

# ***SBC COMMUNICATIONS, INC. v. FCC*: DOES SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996 CONSTITUTE A BILL OF ATTAINDER AGAINST THE BELL OPERATING COMPANIES?**

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Mr. President, today I am introducing the Communications Act of 1994, the first comprehensive rewrite of communications law since the original Communications Act was passed in 1934 . . . . The Communications Act of 1994 will bring order out of chaos in the communications industry . . . . The bill also gives authority over the question of long-distance entry by the Bell companies to the FCC, in consultation with the Attorney General. It is important to permit the Bell companies to enter the field of long distance once they establish that there is competition for local telephone exchange service. Although neither the Bell companies nor the long-distance industry will be completely pleased with the approach taken in this bill, the standard this bill includes establishes a reasonable policy based on competition and the public interest.<sup>1</sup>

The Telecommunications Act of 1996<sup>2</sup> ("1996 Act") was intended to be a comprehensive legislative mechanism which would ensure competition in the local telephone exchange market as America enters a new century of communications service.<sup>3</sup> The *raison d'être* of the 1996 Act is to increase competition within the local telephone service industry.<sup>4</sup> The 1996 Act required Incumbent

Local Exchange Carriers ("ILECs") to open their markets to competition through elimination of the historical barriers to entry which have plagued the telecommunications marketplace for the past century.<sup>5</sup>

Furthermore, the Bell Operating Companies ("BOCs"), which control the local networks in the majority of urban areas where the consumer's telephone calls originate and terminate would be allowed to enter new telecommunications markets.<sup>6</sup> Specifically, Congress placed various obligations on the BOCs through Sections 271-75 of the 1996 Act.<sup>7</sup> In return for meeting these obligations, the BOCs would be allowed to enter the lucrative long distance market.<sup>8</sup> They would also be allowed to enter markets from which they have been limited from entering for decades such as data services and alarm monitoring services.<sup>9</sup>

On December 31, 1997, however, the United States District Court for the Northern District of

<sup>1</sup> 140 CONG. REC. S771-72, (daily ed. Feb. 3, 1994) (statement of Sen. Hollings).

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 86 (to be codified at 47 U.S.C. § 151).

<sup>3</sup> See S. CONF. REP. NO. 104-230, at 113 (1996); see generally Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835 (1997) (providing a detailed discussion of the history of telecommunications law).

<sup>4</sup> See 47 U.S.C. § 251 (Supp. 1997).

<sup>5</sup> See *id.*

<sup>6</sup> See *In re Implementation of the Telecommunications Act of 1996 Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd. 17539 (1996). Prior to the 1982 Modification of Final Judgment, AT&T commanded a triple bottleneck monopoly over the telephone industry. That is, it controlled production of phone equipment, local service, and long distance service. See *United States v. AT&T Co.*, 552 F. Supp. 131, 160-63 (D.D.C. 1982), *aff'd Maryland v. United States*, 460 U.S. 1001

(1983).

<sup>7</sup> See 47 U.S.C. §§ 271-75 (Supp. 1997).

<sup>8</sup> See *id.*; see also *AT&T*, 552 F. Supp. at 160-63 (barring the BOCs from the long distance industry).

<sup>9</sup> See 47 U.S.C. §§ 273-75 (Supp. 1997); see also Bryan Gruley & Stephanie N. Mehta, *FCC Offers to Try to Help Baby Bells*, WALL ST. J., Jan. 15, 1998, at A3. The long distance industry is an \$80 billion market. See Mike Mills, *Ruling Would Let Bells into Long-Distance*, WASH. POST, Jan. 1, 1998, at A1. Note that the long distance restrictions only apply to service to customers within the BOCs' in-region states. See 47 U.S.C. § 271(b) (Supp. 1997). An in-region state is defined as any state in which a BOC is permitted to provide local service to as a result of the 1982 Consent Decree. See *id.* § 271(i). LATA is defined as local access and transport area. Generally, these are the local areas the BOCs were allowed to service as a result of the 1982 Consent Decree. See *id.* § 153(25). Further, the 1996 Act permits the BOCs to begin immediate sale of long-distance service to cellular customers. See *id.* § 271(b)(3) and § 271(g)(3).

Texas held in *SBC Communications, Inc. v. FCC*<sup>10</sup> that Sections 271-75 of the 1996 Act constituted an unconstitutional bill of attainder which automatically found the BOCs guilty of antitrust violations without a judicial hearing.<sup>11</sup> The court held that the 1996 Act embodied a legislative intent to punish the BOCs by restricting them from immediate entry into the long distance market in their respective local access and transport areas ("LATAs").<sup>12</sup> The intent of Sections 271-75, the court held, was based on the notion that the BOCs would commit future antitrust violations.<sup>13</sup>

Section I of this Note examines the history of the BOCs in the telecommunications industry. Section II summarizes the District Court's decision in *SBC Communications*. Section III traces the history of the Bill of Attainder Clause from its roots in "strict historicism" to the present Supreme Court's analysis based on "restrained functionalism."<sup>14</sup> Notably, this Section addresses the patchwork of Supreme Court decisions that have neglected to provide the Bill of Attainder Clause any constitutional significance beyond protection of disfavored groups from legislative persecution. Finally, Section IV takes issue with the reasoning of the District Court's application of the Bill of Attainder Clause to Sections 271-75 of the 1996 Act and argues that the lower court incorrectly found that the sections were unconstitutional.

## I. BRIEF HISTORY OF THE BELL OPERATING COMPANIES IN THE TELEPHONE INDUSTRY

### A. The Modification of Final Judgment

The BOCs stronghold over local service was reinforced by Judge Harold Greene in his 1982 Consent Decree<sup>15</sup> settling a 1974 antitrust lawsuit between AT&T and the Department of Justice ("DOJ").<sup>16</sup> The DOJ contended that AT&T violated the Sherman Antitrust Act<sup>17</sup> by using its pervasive market power to block competitors from providing telephone service.<sup>18</sup> The AT&T Consent Decree, or the Modification of Final Judgment ("1982 MFJ") required that AT&T divest itself of the twenty-two Bell Operating Companies by 1984.<sup>19</sup>

The 1982 MFJ imposed certain "line-of-business" restrictions on the BOCs.<sup>20</sup> Specifically, the restrictions prohibited the BOCs from providing long distance service, manufacturing telecommunications equipment, manufacturing customer premises equipment (*e.g.*, telephones, answering machines, etc.), providing information services, electronic publishing, and alarm services.<sup>21</sup> The line-of-business restrictions, however, allowed the BOCs to retain their monopolies in local exchange service.<sup>22</sup>

<sup>10</sup> 981 F. Supp. 996 (N.D. Tex. 1997).

<sup>11</sup> *See id.* at 1008. Bills of attainder are defined as, "[l]egislative 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." BLACK'S LAW DICTIONARY 165 (6th ed. 1990) (citing *United States v. Brown*, 381 U.S. 437, 448-49 (1965)).

<sup>12</sup> *See SBC Communications*, 981 F. Supp. at 1007.

<sup>13</sup> *See id.*

<sup>14</sup> *See generally* Thomas B. Griffith, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475 (1984) [hereinafter Griffith] (defining historicism as the narrow interpretation of the specific prohibitions that the Framers intended the clause to protect against at the time they wrote the Constitution, while functionalism applies the Bill of Attainder Clause to new factual situations in light of the perceived purpose in its constitutional framework).

<sup>15</sup> *See AT&T*, 552 F. Supp. at 139.

<sup>16</sup> *See id.*

<sup>17</sup> *See* 15 U.S.C. §§ 1-3 (Supp. 1997).

<sup>18</sup> *See AT&T*, 552 F. Supp. at 139.

<sup>19</sup> *See id.* at 226. The BOCs were 22 companies held under seven Regional Bell Operating Companies ("RBOCs"). They consisted of NYNEX, Pacific Telesis, SBC Communications, U.S. West, Bell South, Ameritech, and Bell Atlantic. *See id.* at 140-43 & n.41. Note, there are presently only five RBOCs since SBC Communications acquisition of Pacific Telesis Group and Bell Atlantic's acquisition of NYNEX. *See* Mike Mills, *The Bells' Fastest Operator*, WASH. POST, Jan. 6, 1998, at D1; Mike Mills, *Bell Atlantic May Gain Long-Distance Entree in N.Y.*, WASH. POST, Feb. 7, 1998, at H1.

<sup>20</sup> *See AT&T*, 552 F. Supp. at 227-28.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

## B. Overview of the Special Provisions of the Telecommunications Act of 1996

In an effort to replace the 1982 MFJ, Congress enacted Sections 271-75 of the 1996 Act to promote competition and accordingly freed the BOCs from the line-of-business restraints.<sup>23</sup> Congress determined that in order to improve the national competitive marketplace, the BOCs should be permitted to manufacture telephone equipment, provide cable television connection, and enter the coveted long-distance market.<sup>24</sup> Congress engineered a plan for increased local telephone competition that was designed to prevent each BOC from blocking market entry into their service regions.<sup>25</sup> This plan required the BOCs to meet a checklist of fourteen safeguards in order to be permitted to enter other telecommunications markets.<sup>26</sup> Next, the BOCs were required to submit an application to the Federal Communications Commission ("FCC") certifying that they had satisfied the checklist.<sup>27</sup>

In order to be approved, the FCC requires an applicant under Section 271 to meet four basic requirements. First, the BOC must satisfy either the requirements of Section 271(c)(1)(A) known as

"Track A," or Section 271(c)(1)(B) known as "Track B."<sup>28</sup> "Track A" requires the BOC to enter at least one interconnection agreement with a competing local phone company also known as a competitive local exchange carrier ("CLEC").<sup>29</sup> The CLEC must provide service to business and residential subscribers located in the same market as the RBOC.<sup>30</sup> "Track B" allows a RBOC to satisfy "Track A" if ten months after the 1996 Act was enacted, no request had been made by any CLEC for access or interconnection to the RBOCs' network.<sup>31</sup> Second, the 1996 Act requires the BOCs to establish that they have adequately fulfilled fourteen competitive requirements governing the access and information BOCs have provided to CLECs.<sup>32</sup> Generally, a BOC would satisfy the list if it demonstrated that its network was open to entry for CLECs.<sup>33</sup> Third, if a BOC intends to provide interLATA telecommunications services, it must establish separate affiliates to provide such services under Section 272.<sup>34</sup> Finally, the fourth requirement mandates the FCC to grant the application after formal review, if it concludes that approval is consistent with "the public interest, convenience, and necessity."<sup>35</sup>

<sup>23</sup> See H.R. Rep. No. 102-850, at 7 (1992). The report stated that, although at first the "line of business" restrictions were necessary constraints, it was time to release the BOCs to encourage entry into these lucrative markets. *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See generally* Michael F. Finn, *The Public Interest and Bell Entry Into Long Distance Under Section 271 of the Communications Act*, 5 COMM.LAW CONSP. 203, 209 (1997) [hereinafter Finn] (discussing the BOC entry provisions under the FCC's public interest review).

<sup>26</sup> See 47 U.S.C. § 271(c)(2)(B) (Supp. 1997).

<sup>27</sup> See 47 U.S.C. § 271 (Supp. 1997). In addition, a separate application must be filed by the BOC in the state in which it seeks approval to offer in-region long distance service. *See id.* § 271(d).

<sup>28</sup> See 47 U.S.C. § 271(c)(1)(A) (Supp. 1997); *In Re Application of SBC Communications, Inc. et al.* Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, *Evaluation of the United States Department of Justice*, CC Docket No. 97-121 (May 16, 1997) at 8.

