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.

The Telecommunications Act of 1996 ("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. The raison d'etre of the 1996 Act is to increase competition within the local telephone service industry. 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.

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. Specifically, Congress placed various obligations on the BOCs through Sections 271-75 of the 1996 Act. In return for meeting these obligations, the BOCs would be allowed to enter the lucrative long distance market. 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.

On December 31, 1997, however, the United States District Court for the Northern District of...
Texas held in *SBC Communications, Inc. v. FCC*\(^{10}\) 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.\(^{11}\) 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").\(^2\) The intent of Sections 271-75, the court held, was based on the notion that the BOCs would commit future antitrust violations.\(^3\)

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."\(^4\) 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\(^5\) settling a 1974 antitrust lawsuit between AT&T and the Department of Justice ("DOJ").\(^6\) The DOJ contended that AT&T violated the Sherman Antitrust Act\(^7\) by using its pervasive market power to block competitors from providing telephone service.\(^8\) 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.\(^9\)

The 1982 MFJ imposed certain "line-of-business" restrictions on the BOCs.\(^20\) 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.\(^21\) The line-of-business restrictions, however, allowed the BOCs to retain their monopolies in local exchange service.\(^22\)

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\(^{10}\) 981 F. Supp. 996 (N.D. Tex. 1997).

\(^{11}\) See id. at 1008. Bills of attainder are defined as, "[I]n legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *BLACK'S LAW DICTIONARY* 165 (6th ed. 1990) (citing United States v. Brown, 381 U.S. 437, 448-49 (1965)).

\(^{12}\) See *SBC Communications*, 981 F. Supp. at 1007.

\(^{13}\) See id.

\(^{14}\) 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).

\(^{15}\) See AT&T, 552 F. Supp. at 139.

\(^{16}\) See id.


\(^{18}\) See AT&T, 552 F. Supp. at 139.

\(^{19}\) 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.


\(^{21}\) See id.

\(^{22}\) 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. 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. Congress engineered a plan for increased local telephone competition that was designed to prevent each BOC from blocking market entry into their service regions. This plan required the BOCs to meet a checklist of fourteen safeguards in order to be permitted to enter other telecommunications markets. Next, the BOCs were required to submit an application to the Federal Communications Commission (“FCC”) certifying that they had satisfied the checklist.

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." "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"). The CLEC must provide service to business and residential subscribers located in the same market as the RBOC. "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. 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. Generally, a BOC would satisfy the list if it demonstrated that its network was open to entry for CLECs. Third, if a BOC intends to provide interLATA telecommunications services, it must establish separate affiliates to provide such services under Section 272. 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."
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). Section 274 prohibits a BOC from engaging in electronic publishing through use of their local phone service for four years. Finally, Section 275 forbids a BOC from entering alarm monitoring services for five years.

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. 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. For example, at present there are approximately 100 CLECs in the nation. CLECs have switches in only 132 cities and only $14 billion has been invested in the local telephone industry by the CLECs. 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. Furthermore, residential phone service still remains under the monopolistic blanket of the incumbent local exchange carriers.

Additionally, two of the primary public policy goals of the 1996 Act, universal service and interconnection, remain unfulfilled. Universal service is the goal of providing all consumers with basic telephone services through subsidization from a fund to which all telecommunications providers contribute. 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.

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. More importantly, the FCC has been restrained by the Eighth Circuit decision, Iowa Utilities Board v. FCC, of its authority to create and

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36 “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).

37 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, technical, professional, trade, or other literary materials; or other like similar information.” Id. § 274(h).

38 “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).

39 See Statement of Sen. Hollings, supra note 1 and accompanying text.


42 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”].

43 See Kennard, supra note 41.

44 See id.

45 See President’s Message, supra note 40.

46 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).


49 120 F.3d 753 (8th Cir. 1997).
implement the complex interconnection regulations required under the 1996 Act. Lastly, cable rates have risen, despite Congress’ confident predictions that they would drop.

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. 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.

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. In SBC Communications v. FCC, 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. 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.

The dispute arose from the specific identification and categorization of BOCs in Sections 271-75. 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. SBC contended that the Bill of Attainder Clause of the U.S. Constitution bars such extrajudicial punishment. The FCC on the other hand, argued that Sections 271-75 were appropriate non-punitive legislation which failed to constitute a bill of attainder.

