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From Enemies of The Crown to Regional Telephone Companies: Bills of Attainder Reappraised

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FROM ENEMIES OF THE CROWN TO REGIONAL TELEPHONE COMPANIES: BILLS OF ATTAINDER[1] REAPPRAISED

INTRODUCTION

When asked to decide the constitutionality of economic legislation, courts generally respond with decisions supported by at least one of the prevailing relevant constitutional doctrines. Many of these doctrines are based on the Commerce Clause[2] under Article I or the Due Process or Equal Protection Clauses under the Fourteenth Amendment.[3] Judicial opinions concerning economic legislation decided under these provisions generally rely on a well-developed body of case law.

In a bold departure from the prevailing established doctrines applicable to economic jurisprudence, a federal district court, in *SBC Communications v. Federal Communications Commission,*[4] recently invalidated Sections 271-275 of the 1996 Telecommunications Act[5] (the Act) on the grounds that they constituted a bill of attainder.[6] The court reasoned that because

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[1] *See* BARRON'S LAW DICTONARY 51 (4th ed. 1996). A "bill of attainder" is a legislative act, in any form, that applies 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. *Id.*

[2] U.S. CONST. art. I, § 8. This section provides in pertinent part: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

[3] U.S. CONST. amend. XIV, § 1. This section provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Id.

[4] 981 F. Supp. 996 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226 (5th Cir. 1998).

[5] The 1996 Act was codified as 47 U.S.C §§ 271-275 (1996). These special provisions concern Bell operating companies or any affiliate of a Bell operating company and the authorizations, collaborations, limitations, requirements and prohibitions placed on the companies by Congress.

[6] *See supra* note 1 and accompanying text.

the statute applies solely to Regional Bell Operating Companies ("RBOCs") or their affiliates and precludes these corporations from competing in, *inter alia*, the market for long distance services without the benefit of a judicial trial, it constitutes a bill of attainder.[7] This was one of the only courts to ever apply the Bill of Attainder to economic legislation.

Following the *SBC Communications* decision, observers began to question whether other provisions of the Act may be unconstitutional based on the same relationship and grounds between the Bill of Attainder Clause and economic regulation. Observers also had general questions such as what is the origin and meaning of bills of attainder? This article strives to answer this and similar questions.

Because there are a few Supreme Court opinions decided pursuant to this Clause and the Supreme Court has never addressed the issue of whether a statute regulating specific corporations is unconstitutional pursuant to the Bill of Attainder Clause, it may be useful to examine the history and use of bills of attainder in Great Britain and the United States.

This article, therefore, begins by presenting the history of the bill of attainder in England and in the United States. It then focuses on the *SBC Communications* and other recent lower court decisions. Finally, this article concludes that the federal district court's interpretation of the Bill of Attainder Clause in *SBC Communications* is, at the very least, a long way from the Clause's original understanding.

I. THE ENGLISH EXPERIENCE

The history of Great Britain is replete with rebellions and other struggles for political and financial power. In response to the need for swift and effective methods for quashing rebellions; disposing of undesirable high officials; and solving other problems associated with maintaining political power; the British government developed bills of attainder and bills of pains and penalties. Bills of pains and penalties differed from bills of

[7] *SBC*, 981 F. Supp. at 1002.

attainder in that they did not carry a sentence of death. Significantly, both of these bills were exclusively used to punish people who threatened or attempted to overthrow the government.[8]

Bills of attainder were Parliamentary acts sentencing named or described persons or groups to death without a judicial decision.[9] Most bills of attainder in Great Britain had four characteristics. First, they identified the subject by name or described a readily ascertainable group of individuals. Second, the bills recited the subject's actions which Parliament or the Crown determined deserved punishment. Third, they contained a declaration of guilt. Finally, they prescribed the punishment to be administered.