<sup>29</sup> See 47 U.S.C. § 271(c)(1)(A) (Supp. 1997).

<sup>30</sup> Telephone service can be offered over the competitors' own facilities or over the competitors own facilities accompanied by the resale of service bought from another carrier. See 47 U.S.C. § 271(c)(1)(A) (Supp. 1997).

<sup>31</sup> "[A] Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by Section 252 of this title, or (ii) violated the terms of an agreement approved

under Section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." 47 U.S.C. § 271(c)(1)(B) (Supp. 1997).

<sup>32</sup> See 47 U.S.C. § 271(d)(3) (Supp. 1997).

<sup>33</sup> Section 271 of the 1996 Act requires BOCs to allow other telecommunications to interconnect with their existing network before they can provide long distance service to customers within their service region. See 47 U.S.C. § 271(c)(1)(A) (Supp. 1997). *See also* Henry H. Bartlett, *The Public Interest and the Introduction of Competition into Local Telephone Networks*, 5 COMM.LAW CONSP. 251 (1997) [hereinafter "Bartlett"] (debating the purpose and success of the interconnection provisions of the 1996 Act).

<sup>34</sup> See 47 U.S.C. § 272 (Supp. 1997). A BOC must establish separate affiliates for the following services: (1) manufacturing activities; (2) origination of interLATA telecommunications services; (3) interLATA information services (excluding alarm monitoring and electronic publishing services). *Id.* at §§ 272(a)(2)(A)-(C).

<sup>35</sup> 47 U.S.C. § 271(d)(3)(C) (Supp. 1997). *See generally* Finn, *supra* note 25, at 209 (discussing the "public interest" standard as commonly used tool by Congress to assist an agency in implementing broad policy goals of a particular legislative act); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (citing FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)) (finding the public interest standard intended to be a tool of discretion in order to ensure an agency may carry out the legislative task designated by Congress); *National Broad. Co. v. United States*, 319 U.S. 190 (1943) (allowing the FCC broad discretion under the public interest standard).

Section 273 provides that BOCs will not be permitted to provide telecommunications equipment, or manufacture such equipment if the BOCs have not complied with Section 271(d).<sup>36</sup> Section 274 prohibits a BOC from engaging in electronic publishing through use of their local phone service for four years.<sup>37</sup> Finally, Section 275 forbids a BOC from entering alarm monitoring services for five years.<sup>38</sup>

Two years after President Clinton signed the 1996 Act into law, Senator Hollings' goal of creating order out of chaos has yet to be achieved.<sup>39</sup> Once hailed as the most comprehensive communications legislation in 60 years, the 1996 Act has failed to convert local exchange service from a regulated monopoly to a competitive marketplace.<sup>40</sup> For example, at present there are approximately 100 CLECs in the nation.<sup>41</sup> CLECs have switches in only 132 cities and only \$14 billion has been invested in the local telephone industry by the CLECs.<sup>42</sup> While these figures could be construed as an impetus to competition, the average consumer has yet to enjoy the fruits of the

1996 Act. For instance, CLECs currently account for only 2.6% of all national local telephone revenues.<sup>43</sup> Furthermore, residential phone service still remains under the monopolistic blanket of the incumbent local exchange carriers.<sup>44</sup>

Additionally, two of the primary public policy goals of the 1996 Act, universal service and interconnection, remain unfulfilled.<sup>45</sup> Universal service is the goal of providing all consumers with basic telephone services through subsidization from a fund to which all telecommunications providers contribute.<sup>46</sup> Interconnection, the subject of Section 251, is the duty of a local exchange carrier to provide other telecommunications carriers with the ability to interconnect with its facilities and equipment.<sup>47</sup>

Currently, the comprehensive approach to cost allocations required for achieving universal service cannot be implemented due to an ongoing battle between Internet Service Providers and ILECs.<sup>48</sup> More importantly, the FCC has been restrained by the Eighth Circuit decision, *Iowa Utilities Board v. FCC*,<sup>49</sup> of its authority to create and

<sup>36</sup> "A [BOC] may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that [BOC] or any [BOC] affiliate to provide interLATA services under Section 271(d) of this title, subject to the requirements of this section and the regulations prescribed thereunder, except that neither a [BOC] nor any of its affiliates may engage in such manufacturing in conjunction with a [BOC] not so affiliated or any of its affiliates." 47 U.S.C. § 273(a) (Supp. 1997).

<sup>37</sup> See 47 U.S.C. § 274(a) (Supp. 1997). Electronic publishing includes "the dissemination, provision, publication, or sale to an unaffiliated entity or persons, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like similar information." *Id.* § 274(h).

<sup>38</sup> "No [BOC] or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is 5 years after the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 275(a)(1) (Supp. 1997). Note that if a BOC or affiliate was engaged in the business of alarm monitoring services as of Nov. 30, 1995, Section 275 does not apply. *Id.* § 275(a)(2).

<sup>39</sup> See Statement of Sen. Hollings, *supra* note 1 and accompanying text.

<sup>40</sup> See *President's Message*, FCBA NEWSLETTER (Federal Communications Bar Association, Wash., D.C.), Feb. 1998, at 2-3 [hereinafter *President's Message*]. Industry experts blame local and federal battles as impeding local competition. Further, critics as well as proponents of the 1996 Act claim entry is too expensive. Further, industry experts claim other less expensive mechanisms of local entry created by the 1996 Act

are still too costly to attempt entry. See Salvatore Salamone, *Telecom Act Still Floundering*, INTERNET WK., Feb. 23, 1998.

<sup>41</sup> See Chairman William E. Kennard, Press Statement on the Second Anniversary of the Telecom Act of 1996 (Jan. 30, 1996) [hereinafter "Kennard"].

<sup>42</sup> See *id.* The local phone industry grosses \$100 billion annually in revenues. See Andrew Kupfer, *The Telecom Wars*, FORTUNE, Mar. 3, 1997, at 136 [hereinafter "Kupfer"].

<sup>43</sup> See Kennard, *supra* note 41.

<sup>44</sup> See *id.*

<sup>45</sup> See *President's Message*, *supra* note 40.

<sup>46</sup> See 47 U.S.C. § 254 (Supp. 1997). Universal Service is a plan to provide low cost high quality telecommunications services to all Americans through an even cost to service providers. The 1996 Act expanded the definition of universal service to include: (1) all eligible telecommunications carriers, including wireless service providers may receive universal service subsidies; (2) eligible schools and libraries will receive discount services for telecommunications services, Internet access, and internal connections; and (3) discounts for rural health care providers; discounts for low income consumers. See *id.* at § 254(h); *In re Implementation of the Universal Service Provision in the Telecommunications Act of 1996, Universal Service*, First Report and Order, 12 FCC Rcd. 8776 (1997).

<sup>47</sup> See 47 U.S.C. § 251(a) (Supp. 1997); see generally *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd. 15499 (1996); see also Bartlett, *supra* note 33 (explaining the implementation and debates regarding the interconnection provisions of the 1996 Act).

<sup>48</sup> See generally Comments of Senators Burns and Stevens, *In re Federal State Joint Board on Universal Service, Report to Congress*, CC Dkt. No. 96-45 (Jan. 26, 1998).

<sup>49</sup> 120 F.3d 753 (8th Cir. 1997).

implement the complex interconnection regulations required under the 1996 Act.<sup>50</sup> Lastly, cable rates have risen, despite Congress' confident predictions that they would drop.<sup>51</sup>

These failures have resulted in a torrent of criticism from practitioners who argue that the 1996 Act has failed to achieve its goal of local competition.<sup>52</sup> However, proponents of the 1996 Act maintain that the field of telecommunications is merely experiencing a state of regulatory evolution that will result in a more competitive market.<sup>53</sup>

## II. AN OVERVIEW OF *SBC COMMUNICATIONS, INC. v. FEDERAL COMMUNICATIONS COMMISSION*

Sections 271-75 were struck down as unconstitutional on New Year's Eve, 1997.<sup>54</sup> In *SBC Communications v. FCC*,<sup>55</sup> the U.S. District Court for the Northern District in Texas held that Sections 271-75 of the 1996 Act constitute an unconstitutional bill of attainder.<sup>56</sup> SBC, a RBOC, argued in its summary judgment motion that the sections: (1) amounted to an unconstitutional bill of attainder that; (2) violated the doctrine of separation of powers; (3) violated the equal protection clause; and (4) violated the First Amendment.<sup>57</sup>

The dispute arose from the specific identification and categorization of BOCs in Sections 271-75.<sup>58</sup> SBC charged that the legislation imposed restrictions on only the BOCs' entry into various telecommunications markets and not the entry of other similarly situated carriers.<sup>59</sup> SBC contended that the Bill of Attainder Clause of the U.S. Constitution bars such extrajudicial punishment.<sup>60</sup> The FCC on the other hand, argued that Sections 271-75 were appropriate non-punitive legislation which failed to constitute a bill of attainder.<sup>61</sup>

In its analysis, the court acknowledged that the Supreme Court had not yet decided whether Congress may enact laws that single out a specific corporation.<sup>62</sup> The court further acknowledged that the Supreme Court rarely found a statute to be an unconstitutional bill of attainder.<sup>63</sup> However, the court noted that Sections 271-75 amount to unprecedented legislative acts that require careful constitutional scrutiny.<sup>64</sup> The court stated that legislation is an unconstitutional bill of attainder when it: "(1) identifies a specific individual or group (2) inflicts punishment on that individual or group (3) without the benefit of a judicial trial."<sup>65</sup> The court acknowledged that the first prong was easily satisfied because Section 271 specifically names the BOCs as the only entities forced to fulfill the specific requirements.<sup>66</sup> The

<sup>50</sup> See *id.* The court held that the FCC's statutory authority delegated by Congress to implement Sections 251 and 252 of the 1996 Act was limited. Specifically, the court found that the plain meaning was exceeded by the FCC's broad interconnection arrangement. First, the court found that the FCC could not require the ILECs to charge CLECs certain prices for interconnection rates and unbundled network elements. Second, the court invalidated the FCC's "pick and choose" rule. Third, the court found that the ILECs did not have to provide higher quality network elements, interconnection arrangements, or access to CLECs. Finally, the court held that the FCC could not require ILECs to offer bundled network elements to CLECs. See *id.* In an effort to spur local competition, Florida has drafted legislation that would increase phone bills between 50 to 100 percent. See *id.* Legislators hope the increase will convince CLECs that it is profitable to offer service within the state. See Mike Mills, *Fla. Seeks Higher Phone Rates to Expand Market*, WASH. POST, Mar. 8, 1998, at A8.

<sup>51</sup> See *In Re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, CS Dkt. No. 97-141 (Jan. 13, 1998) (finding cable rates rose four times faster than the rate of inflation in 1997).

<sup>52</sup> See *President's Message, supra* note 40, at 2-3 (discussing the debates at the 15th Annual Conference on Telecommunications Policy and Regulation).

<sup>53</sup> See *id.*

<sup>54</sup> See *SBC Communications*, 981 F. Supp. at 1008.

<sup>55</sup> *Id.* at 996.

<sup>56</sup> See *id.* at 1008.

<sup>57</sup> See *id.* (finding that that the sections were a bill of attainder, the court did not address the equal protection argument nor the first amendment argument).

<sup>58</sup> See *SBC Communications*, 981 F. Supp. at 1000.

<sup>59</sup> See *id.* For example, the court stressed that while SBC and other RBOCs' hands remain tied by the Special Provisions, their competitors such as GTE to offer one stop shopping to their customers (purchase of local and long distance service through one carrier). See *id.* Further, the court also noted that the RBOCs are prevented (unlike similarly situated carriers) from entering alarm monitoring and information services. See *id.* at 1005.