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. The court further acknowledged that the Supreme Court rarely found a statute to be an unconstitutional bill of attainder. However, the court noted that Sections 271-75 amount to unprecedented legislative acts that require careful constitutional scrutiny. 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.” 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. 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.

The court held that the sections were a bill of attainder, the court did not address the equal protection argument nor the first amendment argument.

SBC Communications, 981 F. Supp. at 1000. 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.

“No Bill of Attainder or ex post facto Law shall be passed.” U.S. CONST., ART. I, § 9, cl. 3. SBC Communications, 981 F. Supp. at 1002. The 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. at 1004.

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. at 1004.

court then addressed whether under prongs two and three Sections 271-75 constitute extrajudicial legislative punishment or were attempts at mere economic regulation.\textsuperscript{67}

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.\textsuperscript{68} The first step involves a historical analysis of whether the legislation resembles burdens traditionally found to be legislative punishment.\textsuperscript{69} 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.\textsuperscript{70} Specifically, the Special Provisions prevent the BOCs from engaging in otherwise lawful telecommunications businesses that are a historically protected constitutional right.\textsuperscript{71} 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.\textsuperscript{72} 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.\textsuperscript{73}

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.\textsuperscript{74} That is, the 1996 Act alters the framework previously created by the courts.\textsuperscript{75} It temporarily places the same restrictions in the hands of Congress.\textsuperscript{76} Therefore, the FCC argued, Congress and the FCC acted well within their legal boundaries in extending the restrictions.\textsuperscript{77}

The District Court disregarded the Supreme Court’s neglect to afford corporations protection under the Bill of Attainder Clause.\textsuperscript{78} 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.\textsuperscript{79}

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.\textsuperscript{80} 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.\textsuperscript{81}

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.”\textsuperscript{82} The court held impermissible such legislation that prevents individuals or groups from engaging in a profession, or deprives rights previously enjoyed.\textsuperscript{83} Further, the court found the checklist requirements imposed on the BOCs could not be easily fulfilled.\textsuperscript{84} 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.\textsuperscript{85} The court found that a significant burden existed on

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\item \textsuperscript{67} See SBC Communications, 981 F. Supp. at 1004.
\item \textsuperscript{68} See id.
\item \textsuperscript{69} See id. (citing Nixon v. Administrator of General Services, 433 U.S. 425, 475 (1977)).
\item \textsuperscript{70} See id.; but see Board of Governors of the Federal Reserve Sys. v. Agnew, 329 U.S. 441 (1947).
\item \textsuperscript{71} See SBC Communications, 981 F. Supp. at 1005.
\item \textsuperscript{72} 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].
\item \textsuperscript{73} See id.
\item \textsuperscript{74} See id. at 8.
\item \textsuperscript{75} See id. at 6.
\item \textsuperscript{76} See Defendants Memorandum, supra note 72, at 6.
\item \textsuperscript{77} See id.
\item \textsuperscript{78} 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
\item \textsuperscript{79} See SBC Communications, 981 F. Supp. at 1004.
\item \textsuperscript{80} 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.\(^8_6\)

The court determined that Congress encroached upon the judiciary’s authority to determine compliance with the 1982 MFJ.\(^8_7\) Further, it unlawfully instituted punishment for non-compliance that had yet to be judicially determined.\(^8_8\) The doctrine of separation of powers, the court held, allows only the judiciary to adjudicate such rights and liabilities.\(^8_9\)

The court also addressed the FCC argument that the sections could not be punitive because they were not permanent.\(^9_0\) 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.\(^9_1\) 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.\(^9_2\)

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.”\(^9_3\) The court rejected the FCC argument that the sections

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\(^8_6\) 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, Dissent II: Is the Local Loop Ripe for Competition?, 3 COMM. LAW CONSPECTUS 175, 181 (1995) [hereinafter “Cullari”].

\(^8_7\) See SBC Communications, 981 F. Supp. at 1006.

\(^8_8\) 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.

\(^8_9\) See id.

\(^9_0\) See id. at 1006.

\(^9_1\) 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.

\(^9_2\) Id. at 1007 (quoting Nixon, 433 U.S. at 475).

