis, the court first noted that FOIA defines "persons" to include corporations and does not separately define the term "personal." *Id.* at 497. The court further reasoned that the adjective "personal" must refer to the noun "person." *Id.* As a result, the court concluded that corporations, as persons, have a personal privacy right and can assert the personal privacy exemption. *Id.* at 498.

#### Supreme Court Analysis: A Lesson in Statutory Construction

The Supreme Court reversed the Third Circuit and held that corporations cannot assert a personal privacy right under FOIA. The Court analyzed the statute by working through the well-known principles of statutory construction and by considering a variety of sources that help explain the meaning of privacy both within and outside of the FOIA context.

First, the Court reviewed the plain language of the contested term at issue: "personal." *AT & T*, 131 S.Ct. 1181-82. Although the statute defines the term "person" to include corporations, the statute does not define the term "personal." *Id.* at 1182. When a statute does not define a term, the term is given its ordinary meaning. *Id.* In determining the ordinary meaning of personal, the Court pointed out that a noun and its adjective form can have different meanings. *Id.* at 1181. As an example, the Court noted that the definition of the noun "corn" (to identify a vegetable) is quite different from the adjective "corny" (to describe a certain style of

humor). *Id.* To derive the ordinary meaning of personal, the Court did not rely on the definition of the related term "person," but rather considered the dictionary definition and common usage of the term "personal." *Id.* at 1182. The dictionary definition suggests that personal is not meant to include corporations because the definition includes the words "individual," "one's own," and "pertaining to, or characteristic of a person or self-conscious being, as opposed to a thing or abstraction." *Id.* 1182 (dictionary quotations omitted). Additionally, the term "personal" is typically used in phrases to reflect natural persons; for example, personal correspondence, personal influence, and personal tragedy all refer to natural persons, not corporations. *Id.* at 1182. Personal is also often colloquially used to mean the opposite of business, as in personal versus business expenses or personal life versus work life. *Id.*

Second, apparently not completely convinced of the meaning of word "personal," the Court considered the context in which personal is used by examination of the surrounding language: the phrase "personal privacy." *Id.* at 1182. The Court reasoned that the word "personal" must be interpreted in the context of the phrase "personal privacy" because the combination of two words can create a meaning different than each word independently. *Id.* at 1183. As an illustration, the Court noted that the phrase "golden boy" is understood to mean that one is charming or talented [and does not refer to a boy made out of gold]. *Id.* Consequently, the phrase "personal privacy" cannot, as AT & T argued, be deconstructed to necessarily mean the "privacy of a person." *Id.* Moreover, the Court stated that personal privacy conveys more than merely "of a person" but rather "suggests a type of privacy evocative of human concerns – not the sort usually associated with an entity." *Id.*

The Court also considered other sources in analyzing the phrase "personal privacy." These included unrelated Supreme Court cases and statutes, treatises, an applicable restatement,

and a memorandum published by the Attorney General. *Id.* at 1183-84. These sources failed to show examples of corporations having personal privacy. Further, the Restatement (Second) of Torts and treatises provide that corporations do not have the right of personal privacy. *Id.* citing (RESTATEMENT (SECOND) OF Torts § 6521, cmt. c (1976) and W. PROSSER, LAW OF TORTS § 97, 641-42 (2d ed. 1955)). Accordingly, the Court concluded that AT & T's position was unconvincing and that the corporation could not assert a personal privacy right.

Third, the Court strengthened its conclusion by considering the context of the statute: the language in other FOIA exemptions.<sup>4</sup> *AT & T*, 131 S.Ct. at 1184-85. The guiding principle is that "identical words and phrases within the same statute should normally be given the same meaning." *Id.* at 1185 (quotation omitted). The same language in the instant exemption (Exemption 7) – "unwarranted invasion of personal privacy" – is also included in another exemption (Exemption 6). *Id.* (quoting § 552(b)(6)). Therefore, the meaning of this phrase within Exemption 6 is instructive for determining its meaning in Exemption 7. Exemption 6 protects against the disclosure of medical and personnel files, as well as similar files to prevent an "unwarranted invasion of personal privacy." *See* § 552(b)(6). This exemption cannot apply to corporations because corporations do not have medical files, which supports the conclusion that the phrase "personal privacy" was intended to protect the privacy of natural persons. *See AT & T*, 131 S.Ct. at 1185.

Another exemption (Exemption 4) is also instructive because it protects corporate information and does not include the phrase "personal privacy." *Id.* at 1185; § 552(b)(4). Exemption 4 pertains to "trade secrets and commercial or financial information obtained from a

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<sup>4</sup> In other cases, this step of statutory analysis may also include analyzing the purpose or legislative history the statute. Here, the Court apparently concluded that the other FOIA exemptions provide clear enough guidance so that an examination of the purpose of the entire statute was not necessary.

person and privileged or confidential." § 552(b)(4). The language of Exemption 4 – person, privileged, confidential – applies to corporations. Therefore, corporations may have information that can be protected based on its status of being "privileged" and "confidential," but not based on "personal privacy." *See AT & T*, 131 S.Ct. at 1185. The instant Exemption 7 follows the language of Exemption 6 (which applies to natural persons and not corporate persons) and not Exemption 4 (which applies to corporate persons). *Id.* This, along with an Attorney General memorandum which explains that the "personal privacy" exemption applies to natural persons, supports that corporations cannot assert a personal privacy right. *Id.*

Accordingly, the Supreme Court held that AT & T could not assert a personal privacy right to claim Exemption 7(C) of FOIA and stated: "[w]e trust that AT & T will not take it *personally*." *Id.* at 1186 (emphasis added).

### Conclusion

The Supreme Court's holding in *AT & T* may have been surprising to those who believed that corporations presumptively possess rights afforded to natural persons, particularly in light of *Citizens United*, where the Court afforded First Amendment speech rights to corporations. However, *AT & T* and its successors stand for the general principle that corporations lack personal rights and characteristics.<sup>5</sup>

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<sup>5</sup> Cases that followed *AT&T* have involved issues ranging from alleged Fourth Amendment search and seizure violations to disputes involving insurance coverage. *See, e.g., United States v. Dupree*, 781 F. Supp. 2d 115, 147 (E.D.N.Y. 2011) (corporations lack personal rights and therefore cannot assert a Fourth Amendment privacy right, which is a personal right; but, this did not preclude individuals from challenging the search of their corporate employer); *Blais v. Hartford Fire Ins. Co.*, 2011 WL 1303135, \*11 (D. Mass. March 30, 2011) (corporations cannot have personal affairs and therefore "your" in "your business or personal affairs" in an insurance policy cannot refer to a corporation; this supports the conclusion that the provision is ambiguous, extrinsic evidence is needed, and whether insurance coverage exists cannot be resolved on summary judgment).

Therefore, in analyzing whether a corporation has a certain legal right or characteristic, whether in the litigation or transactional context, attorneys should not presume that courts will always treat corporations in the same manner as natural persons. Further, the way a court decides whether or not a corporation is entitled to a certain right may depend on the colloquial understanding of whether that right is personal, and therefore should be limited to natural persons.