<sup>60</sup> "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST., ART. I, § 9, cl. 3.

<sup>61</sup> See *SBC Communications*, 981 F. Supp. at 1002.

<sup>62</sup> See *id.* at 1003. "[T]he Supreme Court has never addressed the precise issue before this court: whether Congress may enact laws that single out by name specific business entities and restrict their ability to conduct lawful business, and do not do so for other similarly situated entities." *Id.*

<sup>63</sup> See *id.* at 1004.

<sup>64</sup> See *id.* (finding that the statutes were extraordinary because Congress rarely declares someone guilty of an offense and then decides how to remedy that offense).

<sup>65</sup> *Id.* at 1004 (citing *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846 (1984)).

<sup>66</sup> See *id.*; 47 U.S.C. § 271 (Supp. 1997).

court then addressed whether under prongs two and three Sections 271-75 constitute extrajudicial legislative punishment or were attempts at mere economic regulation.<sup>67</sup>

In determining whether these sections constitute a bill of attainder, the court applied the three-pronged analysis used by the Supreme Court to decide whether a law acts as extra-judicial punishment in violation of the Bill of Attainder Clause.<sup>68</sup> The first step involves a historical analysis of whether the legislation resembles burdens traditionally found to be legislative punishment.<sup>69</sup> SBC argued that Section 271's effect was mirrored in Supreme Court precedent, which hold as unconstitutional, laws barring individuals or specific groups from engaging in particular businesses.<sup>70</sup> Specifically, the Special Provisions prevent the BOCs from engaging in otherwise lawful telecommunications businesses that are a historically protected constitutional right.<sup>71</sup> In response, the FCC asserted that deprivation of employment differed from a mere restriction on a particular entity in a certain line of business, a restriction to which the RBOCs have always been subject.<sup>72</sup> By extending the 1982 MFJ, the FCC argued, the regulation neither instituted new restrictions, nor set up permanent bars on the BOCs' ability to enter a lawful business.<sup>73</sup>

The FCC further argued that Sections 271-75 were only a continuation of the existing restrictions adjudicated and administered by the 1982 MFJ, related court orders, and various administrative regulations.<sup>74</sup> That is, the 1996 Act alters the framework previously created by the courts.<sup>75</sup> It

temporarily places the same restrictions in the hands of Congress.<sup>76</sup> Therefore, the FCC argued, Congress and the FCC acted well within their legal boundaries in extending the restrictions.<sup>77</sup>

The District Court disregarded the Supreme Court's neglect to afford corporations protection under the Bill of Attainder Clause.<sup>78</sup> Applying a broad functional analysis, the court concluded that, because the bill of attainder provision protects groups and not just individuals, it should be expanded to include corporations.<sup>79</sup>

The court noted that the constitutional protections against deprivation of rights are not only applied to life, liberty and property, but also to basic civil and political liberties previously enjoyed by an individual or group.<sup>80</sup> Further, the District Court held that the bill of attainder provision can include new forms of burdens and deprivations not traditionally associated with past bill of attainder analyses.<sup>81</sup>

In addition, the court found that the essence of the sections was to punish the BOCs for the anti-trust sins of their "former parent, AT&T."<sup>82</sup> The court held impermissible such legislation that prevents individuals or groups from engaging in a profession, or deprives rights previously enjoyed.<sup>83</sup> Further, the court found the checklist requirements imposed on the BOCs could not be easily fulfilled.<sup>84</sup> The Court labeled Section 271 an "onerous" mechanism designed to prevent the BOCs from entering the lucrative long distance industry when other local service providers not affiliated with the BOCs are allowed to do so.<sup>85</sup> The court found that a significant burden existed on

<sup>67</sup> See *SBC Communications*, 981 F. Supp. at 1004.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.* (citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 475 (1977)).

<sup>70</sup> See *id.*; but see *Board of Governors of the Federal Reserve Sys. v. Agnew*, 329 U.S. 441 (1947).

<sup>71</sup> See *SBC Communications*, 981 F. Supp. at 1005.

<sup>72</sup> See Defendants' Memorandum in Support of their Cross-Motion For Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 6, *SBC Communications, Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997) [hereinafter Defendants' Memorandum].

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 8.

<sup>75</sup> See *id.* at 6.

<sup>76</sup> See Defendants Memorandum, *supra* note 72, at 6.

<sup>77</sup> See *id.*

<sup>78</sup> See *SBC Communications*, 981 F. Supp. at 1003 n.4. "It is well settled that corporations are subject to criminal law . . . Given that a bill of attainder is trial by legislature, with penal consequences, the Court can think of no reason why

the clause should be read so narrowly to exclude corporations." *Id.*

<sup>79</sup> See *id.* (citing *Cummings v. Missouri*, 71 U.S. 277 (1866)); see also *United States v. Brown*, 381 U.S. 437 (1965) (noting that bills of attainder traditionally apply only to groups found guilty of treasonous activities).

<sup>80</sup> See *SBC Communications*, 981 F. Supp. at 1004 (citing *Cummings*, 71 U.S. at 320).

<sup>81</sup> See *id.* (citing *Nixon*, 433 U.S. at 475). Added to the list of traditional rights protected by the Bill of Attainder Clause, the court noted it has been extended to protect prohibition of an individual from employment. See *id.*

<sup>82</sup> See *id.* at 1006.

<sup>83</sup> See *id.* at 1007.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*; but cf. Mike Mills, *The Bells' Fastest Operator, SBC's \$5.8 Billion Offer for Conn. Phone Company Reflects the Aggressiveness of CEO Whiteacre*, WASH. POST, Jan. 6, 1998, at D1. SBC has failed to exemplify the impediments into the telecommunications marketplace cited by Judge Kendall. See *id.* In fact, it is one of the fastest growing phone companies. See *id.* For

SBC in comparison to other ILECs that are able to provide "one-stop shopping" to their consumers.<sup>86</sup>

The court determined that Congress encroached upon the judiciary's authority to determine compliance with the 1982 MFJ.<sup>87</sup> Further, it unlawfully instituted punishment for non-compliance that had yet to be judicially determined.<sup>88</sup> The doctrine of separation of powers, the court held, allows only the judiciary to adjudicate such rights and liabilities.<sup>89</sup>

The court also addressed the FCC argument that the sections could not be punitive because they were not permanent.<sup>90</sup> Under Section 271, once a BOC is found by the FCC to have complied with the checklist, it will be allowed to participate in the in-region interexchange market.<sup>91</sup> The court rejected this argument by relying on prior case law that has held an escape clause is not a necessary factor in determining whether a bill of attainder exists.<sup>92</sup>

The court next applied a functional analysis that required "analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes."<sup>93</sup> The court rejected the FCC argument that the sections

were intended to foster competition.<sup>94</sup> Finding quite the opposite, the court concluded that the 1996 Act establishes competition through Section 251 which requires interconnection arrangements between all ILECs to promote competition.<sup>95</sup> The court reasoned that the sections could only be interpreted as a legislative determination of the BOCs criminal intent, and therefore constitute unconstitutional retroactive punishment.<sup>96</sup> In the final part of its functional analysis, the court rejected the FCC's contention that the legislative history established a non-punitive purpose.<sup>97</sup> At present, Judge Kendall has stayed his decision regarding the Special Provisions pending appeal to the Fifth Circuit.<sup>98</sup>

If the *SBC Communications* decision stands, it would be a fatal blow the Special Provisions of the 1996 Act. The Special Provisions were engineered by Congress to offer a carrot to the BOCs in return for allowing competition into their markets.<sup>99</sup>

The implications emerging from *SBC Communications* are numerous. First, Congress' plan to open local phone markets to competition in return for allowing the BOCs to enter the long distance market will fail if the BOCs are freed of the constraints imposed by the Special Provisions.<sup>100</sup>

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instance, SBC Communications within 21 months has bought out another BOC, held merger talks with AT&T, and offered to purchase the long distance provider Southern New England Telephone. *See id.*

<sup>86</sup> *See SBC Communications*, 981 F. Supp. at 1007. One stop shopping allows the consumer to receive both their local telephone service and long distance service from one telecommunications provider under one bill. *See id.*; *see, e.g.*, Samuel F. Cullari, *Divestiture II: Is the Local Loop Ripe for Competition?*, 3 COMM.LAW CONSPICUOUS 175, 181 (1995) [hereinafter "Cullari"].

<sup>87</sup> *See SBC Communications*, 981 F. Supp. at 1006.

<sup>88</sup> *See id.* at 1007. The court determined that any future anti-competitive activity of the BOCs was properly addressed by the nation's antitrust laws. *See id.* Congress cannot predict an antitrust violation, and therefore the court held that the 271 checklist was a premature statement of the BOCs' guilt. *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at 1006.

<sup>91</sup> *See SBC Communications*, 981 F. Supp. at 1006.

<sup>92</sup> *See id.* The court relied heavily upon *Selective Service Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984). Distinguishing *SBC Communications*, the court found no affirmative restraints existed in the latter. *See id.* However, in the present case, the fourteen duties required under the 271 checklist were not only affirmative duties but onerous and arbitrary. *See id.*

<sup>93</sup> *Id.* at 1007 (quoting *Nixon*, 433 U.S. at 475).

<sup>94</sup> *See id.* The FCC stressed that Congress developed the

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checklist based on a "realistic appraisal of the incentives and ability of a regulated monopolist that controls facilities on which its competitors depend (the local networks) to disadvantage such competitors and thereby impede competition." Defendants' Memorandum *supra* note 72, at 8.

<sup>95</sup> *See SBC Communications*, 981 F. Supp. at 1007 (asserting that competition could not be the Congressional goal of 271 because Congress already promoted competition through Section 251 which required all ILECs to allow CLECs to interconnect to their network).

<sup>96</sup> *See id.*

<sup>97</sup> *See id.* The court determined that increased local competition was already addressed in other parts of the 1996 Act. *See id.* Consequently, the court could not infer any purpose other than "preventing anticompetitive activities" for the enactment of Section 271. *Id.* The court found that such a purpose clearly was punitive. *See id.* at 1008.

<sup>98</sup> *See* Seth Schiesel, *U.S. Judge Stays His Ruling on Long-Distance Service*, N.Y. TIMES, Feb. 12, 1998, at D2; *see also* Joint Brief of Petitioner BellSouth Corp. and Intervenor U.S. West, Inc. at 1, *BellSouth Corp. v. FCC*, No. 97-1113 (D.C. Cir. filed Feb. 28, 1997) (presently the U.S. Circuit Court of Appeals for the District of Columbia is considering whether the bill of attainder argument applies to the BOCs entry into the electronic publishing industry).