\(^9_3\) See id. The FCC stressed that Congress developed the

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\(^9_3\) 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.\(^1_0_0\)CHECKLIST was a premature statement of the BOCs’ guilt. See id.

\(^9_5\) 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).

\(^9_6\) See id.

\(^9_7\) 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.

\(^9_8\) 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).

\(^9_9\) 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.

\(^1_0_0\) 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. This would put other long distance providers (e.g., AT&T, MCI, and Sprint) at a competitive disadvantage. 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. 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. 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 telecommunication companies to the same restrictions.

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. Parliament adjudicated such treasonous activities punishable by death. In drafting the Constitution, the Framers intended the Bill of Attainder Clause to have a narrow meaning. 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. 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.

Through a series of decisions over the past two
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.111 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.112 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.113 The Court’s inclusion of bill of pains and penalties into the bill of attainder definition demonstrated its functional interpretation of the Constitution.114

Bill of attainder jurisprudence lay dormant for more than fifty years until the Court’s 1866 decision in Cummings v. Missouri.115 Cummings involved an action brought by a priest challenging the constitutionality of post Civil War Amendments to the Missouri Constitution.116 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.117 Failure to take the oath resulted in immediate imprisonment.118 Expanding its functional analysis, the Court reasoned that the Amendments did in fact constituted a bill of attainder.119 It based its determination on a number of inferences.120 First, the Court determined that the power to inflict punishment rests with the judiciary.121 Second, the Court determined that Congress may pass retroactive laws which deprive citizens of everything except life, liberty, and cumulation of wealth.122 The Court also noted that punishment is measured by the effect on the citizens, not by legislative intent alone.123 Third, the Court expanded the bill of attainder definition to apply to a whole class and not just to specific individuals.124

The functional analysis of Cummings ran into difficulty in Hawker v. New York125 and Dent v. West Virginia.126 Both cases involved the qualifications to practice medicine.127 In Hawker, the Court found a statute constitutional that prohibited former convicts from practicing medicine.128 In Dent, the Court upheld a state’s right to forbid non-graduates of medical schools from practicing medicine.129 The shift of the Court’s jurisprudence required it to resolve its contradictory holding in Cummings.130 It accomplished this by applying what appeared to be the rational basis test.131 The court determined that, as Hawker and Dent

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111 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”).

112 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.

113 See Fletcher, 10 U.S. at 139.

114 See id. at 138. Justice Marshall also wrote, “[a] bill of attainder may affect the life of an individual, or may confis cate 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.

115 71 U.S. 277 (1866); see also Ex Parte Garland, 71 U.S. 335 (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).

116 See 71 U.S. at 282.

117 See id. at 281.

118 See id.

119 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 privileges as an individual’s right to life, liberty, and property. See id.

120 See id. The majority’s functional view was accompanied by fervent dissent lead 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.

121 See Cummings, 71 U.S. at 286.

122 See id. at 286.

123 See id. at 321-22.

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

125 170 U.S. 189 (1898).

126 129 U.S. 114 (1889).

127 See Hawker, 170 U.S. at 191; Dent, 129 U.S. at 122.

128 See Hawker, 170 U.S. at 199-200.

129 See Dent, 129 U.S. at 128.

130 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.

131 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
were rationally related to a legitimate state end — the fitness to be a doctor — Cummings failed to offer any similar objective. 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. 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, a legislative act excluded three individuals from receiving compensation for their employment because they were found to be subversive. 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. First, did the act specify a certain group of persons? Second, did the act impose punishment on the designated persons? Third, did it impose punishment without the benefit of a judicial trial?

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. 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. Justice Frankfurter interpreted the Bill of Attainder Clause as having a narrow and distinct historical meaning. He also wrote that an essential part of the bill of attainder analysis is an explicit declaration of guilt by the legislature. Justice Frankfurter’s insightful analysis prevailed as the preferred approach to bill of attainder analysis for the next twenty years. The Supreme Court found his bill of attainder jurisprudence particularly useful in the McCarthy era.