These punishments included (1) death; (2) forfeiture of the attainted[10] person's real and personal property to the Crown; and (3) corruption of his blood[11] which meant that a person could not inherit, retain or transmit property to any heir.[12] Those attainted were treated by law as if never born.[13] Consequently, their property automatically reverted to the Crown.

Although the origin of bills of attainder is obscure, their use was established by the fourteenth century. One early example occurred in 1397, when Richard II convinced Parliament to pass a bill of attainder stating that: "if anyone, whatsoever his rank or condition, shall move or excite the Commons of Parliament, or any other person, for the purpose of bringing about a remedy or reformation of any matter which pertains to the [royal] person or rule or kingly prerogative, he shall be taken and held as a

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[8] *See* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 331 (1962).

[9] *Id.* at 330.

[10] *See* BARRON'S LAW DICTIONARY 37 (4th ed. 1996). Attaint is defined as "to be stained or degraded by a conviction." *Id.*

[11] *See generally* ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION 96 (University of Kansas Press, 1956).

[12] *See generally* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 408-12 (George Chase ed., Baker, Voorhis & Co. 1938)(1765).

[13] Charles H. Wilson, Jr., *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CAL. L. REV. 212, 213 (1966).

traitor."[14] This bill of attainder was aimed at a clergyman, Thomas Haxey, who had persuaded the House of Commons to investigate the alleged extravagances in Richard II's household.[15] Since Richard II was clearly more concerned with maintaining his lavish lifestyle than protecting Haxey's life, let alone freedom of petition, he readily accepted the opportunity to present Haxey with a bill of attainder.

Perhaps the most notorious example of a bill of attainder occurred in the case of Jack Cade. This bill of attainder is famous because it was applied to one of the leaders of a rebellion subsequently memorialized by Shakespeare in his play, HENRY VI.[16]

After King Henry VI lost Normandy and his French domains, great resentment broke out in Kent.[17] Soon thereafter, the Kentish army, under Cade's direction, was gathered to march on London.[18] For the first few days of the rebellion, the Kentish army was successful. The rebels, however, eventually met heavy resistance and fled back to Kent.[19] During his attempt to flee London, Cade suffered a mortal wound and died while his captors were transporting him to the King for a reward of £1,000. After Cade's body was presented for this reward, it was beheaded, quartered and conveyed on a hurdle[20] through the streets.[21]

Presumably, this would have been sufficient punishment; however, a year after his death, Parliament passed a bill of

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[14] *See* CHAFEE, *supra* note 11, at 102.

[15] *Id.*

[16] *Id.* at 100. It should also be noted that one of the lines in Shakespeare's version of these events is the source of countless quips about the legal profession: "the first thing we do, is kill all the lawyers." WILLIAM SHAKESPEARE, HENRY VI, Part 2, Act 4, sc. 2.

[17] *Id.* at 98.

[18] *Id.*

[19] *Id.* at 100-01.

[20] A hurdle is a wooden sledge on which the condemned were transported to and from executions.

[21] *See* CHAFEE, *supra* note 11, at 101.

attainder against Cade.[22] After listing the details of Cade's participation in the rebellion, the bill stated that Cade:

> be attainted of these Treasons, and by authority aforesaid forfeit to [Commons] all his Goods, Lands, Tenements, Rents and Possessions which he had on said 8th day of July or after, and his blood corrupted and disabled forever, and he be called within your Realm false Traitor forevermore.[23]

Thus, the bill of attainder against the deceased Cade ensured not only forfeiture of his property and corruption of his blood but acted as a deterrent for future rebels.[24]

Although bills of attainder were relatively uncommon, the British government continued to use them well into the nineteenth century. The last execution under a bill of attainder occurred in 1798.[25] Significantly, bills of attainder were used exclusively to punish individuals who threatened or attempted to subvert the government's political power and not as a mechanism to regulate industry.[26] The latter use is the focus of this article.