<sup>99</sup> *See* H.R. Rep. 102-850, 7 (Aug. 12 1992). "H.R. 5096 would codify a mechanism to encourage entry by the Bell operating companies into these restricted markets as soon as antitrust considerations permit." *Id.*

<sup>100</sup> *See generally* Mike Mills, *Ruling Would Let Bells Into*

Second, the BOCs who control the majority of urban markets could offer consumers one stop shopping through single billing for local and long distance service.<sup>101</sup> This would put other long distance providers (e.g., AT&T, MCI, and Sprint) at a competitive disadvantage.<sup>102</sup> Further, without local competition, BOCs could squeeze out long distance providers, such as MCI or AT&T, by using creative cost mechanisms to institute higher access charges on other companies for connection to their networks.<sup>103</sup> Finally, without incentive to enter the local market, CLECs will have no choice but to merge with the superior situated ILECs resulting in creation of "mega-phone companies" that will control the marketplace.<sup>104</sup> Such serious ramifications require a detailed analysis of the constitutionality of a Congressional bar against one local telecommunications company from a market, while not holding similar telecommunica-

tions companies to the same restrictions.<sup>105</sup>

### III. A BRIEF HISTORY OF BILL OF ATTAINDER JURISPRUDENCE

Historically, bills of attainder were commonly used against political groups that the English Parliament found treasonous.<sup>106</sup> Parliament adjudicated such treasonous activities punishable by death.<sup>107</sup> In drafting the Constitution, the Framers intended the Bill of Attainder Clause to have a narrow meaning.<sup>108</sup> They defined a bill of attainder as an act of the legislature that sentenced a person to death and prevented his heirs from inheriting property.<sup>109</sup> In this regard, the Framers stressed the necessity and importance of the bill of attainder as a constitutional guard against legislative encroachment on the judiciary.<sup>110</sup>

Through a series of decisions over the past two

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*Long-Distance*, WASH. POST, Jan. 1, 1998 at A1. Also, other BOCs have seized on the recent attack of the Special Provisions to enter the long distance data communications industry. See *id.* For example, U.S. West Communications and the Bell Atlantic Corporation recently announced a plan to build a national data network where they could serve their local service regions. See *id.* Such service is also banned by the Special Provisions. See *id.* Their respective applications are awaiting review by the FCC which must determine whether it falls into an exception of the Special Provision intended to encourage new technological developments. See *id.*; but cf. Robert H. Bork, *Laurence Tribe and the Crybaby Bells*, WALL ST. J., Sept. 22, 1997, at A22 [hereinafter "Bork"]. Mr. Bork predicts that if the Special Provisions are found unconstitutional, the line of business restraints imposed by the 1982 MFJ will still remain intact. See *id.* Therefore, the BOCs may find themselves once again completely barred from the long distance industry if 5th Circuit overturns the decision. See *id.*

<sup>101</sup> One stop shopping allows the consumer to receive under one bill both local and long distance service from one telecommunications provider under one bill. See Cullari, *supra* note 86.

<sup>102</sup> See *In re Implementation of the Local Competition Provisions of the 1996 Telecommunications Act, First Report and Order*, 11 FCC Rcd. 15505 (1996). The incumbent LEC through control of the network can discourage a CLEC's entry in two ways: (1) it may choose not to interconnect the CLEC; and (2) it may use its superior position to charge higher prices for terminating calls from the CLEC's customers. See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> Without ensured competition, Chairman Kennard warned that, "[l]ong distance companies will have no alternatives but to merge with an ILEC . . . . The Bells tell everybody—especially you in the investment community—that consumers want 'one-stop-shopping.' If you believe that, then the result would be mergers and consolidation." *Chairman Kennard Warns that Premature Bell Entry Into Long Distance Will Create Megamergers Not Competition*, FCC NEWS, Mar. 13, 1998.

<sup>105</sup> See 47 U.S.C. §§ 271-75 (Supp. 1997).

<sup>106</sup> See Jane Welsh, *The Bill of Attainder Clause: An Unquali-*

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*fied Guarantee of Process*, 50 BROOK. L. REV. 77, 83 (1983) [hereinafter Welsh]. Bills of attainder were deemed a corruption of blood on the family resulting in the designee being treated as if he had never been born. See *id.*; see also ZECHARIAH CHAFFEE JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, 96 (1956).

<sup>107</sup> See Welsh, *supra* note 106, at 83. The lesser strict form of a bill of attainder also employed by parliament were known as bills of pains and penalties. Such bills were punitive but did not result in a death sentence. See *id.* at 84. The English definition of the bill of attainder was "deprivation directed against a specific person or group of persons after a legislative determination of guilt for conduct that may or may not have been criminal when undertaken." *Id.*

<sup>108</sup> See Thomas B. Griffith, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 496 (1984) [hereinafter "Griffith"] (providing an extensive discussion of the historic interpretation of the Bill of Attainder Clause).

<sup>109</sup> See *id.*

<sup>110</sup> Alexander Hamilton's sense of importance of Bill of Attainder Clause appears in his experience in defending the rights of a Loyalist during the British military occupation of New York City. See RICHARD B. MORRIS, *ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION* 450 (1957). Hamilton wrote, ". . . no man can forfeit, or be justly deprived, without his consent, or any right to which as a member of the community, he is entitled, but for some crime incurring forfeiture," and that "no man ought to be condemned unheard, or punished for supposed offences, without having an opportunity of making his defence." *Id.* James Madison shared Hamilton's sense of importance of forbidding Congress to enact laws of bills of attainder to protect the personal rights of citizens. See *id.* In the *Federalist*, no. 44, Madison wrote that "bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights. . ." THE FEDERALIST No. 44 (James Madison).



hundred years, the Supreme Court's bill of attainder analysis has evolved from the Framers' narrow historic interpretation to a functional analysis that still respects the Framers' intent.<sup>111</sup> For instance, beginning as early as 1810 in *Fletcher v. Peck*, the Court merged a less strict form of the bill of attainder, bills of pains and penalties (legislative punishment that did not result in death) into its bill of attainder definition.<sup>112</sup> Justice Marshall wrote in *Fletcher* that state legislatures could not pass *ex post facto* laws which forfeit the estate of the purchaser for crimes committed by the seller.<sup>113</sup> The Court's inclusion of bill of pains and penalties into the bill of attainder definition demonstrated its functional interpretation of the Constitution.<sup>114</sup>

Bill of attainder jurisprudence lay dormant for more than fifty years until the Court's 1866 decision in *Cummings v. Missouri*.<sup>115</sup> *Cummings* involved an action brought by a priest challenging the constitutionality of post Civil War Amendments to the Missouri Constitution.<sup>116</sup> The Amendments provided that a person holding an office of trust must take an oath where he denies ever acting in a sympathetic manner for the Rebel cause.<sup>117</sup> Failure to take the oath resulted in immediate imprisonment.<sup>118</sup> Expanding its func-

tional analysis, the Court reasoned that the Amendments did in fact constitute a bill of attainder.<sup>119</sup> It based its determination on a number of inferences.<sup>120</sup> First, the Court determined that the power to inflict punishment rests with the judiciary.<sup>121</sup> Second, the Court determined that Congress may pass retroactive laws which deprive citizens of everything except life, liberty, and cumulation of wealth.<sup>122</sup> The Court also noted that punishment is measured by the effect on the citizens, not by legislative intent alone.<sup>123</sup> Third, the Court expanded the bill of attainder definition to apply to a whole class and not just to specific individuals.<sup>124</sup>

The functional analysis of *Cummings* ran into difficulty in *Hawker v. New York*<sup>125</sup> and *Dent v. West Virginia*.<sup>126</sup> Both cases involved the qualifications to practice medicine.<sup>127</sup> In *Hawker*, the Court found a statute constitutional that prohibited former convicts from practicing medicine.<sup>128</sup> In *Dent*, the Court upheld a state's right to forbid non-graduates of medical schools from practicing medicine.<sup>129</sup> The shift of the Court's jurisprudence required it to resolve its contradictory holding in *Cummings*.<sup>130</sup> It accomplished this by applying what appeared to be the rational basis test.<sup>131</sup> The court determined that, as *Hawker* and *Dent*

privileges as an individual's right to life, liberty, and property. *See id.*

<sup>120</sup> *See id.* The majority's functional view was accompanied by fervent dissent led by Justice Miller based on the historicism analysis. *See id.* Justice Miller argued that the historical interpretations were limited to the common law definition: corruption of blood or conviction or sentence of a named person. *See id.* Therefore, the Amendments did not satisfy the Court's bill of attainder test. *See id.*

<sup>121</sup> *See Cummings*, 71 U.S. at 286.

<sup>122</sup> *See id.* at 286.

<sup>123</sup> *See id.* at 321-22.

<sup>124</sup> *See id.* at 323 (noting that bills of attainder could either identify an individual or target an entire class).

<sup>125</sup> 170 U.S. 189 (1898).

<sup>126</sup> 129 U.S. 114 (1889).

<sup>127</sup> *See Hawker*, 170 U.S. at 191; *Dent*, 129 U.S. at 122.

<sup>128</sup> *See Hawker*, 170 U.S. at 199-200.

<sup>129</sup> *See Dent*, 129 U.S. at 128.

<sup>130</sup> *See Cummings*, 71 U.S. at 281. The *Hawker* Court distinguished *Cummings* because in *Hawker*, there was a direct link between the patient and his trust in the practitioner of medicine. *See id.* Such a legislative goal, held the Court, must receive greater weight than the general prohibition against employment outlined in *Cummings*. *See Hawker*, 170 U.S. at 198. The Court's analysis exemplifies the weight a valid governmental purpose is given in drafting legislation that may be subject to bill of attainder scrutiny. *See id.*

<sup>131</sup> *See Dent*, 129 U.S. at 125; *Hawker*, 170 U.S. at 198-99; *see also Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating

<sup>111</sup> *See Griffith*, *supra* note 108, at 477 (discussing the continued debate regarding whether the Bill of Attainder Clause should be defined as protecting the formal characteristics associated with its creation or the future evils that "the common-law forms represented").

<sup>112</sup> *See Fletcher v. Peck*, 10 U.S. 87, 138 (1810); *see also Marbury v. Madison*, 5 U.S. 137 (1803) (asking if a bill of attainder is passed, should the court condemn to death persons the Constitution seeks to preserve); *Griffith*, *supra* note 108, at 479.

<sup>113</sup> *See Fletcher*, 10 U.S. at 139.

<sup>114</sup> *See id.* at 138. Justice Marshall also wrote, "[a] bill of attainder may affect the life of an individual, or may confiscate his property or both." *Id.* (recognizing that "the power of the legislature over lives and fortunes of individuals is restrained"). *Griffith*, *supra* note 108, at 479.

<sup>115</sup> 71 U.S. 277 (1866); *see also Ex Parte Garland*, 71 U.S. 333 (1866). A companion case striking down a federal statute which required attorneys who wished to practice in federal court to submit a loyalty oath. *See id.* at 335. The attorneys were required to swear that they had not participated in the Confederate rebellion. *See id.*; *see also Welsh*, *supra* note 106, at 90-93 (discussing the broadened interpretation of the Bill of Attainder Clause by the Supreme Court).

<sup>116</sup> *See* 71 U.S. at 282.

<sup>117</sup> *See id.* at 281.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 287. The Court noted that punishment is infliction of "pain or privation." *Id.* The Court then decided that deprivation of privilege is punishment. *See id.* It defined

were rationally related to a legitimate state end — the fitness to be a doctor — *Cummings* failed to offer any similar objective.<sup>132</sup> However, in order to avoid having to strike down the popular regulations, the Court was forced to cast aside the broadened principles under functionalism laid out in *Cummings*.<sup>133</sup> As a result, *Hawker* and *Dent* marked the beginning of the Court's application of inconsistent bill of attainder tests.