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. 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. The Court found that since

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132 See Dent, 129 U.S. at 125.
133 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).
134 328 U.S. 305 (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.
135 See id. at 304-05; see also Griffith, supra note 108, at 483-84 (discussing the Lovett Court’s jurisprudence at length).
136 See id. at 316.
137 See id.
138 See id.
139 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).
140 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).
141 See Lovett, 328 U.S. at 318.
142 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 Frankfurters historical approach to the bill of attainder analysis).
143 See Lovett, 328 U.S. at 323.
144 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.
145 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 my merely altering their behavior); see American Communications Ass’n v. Douds, 339 U.S. 825, 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).
147 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. The Court traced the detailed history of bill of attainder jurisprudence and ultimately found that the Bill of Attainder Clause was an important ingredient of the doctrine of separation of powers. 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.

In Nixon v. Administrator of General Services, the Court once again developed a new approach to bill of attainder analysis. Nixon involved the Presidential Recordings and Materials Preservation Act ("Recordings Act") that permitted the Administrator of General Services to obtain tape recordings of all the former presidents. In 1998, the last time the Supreme Court addressed a bill of attainder argument was in Selective Service System v. Minnesota Public Interest Research Group in 1984. Selective Service involved a student's qualifications to receive financial aid under the Draft..

First, the Court found the Recordings Act's burden fell well outside the historically severe bills of attainder feared by the Framers. 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. 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.

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. 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. 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.

Further, Congress possessed a sufficient purpose in singling out President Nixon in the future preservation of important presidential records.

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. In order to qualify as a bill of attainder, legislative punishment had to be punitive in nature. The Court created a three part analysis in order to evaluate whether legislation was punitive. 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.

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The last time the Supreme Court addressed a bill of attainder argument was in Selective Service System v. Minnesota Public Interest Research Group in 1984. Selective Service involved a student's qualifications to receive financial aid under the Draft.
fense Authorization Act of 1983 ("Defense Act"). The Defense Act required men to attest that they had registered for the draft in order to be eligible for financial aid. Failure to file the required statement with their school resulted in denial of all federally supported financial aid benefits to the student. 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. 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.

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

Addressing the specificity prong, the Court employed a historical analysis to determine whether a specific group or individual was named. In doing so, the Court considered the structure of the Defense Act, as well as its legislative history. 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.'" 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. By contrast, in Selective Service there was no such absolute barrier because non-registrants received the benefit of an escape clause. Therefore, by complying with the registration requirement, a non-registrant could eliminate the statutory barrier to financial aid.

Next, the Court turned to the second prong of the test to determine whether denial of financial aid to non-registrants constituted legislative punishment. The Court found the Defense Act failed in this respect. The Court emphasized that each bill of attainder case requires unique consideration. 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.

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

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167 See id. at 844.
168 See id.
169 See id.
170 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.
171 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.
172 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.
173 See id. at 851-53.
174 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, 453 U.S. at 470; Lewitt, 328 U.S. at 924). 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.
175 See Selective Serv., 468 U.S. at 849-51.
176 See id. at 848-50.
177 Id. at 850 (quoting CSC v. Letter Carriers, 413 U.S. 548, 571 (1973)).
178 See id. at 850-51. Cf. Cummings, 71 U.S. at 281; Ex Parte Garland, 71 U.S. at 333.
179 See Selective Serv., 468 U.S. at 851.
180 See Selective Serv., 468 U.S. at 851.
181 See id.
182 See id.
183 See id. at 852.
184 Id. at 852.
impermissible punishment. 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. 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. 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. Therefore, the Court found that the Defense Act did not fit the historical meaning of "legislative punishment" under the first prong.

Second, the Court set out to determine whether the statute furthered non-punitive goals or an intent to punish. 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. The Court found that draft registration was a worthwhile objective that fell well within the ambit of a non-punitive legislative goal.

Consequently, the Selective Service Court held that the Defense Act neither singled out a specific group nor inflicted punishment. The Court first applied a functional analysis declaring that each bill of attainder case is unique, but then appeared to soften its analysis with a historical twist.

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. Portions of the Framers' intent embodied within the Constitution have been preserved over the past 200 years under functionalism. Certain clauses, however, are still read in a narrow light that respects the Framers' original intent. The Bill of Attainder Clause falls into this strict formalist category. Accordingly, the Court has held five legislative acts to be unconstitutional bills of attainder over the past two hundred years. Further, each of these cases involved legislative acts during two anxious periods in American history, namely the Civil War and the Cold War. 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.

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.

See discussion supra Part III.

See id.; Lovett, 328 U.S. at 321.

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).

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.

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. 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. 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. 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. 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. Citing Brown, the District Court stated the Bill of Attainder Clause must be read broadly. However, the Supreme Court's functional analysis has actually been read narrowly. The last time the Court expanded the definition of the Bill of Attainder Clause was during the Civil War era in Cummings v. Missouri. 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.

Whether a constitutional provision is available for the benefit of corporations depends on the nature, history, and purpose of that provision. Corporations are considerably different from the politically subversive citizens or groups the clause was intended to protect. The application of the bill of attainder to disfavored groups stems from the Framers' intent to protect political entities from oppression. Therefore, the specificity component of the bill of attainder analysis was extended to its limit in Cummings. 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.

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). The amorphous nature of the corporate entity generally does not allow it to be considered a political entity. 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.

2. Second Component: Subversiveness

The Framers' intent was to avoid, not protect, political subversion. The Framers did not wish to make the Bill of Attainder Clause's protection available to politically unpopular groups. The Framers limited the Bill of Attainder Clause to prevent political subversion. See supra note 196. The Bill of Rights was a blueprint for a republic of free and independent nations. The Framers intended to protect the newly formed American Republic from political subversion. They were concerned about a government that would corrupt the people and its institutions. The Framers were aware of the potential for political subversion and wanted to protect the people from this corruption. The Bill of Rights was intended to prevent political subversion, not to protect politically unpopular groups.

3. The Bill of Attainder Clause Is Not to be Used as a Substitute for Equal Protection

The Supreme Court has held that the Bill of Attainder Clause is not to be used as a substitute for the Equal Protection Clause. See supra note 72, at 2. The application of the Bill of Attainder Clause to disfavored groups stems from the Framers' intent to protect political entities from oppression. Therefore, the specificity component of the bill of attainder analysis was extended to its limit in Cummings. 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.

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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. Also, the seven RBOCs have become five RBOCs as a result of mergers within that group. 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 investigated results in the loss of a privilege they have not enjoyed since their creation during divestiture. 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. Congress intended not to impose punishment, but rather to deregulate them through a set of carefully crafted long distance entry requirements.

2. The Escape Clause

The specificity analysis also fails the revised functional approach enunciated in Selective Service. In Selective Service, the Court stressed that only complete barriers to entry into a profession can be challenged as an impermissible bill of attainder. The District Court found the Special Provisions, unlike the registration requirement in Selective Service were “onerous” and impossible to satisfy. 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. 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. 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. Moreover, other Senators were certain that BOCs would be able to satisfy the checklist shortly after the 1996 Act was passed. One Senator was concerned that the checklist was too lenient. In addition, while no 271 applications have been approved yet by the FCC, that does not

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 then checklist failures.\textsuperscript{237} Nevertheless, the first BOC is expected to be allowed to provide long distance service within its service region by the year's end.\textsuperscript{238} 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.\textsuperscript{239}

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 Restrainted 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 extra-judicial punishment or appropriate regulation.\textsuperscript{240} In applying the three-prong punishment test, the Court has stressed that "each case has turned on its own highly particularized context."\textsuperscript{241} Quite simply, this test follows the narrow approach taken by Justice Frankfurter years earlier in studying each unique case.\textsuperscript{242} 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.\textsuperscript{243} 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.\textsuperscript{244} Third, the Court examines the legislative history to determine if there is any Congressional intent to punish the specified individuals or group.\textsuperscript{245} 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.\textsuperscript{246}

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

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

\textsuperscript{237} 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.

\textsuperscript{238} See Mike Mills, Bell Atlantic May Gain Long-Distance Entry 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.

\textsuperscript{239} 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

\textsuperscript{240} See Nixon, 433 U.S. at 475-76 (applying both a historical and functional analysis); Selective Serv., 468 U.S. 841 at 853-54.

\textsuperscript{241} Selective Serv., 468 U.S. at 852 (quoting Flemming v. Nestor, 363 U.S. 603, 616 (1960)).

\textsuperscript{242} 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).

\textsuperscript{243} See Nixon, 433 U.S. at 475-76.