It was not until 1946 that the Court labeled another statute an unconstitutional bill of attainder. In *United States v. Lovett*,<sup>134</sup> a legislative act excluded three individuals from receiving compensation for their employment because they were found to be subversive.<sup>135</sup> In an attempt to resolve its failure to structure an effective functional bill of attainder analysis in earlier cases, Justice Black identified three elements that reviewing courts should consider to determine whether legislation amounted to a bill of attainder.<sup>136</sup> First, did the act specify a certain group of persons?<sup>137</sup> Second, did the act impose punishment on the designated persons?<sup>138</sup> Third, did it impose punishment without the benefit of a judicial trial?<sup>139</sup> The Court applied the standard Justice Black laid

out and held that a legislature's specific exclusion of a group from government service on grounds of subversion constituted specificity and punishment without a judicial hearing.<sup>140</sup> Notably, the more significant section of the *Lovett* decision was Justice Frankfurter's concurrence because it called for an even narrower reading of the Bill of Attainder Clause based on its historical application.<sup>141</sup> Justice Frankfurter interpreted the Bill of Attainder Clause as having a narrow and distinct historical meaning.<sup>142</sup> He also wrote that an essential part of the bill of attainder analysis is an explicit declaration of guilt by the legislature.<sup>143</sup> Justice Frankfurter's insightful analysis prevailed as the preferred approach to bill of attainder analysis for the next twenty years.<sup>144</sup> The Supreme Court found his bill of attainder jurisprudence particularly useful in the McCarthy era.<sup>145</sup>

In *United States v. Brown*, the Court refined its functional bill of attainder analysis when it shifted its scrutiny from non traditional punishments to specificity.<sup>146</sup> *Brown* involved a Congressional statute that prohibited anyone who had been a member of the Communist Party to serve as an officer in a labor union.<sup>147</sup> The Court found that since

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that the court will uphold the legislative classification so long as it bears a rational relation to some legitimate end).

<sup>132</sup> See *Dent*, 129 U.S. at 125.

<sup>133</sup> See Griffith, *supra* note 108, at 482 (noting that *Hawker* and *Dent* represent an early example of the Court's difficult task in balancing liberties that the Bill of Attainder Clause seeks to protect against politically neutral legislation).

<sup>134</sup> 328 U.S. 303 (1946). *Lovett* involved the Emergency Relief Appropriations Act of 1941. See *id.* Congress was concerned that during the late thirties, numerous governmental subversives were occupying influential federal positions. See *id.* Labeled as "crackpot, radical bureaucrats and affiliates of communist front organizations," the petitioners were targeted and denied pay for their government employment. *Id.* Further, at a hearing to determine how serious a threat to government the named individuals posed, the alleged subversives were not allowed to have their attorneys present. See *id.* at 304-05.

<sup>135</sup> See *id.* at 304-05; see also Griffith, *supra* note 108, at 483-84 (discussing the *Lovett* Court's jurisprudence at length).

<sup>136</sup> See *id.* at 316.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* (citing the numerous constitutional procedural safeguards the accused is awarded at trial such as the right to a jury, representation by counsel, and confrontation of witnesses).

<sup>140</sup> See *id.* at 317; see also Griffith, *supra* note 108, at 483-84 (interpreting the *Lovett* bill of attainder test as requiring specific exclusion from employment due to Congressional fact finding).

<sup>141</sup> See *Lovett*, 328 U.S. at 318.

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<sup>142</sup> See *id.* at 321-22. "The prohibition against bills of attainder must be viewed in the background of the historic situation when moves in specific legislation that are now the conventional and, for the most part, the exclusive concern of courts were commonplace legislative practices." *Id.* at 322; see also Griffith, *supra* note 108, at 484 (discussing Justice Frankfurter's historical approach to the bill of attainder analysis).

<sup>143</sup> See *Lovett*, 328 U.S. at 323.

<sup>144</sup> See David P. Restaino, *Conditioning Financial Aid on Draft Registration: A Bill of Attainder Analysis*, 84 COLUM. L. REV. 775, 779 (1984) [hereinafter Restaino]; Griffith, *supra* note 108, at 484. Justice Frankfurter found there are two types of constitutional claims. See *id.* Certain claims are awarded broad standards such as equal protection. See *id.* However, there are clauses which derive from specific provisions that are limited. See *id.* These provisions were too narrow to afford any continued judicial enforcement. See *id.* The bill of attainder is such a provision. See *Lovett*, 328 U.S. at 321.

<sup>145</sup> See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 87-88 (1961) (finding a statute that required Communist party members to register with the Justice Department did not constitute a bill of attainder because it lacked specificity. The Court determined the party members could "escape" the regulation by merely altering their behavior); see *American Communications Ass'n v. Douds*, 339 U.S. 382, 413 (1950) (finding a statute that denied persons who would not attest to belonging to anarchist groups was a reasonable legislative purpose for qualifications to serve as a public employee).

<sup>146</sup> See *United States v. Brown*, 381 U.S. 437, 461-62 (1965); see Griffith, *supra* note 108, at 486.

<sup>147</sup> See *Brown*, 381 U.S. at 438 n.1.

the statute specifically designated Communist Party members and permanently denied those members employment opportunities for their political affiliation, the statute constituted a bill of attainder.<sup>148</sup> The Court traced the detailed history of bill of attainder jurisprudence and ultimately found that the Bill of Attainder Clause was also an important ingredient of the doctrine of separation of powers.<sup>149</sup> The Court held that while the legislature may depict general characteristics of the parties subject to a piece of legislation when enacting a piece of legislation, it cannot single out specific individuals, as it did in the case of Communist party members.<sup>150</sup>

In *Nixon v. Administrator of General Services*, the Court once again developed a new approach to bill of attainder analysis.<sup>151</sup> *Nixon* involved the Presidential Recordings and Materials Preservation Act ("Recordings Act")<sup>152</sup> that permitted the Administrator of General Services to obtain tape recordings of all the former presidents.<sup>153</sup>

The Court applied a two part analysis: (1) whether the Recordings Act specified the former President, and (2) whether the Act represented legislative punishment.<sup>154</sup> The Court found a bill of attainder did not exist.<sup>155</sup> First, the Court stressed that the specificity clause, while an important guard against tyranny, does not limit the legislature's ability to impose adverse restrictions on certain individuals or groups.<sup>156</sup> Moreover, the Court found that the naming of President Nixon in the Recordings Act, amounted to a legitimate class of one.<sup>157</sup> Further, Congress possessed a suf-

ficient purpose in singling out President Nixon in the future preservation of important presidential records.<sup>158</sup>

Second, the Court determined that even if the specificity prong was satisfied, the Recordings Act still did not constitute forbidden legislative punishment under prong two.<sup>159</sup> In order to qualify as a bill of attainder, legislative punishment had to be punitive in nature.<sup>160</sup> The Court created a three part analysis in order to evaluate whether legislation was punitive.<sup>161</sup> The test required a determination of whether: (1) the Recordings Act's burden was similar to historical bills of attainder, (2) the Recordings Act furthered non-punitive legislative purposes, and (3) the legislative history of the Recordings Act indicated a Congressional intent to punish.<sup>162</sup>

First, the Court found the Recordings Act's burden fell well outside the historically severe bills of attainder feared by the Framers.<sup>163</sup> After rigorous scrutiny of the both the Recordings Act and its legislative history, the Court found that the Act was non-punitive and Congress did not intend to punish the President.<sup>164</sup> The non-punitive goals were designed to ensure the availability of the papers as evidence for a possible criminal hearing or to preserve the historically valuable papers, were a legitimate Congressional purpose.<sup>165</sup>

The last time the Supreme Court addressed a bill of attainder argument was in *Selective Service System v. Minnesota Public Interest Research Group*<sup>166</sup> in 1984. *Selective Service* involved a student's qualifications to receive financial aid under the De-

<sup>148</sup> See *id.* at 442.

<sup>149</sup> See *id.* at 442-43. The Court concluded that the Bill of Attainder Clause was written by the Framers to prevent the legislature from acting as the judge and jury in determining the blameworthiness of specific individuals. See *id.* at 445.

<sup>150</sup> See *id.* at 445.

<sup>151</sup> See *Nixon*, 433 U.S. 425. See also Restaino, *supra* note 144, at 789 (arguing that burden constitutes punishment).

<sup>152</sup> See 47 U.S.C. § 101 (Supp. 1997).

<sup>153</sup> See *Nixon*, 433 U.S. at 425. The Administrator of General Services was also authorized to obtain these materials from any federal employee in possession of such recordings. See *id.*

<sup>154</sup> See *id.* at 473-74.

<sup>155</sup> See *id.* at 484.

<sup>156</sup> See *id.* at 471.

<sup>157</sup> See *id.* at 472. The fact that President Nixon was the only individual named in the Recordings Act did not justify the specificity prong of bill of attainder analysis because the Recordings Act was targeted at future presidents as well. See *id.* Specifically, the Court accepted the status of past presidential papers that were already archived, as well as the Recording Act's assurance that future presidents' records would

be preserved. See *id.* Nixon was named because at the time the Recordings Act was written, President Nixon's papers were the only materials in jeopardy. See *id.*

<sup>158</sup> See *Nixon*, 433 U.S. at 472. The Court found that since all past Presidential materials were housed in presidential libraries, it was a reasonable legislative purpose to ensure preservation of President Nixon's papers. *Id.*

<sup>159</sup> See *id.* at 472-73.

<sup>160</sup> See *id.* at 473.

<sup>161</sup> See *id.* at 473-76.

<sup>162</sup> See *id.* at 473-76. While also applying a historical analysis, the Court noted that a functional test is necessary to determine whether the law "under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes." *Id.* "Where such legitimate purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decision makers." *Id.*

<sup>163</sup> See *id.* at 473-75.

<sup>164</sup> See *id.* at 477-78.

<sup>165</sup> See *id.* at 476-77.

<sup>166</sup> See *Selective Serv.*, 468 U.S. at 841.

fense Authorization Act of 1983 ("Defense Act").<sup>167</sup> The Defense Act required men to attest that they had registered for the draft in order to be eligible for financial aid.<sup>168</sup> Failure to file the required statement with their school resulted in denial of all federally supported financial aid benefits to the student.<sup>169</sup> Initially, the District Court, after applying the *Nixon* analysis, determined that the identification of an ascertainable group, potential male students, violated the first prong of the bill of attainder test.<sup>170</sup> Second, the court found that by possible denial of federal aid, the Defense Act constituted legislative punishment under the second prong of the bill of attainder analysis.<sup>171</sup>

Once again, the Supreme Court had to reconcile the conflicting tests established in its prior decisions.<sup>172</sup> In yet another attempt to develop a comprehensive bill of attainder standard, the Court applied a functional analysis.<sup>173</sup> However, it softened the review by supplementing it with a historical approach.<sup>174</sup>

Addressing the specificity prong, the Court employed a historical analysis to determine whether a specific group or individual was named.<sup>175</sup> In doing so, the Court considered the structure of the Defense Act, as well as its legislative history.<sup>176</sup> Hesitant to alter a Congressional mandate, the Court stated that the purpose of the "judicial function is 'not to destroy the Act if we can, but to construe it, if consistent with the will of Congress,

so as to comport with constitutional limitations.'"<sup>177</sup> The Court was able to distinguish *Cummings* and *Garland* because they involved absolute barriers to the entry of individuals into certain professions due to their past affiliations.<sup>178</sup> By contrast, in *Selective Service* there was no such absolute barrier because non-registrants received the benefit of an escape clause.<sup>179</sup> Therefore, by complying with the registration requirement, a non-registrant could eliminate the statutory barrier to financial aid.<sup>180</sup>

Next, the Court turned to the second prong of the test to determine whether denial of financial aid to non-registrants constituted legislative punishment.<sup>181</sup> The Court found the Defense Act failed in this respect.<sup>182</sup> The Court emphasized that each bill of attainder case requires unique consideration.<sup>183</sup> Therefore, in order to determine whether a legislative act was punishment, the Court applied the three-step inquiry of its earlier *Nixon* decision: (1) whether the challenged act fits the historical meaning of legislative punishment, (2) whether the burdens imposed by the act can reasonably be said to further "nonpunitive legislative purposes", and (3) whether the legislative history of the act indicates a congressional intent to punish.<sup>184</sup>

Applying the first prong's historical test, the Court distinguished the Defense Act from its past decisions in which it found legislation contained

<sup>167</sup> See *id.* at 844.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* at 845-46. The lower court determined that the statute clearly singled out students who filed late registrants as the only individuals subject to the Defense Act. See *id.* The court concluded this satisfied the specificity requirement of bill of attainder analysis because the Defense Act targeted students due to their past conduct. See *id.*

<sup>171</sup> See *Selective Serv.*, 468 U.S. at 846. The punishment requirement was satisfied because the court equated the pursuit of education to the pursuit of a vocation. See *id.* By depriving students of this right, the court concluded the students were punished. See *id.*

<sup>172</sup> See *id.* at 850-51. The court distinguished its *Cummings* and *Garland* decisions because those two cases involved absolute entry barriers into a profession because the individuals named could not file loyalty oaths. See *id.* The individuals named were completely barred from seeking a vocation due to their past affiliations. See *id.* However, the Court determined that in *Selective Serv.*, the Defense Act could not be construed as an absolute barrier because the students were allowed to erase their past conduct through draft registration. See *id.*

<sup>173</sup> See *id.* at 851-53.