\textsuperscript{244} See id.

\textsuperscript{245} See id.

\textsuperscript{246} See Restaino, supra note 144, at 790.


\textsuperscript{248} See SBC Communications, 981 F. Supp. at 1006.

\textsuperscript{249} See id.

\textsuperscript{250} 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.\textsuperscript{251} When denial of employment is associated with a valid legislative objective, however, the historical analysis consistently fails.\textsuperscript{252} 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.\textsuperscript{253}

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

In \textsl{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."\textsuperscript{254} Such an intent could not be found to further non-punitive purposes.\textsuperscript{255} 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.\textsuperscript{256} 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.\textsuperscript{257} Further, the court determined that other parts of the 1996 Act accomplished any Congressional intent of increasing competition for the entire telecommunications marketplace.\textsuperscript{258} The court determined that Congress' general competitive rules in the more targeted Special Provisions treated the BOCs differently from other similarly situated carriers.\textsuperscript{259} Such severe treatment, concluded the District Court, could not promote non-punitive purposes.\textsuperscript{260} However, the District Court failed to delineate that harm inflicted by a governmental authority does not necessarily denote punishment.\textsuperscript{261} There may be other reasons which legitimize a non-punitive intent.\textsuperscript{262} 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.\textsuperscript{263}

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.\textsuperscript{264} 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.\textsuperscript{265} The BOCs' control of urban areas distinguishes them from other ILECs.\textsuperscript{266} 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.\textsuperscript{267} Under the functional analysis, legislation enacted for geographical reasons can easily be found to further non-punitive purposes.

\textsuperscript{251} See, e.g., Cummings, 71 U.S. 277; see \textit{Ex Parte Garland}, 71 U.S. 333; Brown, 381 U.S. 437; Lovett, 328 U.S. 303; but see Nixon, 435 U.S. 425; Selective Serv., 468 U.S. 841; Hawker, 170 U.S. 189; Dent, 129 U.S. 114.
\textsuperscript{252} See supra notes 126 - 134 and accompanying text.
\textsuperscript{254} \textsl{SBC Communications}, 981 F. Supp. at 1005.
\textsuperscript{255} 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").
\textsuperscript{256} See id.
\textsuperscript{257} See id.
\textsuperscript{258} See id.
\textsuperscript{259} See \textsl{SBC Communications}, 981 F. Supp. at 1005.
\textsuperscript{260} See id.; Nixon, 433 U.S. at 475-76.
\textsuperscript{261} 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 discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation." \textit{Id.}
\textsuperscript{262} See id.
\textsuperscript{263} See id.
\textsuperscript{264} 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." \textit{Id.} (citing United States v. GTE, 603 F. Supp. 730 (D.D.C. 1984)).
\textsuperscript{265} See H.R. REP. No. 104-204, at 50 (1995); cf. \textsc{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).
\textsuperscript{266} See H.R. REP. No. 104-204, at 50 (1995).
\textsuperscript{267} 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.268

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.269 SBC's lawsuit can only be construed as assisting in writing the law it now abhors.270 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 1992.271 As a result, it held extensive hearings with constitutional scholars in order to develop the Special Provisions.272 Notably, Congress relied on Johnny H. Killian's exhaustive refutation of the bill of attainder arguments.273 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.274

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.275

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.276 Further, the RBOCs applauded the enactment of the Special Provisions.277 However, when their inadequate 271 applications were rejected, they cried foul.278

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

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268 See SBC Communications, 981 F. Supp. at 1006.
269 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.
270 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.
272 "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.
274 See id.
275 See Kupfer, supra note 42.
276 See Bork, supra note 100, at A22. For example, SBC spent more than a decade lobbying Congress to enact the Special Provisions. See id.
277 See id.
278 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.
279 See id.
280 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.*281 The Bill of Attainder Clause is not a tool that allows a defined group to escape burdens that it dislikes.282 Practically speaking, at one time or another, a group will find itself adversely affected by legislation.283 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.284

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

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.287 As a result, it is presently considering a bill that would abolish the 271 entry provisions altogether.288 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.

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281 See *Nixon,* 433 U.S. at 470.
282 See id.
283 See id.
284 Id.
285 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.
286 See *Nixon,* 433 U.S. at 470.
288 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.