<sup>174</sup> See *id.* The Court limited the scope of deprivations that may constitute punishment. See *id.* Specifically, the Court noted that every burden on a citizen by the legislature cannot be interpreted as punishment. See *id.* Therefore, while the definition of punishment in the bill of attainder context has slightly expanded, it was never expanded to include deprivations beyond those traditionally associated with the Bill of Attainder Clause. See *id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 606 (1960); *Nixon*, 433 U.S. at 470; *Lovett*, 328 U.S. at 324). The Court's new two-pronged analysis inquired whether the statute in question: (1) specified a specific group or individual; and (2) constituted legislative punishment. See *id.*

<sup>175</sup> See *Selective Serv.*, 468 U.S. at 849-51.

<sup>176</sup> See *id.* at 848-50.

<sup>177</sup> *Id.* at 850 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 571 (1973)).

<sup>178</sup> See *id.* at 850-51. Cf. *Cummings*, 71 U.S. at 281; *Ex Parte Garland*, 71 U.S. at 333.

<sup>179</sup> See *Selective Serv.*, 468 U.S. at 851.

<sup>180</sup> See *Selective Serv.*, 468 U.S. at 851.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

<sup>183</sup> See *id.* at 852.

<sup>184</sup> *Id.* at 852.

impermissible punishment.<sup>185</sup> Specifically, the Court found that the non-contractual benefit associated in *Selective Service* was significantly different from historical punishments, such as imprisonment, which the Framers sought to prohibit.<sup>186</sup> The Court further held that non-contractual benefits could not be equated with affirmative disabilities, such as imprisonment, that had traditionally been associated with punishment.<sup>187</sup> Moreover, the escape clause of the Defense Act allowed the non-registrants to control their destiny unlike the permanent legislative barriers that existed in the legislation considered in the *Cummings* and *Garland* cases.<sup>188</sup> Therefore, the Court found that the Defense Act did not fit the historical meaning of "legislative punishment" under the first prong.<sup>189</sup>

Second, the Court set out to determine whether the statute furthered non-punitive goals or an intent to punish.<sup>190</sup> Focusing on the legislative history of the Defense Act, the Court held that the purpose of Congress was to encourage non-registrants to register for the draft.<sup>191</sup> The Court found that draft registration was a worthwhile objective that fell well within the ambit of a non-punitive legislative goal.<sup>192</sup>

Consequently, the *Selective Service* Court held that the Defense Act neither singled out a specific group nor inflicted punishment.<sup>193</sup> The Court first applied a functional analysis declaring that each bill of attainder case is unique, but then ap-

peared to soften its analysis with a historical twist.<sup>194</sup>

#### IV. BILL OF ATTAINDER — DISSECTIONS: ANALYZING THE DISTRICT COURT'S FUNCTIONAL ANALYSIS

##### A. Overview

Traditionally, the Supreme Court has afforded bill of attainder protection to politically unpopular groups or individual citizens targeted for exclusion from government service.<sup>195</sup> Portions of the Framers' intent embodied within the Constitution have been preserved over the past 200 years under functionalism.<sup>196</sup> Certain clauses, however, are still read in a narrow light that respects the Framers' original intent.<sup>197</sup> The Bill of Attainder Clause falls into this strict formalist category.<sup>198</sup> Accordingly, the Court has held five legislative acts to be unconstitutional bills of attainder over the past two hundred years.<sup>199</sup> Further, each of these cases involved legislative acts during two anxious periods in American history, namely the Civil War and the Cold War.<sup>200</sup> In all other cases, however, the Court has been hesitant to find legislation to be unconstitutional under either its functional or formal approach to the Bill of Attainder Clause.<sup>201</sup>

<sup>185</sup> See *Selective Serv.*, 468 U.S. at 853.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *Selective Serv.*, 468 U.S. at 854.

<sup>191</sup> See *id.* (finding that Congress based its passage of the statute based on the fact that at the time more than half a million men failed to register for the draft).

<sup>192</sup> See *id.* at 855-56.

<sup>193</sup> See *id.* at 856.

<sup>194</sup> See *id.* at 851-53.

<sup>195</sup> See Harvey Berkman, *Is the Telcom Law 'Punishment' for the Bells?*, NAT'L. L. J. at A10 (Jan. 26, 1998).

<sup>196</sup> Justice Frankfurter's concurrence in *Lovett* illustrates this division of constitutional protections into two categories. His jurisprudence should be quoted at length:

Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (*e.g.*, 'due process,' 'equal protection of the laws,' 'just compensation'), and the division of power as between the States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from

very specific provisions of the Constitution. These had their source in definite grievances and led the fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits. The prohibition of bills of attainder falls of course among these very specific constitutional provisions.

*Lovett*, 328 U.S. at 321.

<sup>197</sup> See discussion *supra* Part III.

<sup>198</sup> See *id.*; *Lovett*, 328 U.S. at 321.

<sup>199</sup> *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872); *Cummings*, 71 U.S. (4 Wall.) 277; *Ex parte Garland*, 71 U.S. (4 Wall.) 333. These cases involved post Civil War laws that required individuals to take oaths that they had previously not supported the Confederacy. *Id.*; see also *Brown*, 381 U.S. 437 (invalidating a law denying Communist Party members from holding various union positions); *Lovett*, 328 U.S. 303 (1946) (invalidating a law which prohibited appropriations to government employees found to be subversives).

<sup>200</sup> See *Pierce*, 83 U.S. at 234; *Cummings*, 71 U.S. 277; *Ex parte Garland*, 71 U.S. at 333; *Brown*, 381 U.S. at 437.

<sup>201</sup> See discussion *supra* Part III.

## B. Prong One: Specificity

### 1. *The Bill of Attainder Clause Was Not Intended to Apply to Corporations*

The District Court in *SBC Communications* included corporations within groups or citizens traditionally protected from bills of attainder.<sup>202</sup> The court failed to engage in an analysis of past bill of attainder precedent.<sup>203</sup> It did however, assert that because corporations receive other constitutional protections, it must be logical to conclude that corporations can be afforded bill of attainder protection.<sup>204</sup> The court ignored the Supreme Court's cautioning in *Nixon* that the Bill of Attainder Clause is not to be used as a substitute for the Equal Protection Clause.<sup>205</sup> Also, the District Court ignored the Supreme Court's determination that the Bill of Attainder Clause does not prevent Congress from enacting laws that single out small groups.<sup>206</sup> As explained by Laurence Tribe, the specificity requirement of the Bill of Attainder Clause is limited, allowing Congress to impose restrictions on named groups in appropriate circumstances.<sup>207</sup>

Citing *Brown*, the District Court stated the Bill of Attainder Clause must be read broadly.<sup>208</sup> However, the Supreme Court's functional analysis has actually been read narrowly.<sup>209</sup> The last time the Court expanded the definition of the Bill of

Attainder Clause was during the Civil War era in *Cummings v. Missouri*.<sup>210</sup> The functional clarification of the Bill of Attainder Clause by the *Cummings* Court was not in fact a broader reading of the clause, but rather a limited extension to protect politically unpopular groups singled out for their beliefs.<sup>211</sup>

Whether a constitutional provision is available for the benefit of corporations depends on the nature, history, and purpose of that provision.<sup>212</sup> Corporations are considerably different from the politically subversive citizens or groups the clause was intended to protect.<sup>213</sup> The application of the bill of attainder to disfavored groups stems from the Framers' intent to protect political entities from oppression.<sup>214</sup> Therefore, the specificity component of the bill of attainder analysis was extended to its limit in *Cummings*.<sup>215</sup> An inclusion of telecommunications companies into the groups the clause was written to protect is a considerable leap from the Court's earlier inclusion of politically disfavored in *Cummings*.<sup>216</sup>

Second, for the bill of attainder specificity analysis to be satisfied, a statute requires that an individual or group maintain a characteristic that can be singled out as both "specific" and as "fixed" (an immutable past behavior or affiliation).<sup>217</sup> The amorphous nature of the corporate entity generally does not allow it to be considered a

<sup>202</sup> *SBC Communications*, 981 F. Supp. at 1003 (finding that the Supreme Court has not addressed whether corporate entities are protected under the Bill of Attainder Clause).

<sup>203</sup> *See id.* at 1003 n.4.

<sup>204</sup> *See id.*

<sup>205</sup> *See Nixon*, 433 U.S. at 471.

<sup>206</sup> *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 242 (1995) (Breyer, J. concurring); *see also* Defendants' Memorandum, *supra* note 72, at 2.

<sup>207</sup> *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 644 (2d ed. 1988) [hereinafter *TRIBE*]; *see* Defendants' Memorandum, *supra* note 72, at 2; *see also* *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1227 (D.R.I. 1982) (finding the Bill of Attainder Clause did not apply to a corporation).

<sup>208</sup> *See SBC Communications*, 981 F. Supp. at 1004.

<sup>209</sup> *See supra* note 196.

<sup>210</sup> *See Cummings*, 71 U.S. at 323.

<sup>211</sup> *See id.*

<sup>212</sup> *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778-81 (1978) (holding that a Massachusetts statute that limited corporations from contributing to electoral campaigns violated the First Amendment); *but cf. Cannon*, 553 F. Supp. at 1220 (stating that the Bill of Attainder Clause was not applicable to a corporation).

<sup>213</sup> *See supra* note 196.

<sup>214</sup> The Framers intent for the Bill of Attainder Clause to be a protective device against political persecution is best illustrated through their personal experiences. Thomas Jefferson had his own bitter experience with a bill of attainder during the prelude to the American Revolution. *See* *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 11 (Adrienne Koch & William Peden eds., 1944). Jefferson wrote in his Autobiography that in 1774, his authoring of "A Summary View of the Rights of British America" earned him the distinction of having his name inserted in "a long list of proscriptions, enrolled in a bill of attainder commenced in one of the houses of Parliament, but suppressed in embryo by the hasty step of events, which warned them to be a little cautious." *Id.* Jefferson notes that the bill included Adamses, John Hancock, and Peyton Randolph. *See id.*

<sup>215</sup> *See Cummings*, 71 U.S. at 277.

<sup>216</sup> *See* Griffith, *supra* note 14, at 502-3.

<sup>217</sup> *See* TRIBE, *supra* note 207, at 655 ("[T]he most basic test" of a bill of attainder is that the statute must "single out or 'specify' a fixed class of persons for disadvantageous treatment"); *see also* Tim Sloan, *Creating Better Incentives Through Regulation: Section 271 of the Communications Act of 1934 and the Promotion of Local Exchange Competition*, 50 *FED. COMM. L.J.* 310, 314 (1998) [hereinafter "Sloan"] (discussing the 'specific' and 'fixed' requirement of the Bill of Attainder Clause).

closed class with either "specific" or "fixed" characteristics. Mergers and acquisitions allow members to exit and enter the corporate entity. The BOCs named in the 1996 Act have already changed their characteristics from those named in the Special Provisions, or in the 1982 MFJ. For example, Southern New England Telephone ("SNET") was not made subject to the Special Provisions; however, after being acquired by SBC Communications, SNET is now subject to those requirements.<sup>218</sup> Also, the seven RBOCs have become five RBOCs as a result of mergers within that group.<sup>219</sup> In contrast, where a person was a member of the Communist party is a past characteristic that can never be altered. However, corporations can redefine themselves and lose characteristics. Therefore, when the conduct being protected stems from past violations that are not traditionally protected liberties, such the felonious activity in *Cummings*,<sup>220</sup> then the group specified will not receive bill of attainder protection.<sup>221</sup>

Also, as the Supreme Court noted in *Selective Service*, Congress did not legislate against non-registrants on the basis of their political association, but rather to ensure compliance with draft registration requirements.<sup>222</sup> In *SBC Communications*, the situation is even more specific. Again, Congress has not imposed action against political activity, but has merely maintained certain 1982 MFJ restrictions in order to ensure a fair, orderly, and competitive marketplace.<sup>223</sup>

Furthermore, BOCs have mutable characteristics in a different way. The District Court in *SBC Communications* held that the Special Provisions stripped the BOCs of the ability to enter a new market.<sup>224</sup> The court failed to determine, however, that in order to strip the BOCs of their rights, they must have previously had the ability to provide inter-exchange service.<sup>225</sup> The purpose of the Special Provisions was primarily to allow the

BOCs into the long distance market, a right or privilege they have not enjoyed since their creation during divestiture.<sup>226</sup> To indicate, pursuant to Judge Kendall's discussion that they are innocent corporations whose only downfall was AT&T's reign over them extends the analysis beyond its proper parameters.<sup>227</sup> Congress intended not to impose punishment, but rather to deregulate them through a set of carefully crafted long distance entry requirements.<sup>228</sup>

## 2. The Escape Clause

The specificity analysis also fails the revised functional approach enunciated in *Selective Service*.<sup>229</sup> In *Selective Service*, the Court stressed that only complete barriers to entry into a profession can be challenged as an impermissible bill of attainder.<sup>230</sup> The District Court found the Special Provisions, unlike the registration requirement in *Selective Service* were "onerous" and impossible to satisfy.<sup>231</sup> By declaring the 1996 Act itself was a complete barrier to long distance entry, the District Court improperly ignored the Court's analysis in *Selective Service*.<sup>232</sup> Instead, careful analysis of the extensive legislative history is required which explains that the Special Provisions were intended to establish an easily attainable goal for BOCs interested in providing in-region inter-exchange service.<sup>233</sup> Numerous Senators stated that these requirements could be easily satisfied. Senator Kerrey expressed concern whether these requirements could be fulfilled without promoting the intended local competition benefits for the consumer.<sup>234</sup> Moreover, other Senators were certain that BOCs would be able to satisfy the checklist shortly after the 1996 Act was passed.<sup>235</sup> One Senator was concerned that the checklist was too lenient.<sup>236</sup> In addition, while no 271 applications have been approved yet by the FCC, that does not

<sup>218</sup> See Mike Mills, *The Bells' Fastest Operator, SBC's \$5.8 Billion Offer for Conn. Phone Company Reflects the Aggressiveness of CEO Whiteacre*, WASH. POST, Jan. 6, 1998, at D1.

<sup>219</sup> See *id.*

<sup>220</sup> See *supra* notes 115-124, at 28-30.

<sup>221</sup> See Griffith, *supra* note 14, at 502-03.

<sup>222</sup> See *Selective Serv.*, 468 U.S. at 855-56.

<sup>223</sup> See 47 U.S.C. § 271 (Supp. 1997).

<sup>224</sup> See *SBC Communications*, 981 F. Supp. at 1005.

<sup>225</sup> See *AT&T*, 552 F. Supp. at 227-28.

<sup>226</sup> See *id.*; see 47 U.S.C. § 271 (Supp. 1997).

<sup>227</sup> See Bork, *supra* note 100, at 24.

<sup>228</sup> See H.R. REP. NO. 102-850, at 92 (1992).

<sup>229</sup> See *Selective Serv.*, 468 U.S. at 849-50.

<sup>230</sup> See *id.* at 850-51.

<sup>231</sup> See *SBC Communications*, 981 F. Supp. at 1007.

<sup>232</sup> See *id.*

<sup>233</sup> See *id.*

<sup>234</sup> See 141 CONG. REC. S8444 (daily ed. June 15, 1995) (statement of Sen. Kerrey); see generally Sloan, *supra* note 217, at 316-18 (discussing the extensive legislative history of the 1996 Act that addressed the competitive aspects of Section 271).

<sup>235</sup> See 141 CONG. REC. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux).

<sup>236</sup> See 141 CONG. REC. S7888 (daily ed. June 7, 1995) (statement of Sen. Pressler).

necessarily mean that the competitive checklist is impossible to satisfy. On the contrary, the BOCs' 271 applications have been criticized by the FCC for their failure to comply with competitive entry requirements rather than checklist failures.<sup>237</sup> Nevertheless, the first BOC is expected to be allowed to provide long distance service within its service region by the year's end.<sup>238</sup> The FCC has sought to make their 271 review process more "user friendly" and in an effort to reduce administrative burdens and promote market entry.<sup>239</sup>

The latter examples all offer support for the specificity requirement of bill of attainder jurisprudence to be fulfilled under the functional analysis illustrated in *Selective Service*. The 271 checklist was intended by Congress to be an easy prerequisite to satisfy, and shortly its requirements will be satisfied.

### C. Prong Two: Punishment Under the Restrained Functional Analysis

Within its past two decisions of *Nixon* and *Selective Service*, the Supreme Court has focused on three elements to determine if legislation is extrajudicial punishment or appropriate regulation.<sup>240</sup> In applying the three-prong punishment test, the Court has stressed that "each case has turned on its own highly particularized context."<sup>241</sup> Quite simply, this test follows the narrow approach taken by Justice Frankfurter years earlier in studying each unique case.<sup>242</sup> There are three ways punishment may be considered unconstitutional.

First, if the legislation falls into the Framers' narrow interpretation which addressed only traditional punishments at the time the Constitution was written, then the act will be considered a bill of attainder.<sup>243</sup> Second, applying a restrained functional approach, the Court will not find a bill of attainder to exist if the legislative provisions further non-punitive goals.<sup>244</sup> Third, the Court examines the legislative history to determine if there is any Congressional intent to punish the specified individuals or group.<sup>245</sup> All three tests contain a common theme: impermissible legislative punishment. Clearly, the Court is not concerned with permissible burdens or escapable barriers, but only with the impermissible punishment forbidden by the Framers through their inclusion of the Bill of Attainder Clause into the Constitution.<sup>246</sup>

#### 1. *Is The Burden Imposed Similar to Historical Bills of Attainder?*

Economic regulation has traditionally been viewed as non-punitive.<sup>247</sup> The *SBC Communications* court, however, found the 271 checklist was a prohibition of entry into employment.<sup>248</sup> Employment, the court reasoned, is a traditionally protected liberty.<sup>249</sup> However, barring an individual from employment has been found constitutional even during the era of the Court's strict historicism.<sup>250</sup> Therefore, bill of attainder jurisprudence requires that a motivational intent accompany the punishment. That intent must

<sup>237</sup> See, e.g., *In re Application of SBC Communications, Inc. et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Dkt. No. 97-121 (May 16, 1997). The FCC's order regarding a 271 application was critical of SBC's evidence for competition within Oklahoma. See *id.* SBC argued that a CLEC that was offering resale of local service on a limited test basis constituted competition under Section 271. See *id.* The FCC found this argument strongly lacking evidence in establishing local competition has arrived in Oklahoma. See *id.*

<sup>238</sup> See Mike Mills, *Bell Atlantic May Gain Long-Distance Entree in N.Y.*, WASH. POST, Feb. 7, 1998 at H1. Even staunch critics of Bell Atlantic's entry into long distance have acknowledged that it appears to be meeting the 271 competitive requirements. See *id.* This is mainly because competition in the New York area is more prevalent than in the other BOC service regions. See *id.*

<sup>239</sup> See *Wake Up Call: FCC Commissioner Michael Powell Calls For A New Collaborative Approach to Section 271 Applications* (Jan. 15, 1998). Commissioner Powell stressed the need for an industry wide solution. Competition, he declared, could only

incur if cooperatives efforts exist between the FCC, CLECs, and ILECs. See *id.*; see also Bryan Gruley and Stephanie N. Mehta, *FCC Offers to Try to Help Baby Bells*, WALL ST. J. Jan. 15, 1998, at A3.

<sup>240</sup> See *Nixon*, 433 U.S. at 475-76 (applying both a historical and functional analysis); *Selective Serv.*, 468 U.S. 841 at 853-54.

<sup>241</sup> *Selective Serv.*, 468 U.S. at 852 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

<sup>242</sup> See *Lovett*, 328 U.S. at 322; see also Griffith, *supra* note 14, at 477 (discussing Justice Frankfurter's historical approach to the bill of attainder analysis).

<sup>243</sup> See *Nixon*, 433 U.S. at 475-76.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *Restaino*, *supra* note 144, at 790.

<sup>247</sup> See, e.g., *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

<sup>248</sup> See *SBC Communications*, 981 F. Supp. at 1006.

<sup>249</sup> See *id.*

<sup>250</sup> See, e.g., *Hawker*, 170 U.S. 189 (1898); *Dent*, 129 U.S. 114 (1889).



amount to a denial of employment due to political association.<sup>251</sup> When denial of employment is associated with a valid legislative objective, however, the historical analysis consistently fails.<sup>252</sup> Therefore, even if employment under prong one is encompassed into the punishment analysis, prong two fails because the Special Provisions were not enacted as a result of the BOCs' political association. Congress denied the BOCs' immediate entry into long distance because Congress wanted first to ensure greater competition within the local telephone market.<sup>253</sup>

2. *Under A Functional Test, Can the Burdens Imposed by the 1996 Act Be Found To Further Non-punitive Legislative Purposes?*

In *SBC Communications*, the court concluded that the intent of Congress in the Special Provisions was to penalize the BOC for the "sins of their parent, AT&T."<sup>254</sup> Such an intent could not be found to further non-punitive purposes.<sup>255</sup> Unfortunately, this argument was assisted by the Defendant, the FCC, in their opposing brief, arguing that the Act was intended to promote anti-competitive activity.<sup>256</sup> Therefore, the court did not have to look very far to conclude that the Special Provisions convict the BOCs of anti-competitive activities before they occur.<sup>257</sup> Further, the court determined that other parts of the 1996 Act accomplished any Congressional intent of increasing competition for the entire telecommunications marketplace.<sup>258</sup> The court determined that

Congress' general competitive rules in the more targeted Special Provisions treated the BOCs differently from other similarly situated carriers.<sup>259</sup> Such severe treatment, concluded the District Court, could not promote non-punitive purposes.<sup>260</sup> However, the District Court failed to delineate that harm inflicted by a governmental authority does not necessarily denote punishment.<sup>261</sup> There may be other reasons which legitimize a non-punitive intent.<sup>262</sup> When other non-punitive legitimate purposes exist for disenfranchising a named group of their previously enjoyed rights, the legislature has not exceeded the Bill of Attainder Clause.<sup>263</sup>

The court's rejection of the FCC's pro-competitive argument can be repudiated upon examination of the 1996 Act's legislative history. Congress' purpose for imposing the 271 checklist on the BOCs was not punitive, but based instead on numerous other considerations, such as the geographical position of the BOCs.<sup>264</sup>

The safeguards were not aimed at punishing the BOCs; the legislative purpose was aimed at providing the consumers with a choice of local service in the most congested phone markets.<sup>265</sup> The BOCs' control of urban areas distinguishes them from other ILECs.<sup>266</sup> Congress deemed the satisfaction of the checklist necessary to spur competition in these urban areas, which are significantly different from those controlled by other ILECs.<sup>267</sup> Under the functional analysis, legislation enacted for geographical reasons can easily be found to further non-punitive purposes.

<sup>251</sup> See, e.g., *Cummings*, 71 U.S. 277; see *Ex Parte Garland*, 71 U.S. 333; *Brown*, 381 U.S. 437; *Lovett*, 328 U.S. 303; but see *Nixon*, 433 U.S. 425; *Selective Serv.*, 468 U.S. 841; *Hawker*, 170 U.S. 189; *Dent*, 129 U.S. 114.

<sup>252</sup> See *supra* notes 126 - 134 and accompanying text.

<sup>253</sup> See generally 47 U.S.C. § 271 (1996).

<sup>254</sup> *SBC Communications*, 981 F. Supp. at 1005.

<sup>255</sup> See *id.* (quoting *Nixon*, 433 U.S. at 475) ("Where such reasonable purposes do not appear, it is reasonable to conclude that punishment of the individuals disadvantaged by the enactment was the purpose of the decisionmakers").

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See *SBC Communications*, 981 F. Supp. at 1005.

<sup>260</sup> See *id.*; *Nixon*, 433 U.S. at 475-76.

<sup>261</sup> See *Nixon*, 433 U.S. at 471 n.32. "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than pu-

nitive for such deprivation." *Id.*

<sup>262</sup> See *id.*

<sup>263</sup> See *id.*

<sup>264</sup> See H.R. REP. NO. 102-850, 94 (Aug. 12 1992). "Each RBOC controls essential local exchange facilities in all, or virtually all, the major metropolitan areas in its geographic reason. As courts have found, each of the RBOCs has market power significantly greater than the only other comparably sized local exchange carrier, in that GTE's widely dispersed exchanges are primarily rural and suburban in character and otherwise differ from the RBOCs." *Id.* (citing *United States v. GTE*, 603 F. Supp. 730 (D.D.C. 1984)).

<sup>265</sup> See H.R. REP. NO. 104-204, at 50 (1995); cf. LEE L. SELWYN, ET AL., *ECONOMICS AND TECHNOLOGY, INC., THE 'CONNECTICUT EXPERIENCE' WITH TELECOMMUNICATIONS COMPETITION, A CASE STUDY IN GETTING IT WRONG* 39-40 (1998) (concluding that since SNET is exempt from the incentives of the Special Provisions, it has no reason to remove existing barriers to local competition).

<sup>266</sup> See H.R. REP. NO. 104-204, at 50 (1995).

<sup>267</sup> See *id.*

3. *Does the Legislative History of the 1996 Act Establish a Congressional Intent to Punish?*

The District Court in *SBC Communications* once again focused on the transition of telecommunications policy making authority from the courts to the legislature as evidence of Congressional intent to punish.<sup>268</sup>

A more in-depth examination of the legislative history reveals that Congress was careful to craft the 1996 Act to avoid any subsequent construction of it as a punitive mechanism.

First, the District Court did not even consider that the RBOCs themselves continuously lobbied Congress to enact the Special Provisions.<sup>269</sup> SBC's lawsuit can only be construed as assisting in writing the law it now abhors.<sup>270</sup> A punitive legislative intent cannot exist, however, when that legislature supported by the group it affects.

If the District Court's decision stands, *SBC Communications* will gain the notorious distinction of the first bill of attainder case where the group attempting to declare the statute unconstitutional assisted in inflicting the legislative act upon itself.

Second, Congress was alerted that the proposed version of the 1996 Act might be interpreted as a bill of attainder as early as 1992.<sup>271</sup> As a result, it held extensive hearings with constitutional scholars in order to develop the Special Provisions.<sup>272</sup> Notably, Congress relied on Johnny H. Killian's exhaustive refutation of the bill of attainder argu-

ment.<sup>273</sup> Further, only after taking into account findings that a checklist would not violate the Bill of Attainder Clause did Congress develop the Special Provisions. Congress did so in an attempt to avoid any future judicial determination that might declare the Special Provisions to be punitive.<sup>274</sup>

V. REGULATORY CHESS: SBC'S EFFORT TO STALL THE 271 PROCESS

The Supreme Court has only found Acts to be invalid bills of attainder during the Civil War and the Cold War. Now, the U.S. Circuit Court of Appeals for the Fifth Circuit will determine whether it applies to the current communications wars.<sup>275</sup>

In an attempt to shift authority regarding national telecommunications policy from the courts to Congress, then to the FCC, the BOCs were key players in the construction of the Special Provisions.<sup>276</sup> Further, the RBOCs applauded the enactment of the Special Provisions.<sup>277</sup> However, when their inadequate 271 applications were rejected, they cried foul.<sup>278</sup>

SBC's action declaring the Special Provisions an invalid bill of attainder amounts to frustration over failure to achieve FCC approval.<sup>279</sup> In a costly gamble to have their cake and eat it too, SBC abandoned the process for which they have extensively lobbied.<sup>280</sup> This sends a conflicting message to all corporations: lobby for the laws you

<sup>268</sup> See *SBC Communications*, 981 F. Supp. at 1006.

<sup>269</sup> See H.R. REP. 102-850, at n.491 (Aug. 12, 1992). The BOCs hired Robert Pitofsky to refute the bill of attainder claim. See *id.* Mr. Pitofsky stated relevant case law permitted Congress to remove or modify the 1982 MFJ. See *id.*

<sup>270</sup> Judge Kendall has been characterized as possessing disdain for government and the special interests associated it. See Ann Davis, *Maverick Judge in Telecom Case Bucks System*, WALL ST. J., Jan. 8, 1998, at B1. In forum shopping, SBC Communications was criticized for taking such a significant piece of legislation away from the U.S. Court of Appeals in Washington D.C. which traditionally hears telecommunications cases and filing it in a court that is far removed and unfamiliar with such complex law. See *id.*

<sup>271</sup> See H.R. REP. NO. 102-850, at 92 (1992).

<sup>272</sup> "These constitutional arguments against the MFJ and H.R. 5096 have been rejected wholesale by other legal scholars, and most pertinently, by Judge Greene as well." H.R. REP. NO. 102-850, at 92-93 (1992). Commenting on this Bill, Laurence H. Tribe dismissed the distinction between regulatory purpose and a punitive one, and stated any attempt to single out the BOCs would violate basic constitutional principles behind the Bill of Attainder Clause. See *id.* at 93.

<sup>273</sup> See generally H.R. REP. 102-850 (1992).

<sup>274</sup> See *id.*

<sup>275</sup> See Kupfer, *supra* note 42.

<sup>276</sup> See Bork, *supra* note 100, at A22. For example, SBC spent more than a decade lobbying Congress to enact the Special Provisions. See *id.*

<sup>277</sup> See *id.*

<sup>278</sup> See *id.* In SBC's initial application, it still controlled more than 99% of the local market. *Id.* Further, Chairman Kennard critiqued SBC's applications in the following statement:

We looked carefully at each application. Unfortunately, none of them met the statutory requirements established by Congress. Although the facts presented in these applications were different, there was one common thread: the competing providers in each state did not have the same access to the local network that the Bell Company enjoys. Therefore, local market was not open. Without the same access, competitors cannot provide customers with the same service and, therefore, customers do not have a realistic choice of service providers.

The Telecommunications Act of 1996, Moving Towards Competition Under Section 271 Before the Subcommittee on Antitrust, Business Rights, and Competition, 105th Cong. (1998) (statement of William E. Kennard, Chairman, FCC).

<sup>279</sup> See *id.*

<sup>280</sup> See *id.*

think are in your best interest, but if the laws are not implemented in a way most favorable to you, ask the courts to declare them unconstitutional.

Such activity directly conflicts with the Supreme Court's bill of attainder characterization laid out in *Nixon*.<sup>281</sup> The Bill of Attainder Clause is not a tool that allows a defined group to escape burdens that it dislikes.<sup>282</sup> Practically speaking, at one time or another, a group will find itself adversely affected by legislation.<sup>283</sup> Nevertheless, "realistic conceptions of classification and punishment" traditionally associated with the bill of attainder doctrine cannot be expanded to invalidate every act that imposes a restriction on a group.<sup>284</sup>

What SBC may not have realized is that if the Special Provisions are found unconstitutional, the 1982 MFJ may be reinstated.<sup>285</sup> In that event, the BOCs will be completely barred from long distance entry whether inside or outside their service regions.<sup>286</sup>

Until the Fifth Circuit renders a decision regarding the Special Provisions, in-region long distance entry will be further delayed for the BOCs. Eventually, the transfer of authority from the 1982 MFJ to the FCC will occur. The real question is whether the FCC will find that a 271 application legitimately establishes local competition or whether the FCC grants a 271 application to avoid the judicial scrutiny it is receiving from the courts. On the legislative front, Congress is also being bogged down by the stalled 271 process.<sup>287</sup> As a result, it is presently considering a bill that would abolish the 271 entry provisions altogether.<sup>288</sup> In the meantime, the true victim in this debate is the

local service consumer, who continues to be denied competitive local phone rates as a result of corporate maneuvering.

## VI. CONCLUSION

The BOCs involvement in the telecommunications industry since the implementation of the 1982 MFJ has been entertaining. For instance, they enjoyed the benefit of monopolies within their respective markets after the 1982 MFJ. In the meantime, the BOCs stared longingly at the monetary benefits that long distance service could bring. After extensive lobbying, their wish was granted in the 1996 Act. Unfortunately, in failing to provide local competition they did not live up to their end of their bargain.

Consequently, in a game of cat and mouse with Congress and the FCC, they created an engaging argument based on the contention that the Special Provisions of the 1996 Act amounted to a bill of attainder. After discussion of the limited Supreme Court decisions that have found laws to constitute a bill of attainder, it becomes clear that the position of the BOCs falls well outside any legitimate claim they may have. Specifically, they have failed to satisfy either the necessary specificity or punishment requirements for a bill of attainder argument to succeed.

SBC's effort to stall the 271 process is filled with strategic corporate maneuvers. In effect, it has amounted to concessions by both the FCC and Congress. Nevertheless, it continues to violate the competitive spirit of the 1996 Act.

<sup>281</sup> See *Nixon*, 433 U.S. at 470.

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

<sup>284</sup> *Id.*

<sup>285</sup> See *id.* "If SBC could somehow establish that the long-distance provisions of the 1996 Act are unconstitutional, the necessary consequence would be reinstatement of the court's

order, which contained more severe restrictions." *Id.*

<sup>286</sup> See *Nixon*, 433 U.S. at 470.

<sup>287</sup> See S. 1766, 105th Cong. §§ 1, 3, 270 (1998).

<sup>288</sup> Senator McCain recently introduced a bill to amend the 1996 Act and would allow the BOCs to provide intrastate and interstate telecommunications services one year after its enactment. See *id.*