II. THE COLONIAL EXPERIENCE AND THE CONSTITUTION

During and after the Revolutionary War, each of the thirteen colonies passed bills of attainder and other punitive statutes directed at Loyalists. Most of these bills imposed penalties less severe than death, and thus were referred to as "bills of pains and penalties."[27] However, at the Constitutional Convention of 1787, the Framers[28] decided to outlaw these forms of legislative

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[22] *Id.*
[23] *Id.* at 101-02.
[24] *Id.* at 102.
[25] *Id.* at 136.
[26] *See* WILSON *supra* note 13, at 212.
[27] *See id.* at 217.
[28] This is a legal term of art used to describe the people who drafted or "framed" the United States Constitution. Alexander Hamilton, James

punishment.[29] Accordingly, they adopted two new bill of attainder clauses. The first was directed at Congress[30] and the second was directed at the states.[31] This article refers to the two clauses collectively.

Several reasons are generally advanced in support of the Framers' decision to prohibit traditional bills of attainder. First, the Framers were aware that had they lost the Revolutionary War and they could be subject to bills of attainder by the British Government.[32] Second, many of the Framers were concerned with the potential threat to liberty posed by an overly powerful legislative branch.[33] Third, the Framers were concerned that a bill of attainder might be used as a judicial function, substituting a legislative decision as to guilt and punishment for a judicial trial and sentencing.[34] And fourth, the Framers believed that the restoration of commercial relationships with Great Britain was imperative for America's prosperity.[35]

III. SUPREME COURT INTERPRETATION

Although the Bill of Attainder Clause was mentioned in dictum as early as 1810,[36] the Supreme Court did not pass upon the Bill

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Madison, and John Jay, for example, are considered Framers of the Constitution.

[29] *See* Note, *supra* note 8, at 330-31.

[30] U.S. CONST. art. I, § 9. This section provides: "No Bill of Attainder or ex post facto law shall be passed." *Id.*

[31] U.S. CONST. art. I, § 10. This section provides in pertinent part: "No Bill of Attainder on ex post facto law shall be passed." *Id.*

[32] Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Process,* 50 BROOK. L. REV. 77, 84 (1983).

[33] THE FEDERALIST No. 44, at 282-83 (J. Madison); No. 78, at 466 (A. Hamilton) (Clinton Rossiter ed., 1961).

[34] *See* Wilson, *supra* note 13, at 217 (stating that as it applies to Congress, the Bill of Attainder Clause re-enforces the separation of powers between the legislative and judicial branches of government).

[35] *Id.* at 218. The threat to the restoration of these relationships posed by bills of attainder directed at Loyalists was eradicated by the Bill of Attainder Clause.

[36] Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). Chief Justice Marshall noted in dictum that the Constitution's prohibition on bills of attainder should

of Attainder Clause until after the Civil War. The Court's first decisions based on the Bill of Attainder Clause were *Cummings v. Missouri* and *Ex parte Garland*. Both cases involved statutes that were motivated by political concerns.[37]

In *Cummings*,[38] the Court struck down post Civil War amendments to the Missouri Constitution which provided that no individual could vote, hold office, teach or hold property in trust for a religious organization without taking an oath that he never had sympathized with the Rebel cause.[39] The petitioner, a Roman Catholic priest, was convicted under this statute for preaching without having taken the required oath, was fined $50.00, and imprisoned until the fine was paid.[40] The Court found that the State legislature had passed the statute because it thought that supporting the Rebel cause was reprehensible and that the only way to punish Rebel supporters was to severely restrict their ability to participate in society.[41]

In *Garland*, [42] the Court struck down a federal statute requiring attorneys practicing in federal courts to take a similar oath. The Court based its decision on *Cummings* and emphasized that "exclusion from any of the professions or any ordinary avocations of life for past conduct can be regarded as punishment for such conduct."[43]

These cases represent a departure from the historical understanding of bills of attainder in two ways. First, the Court ruled that the Bill of Attainder Clause applied to bills proscribing punishments less severe than death. Second, the Court's definition of a bill of attainder omitted the requirements of a recital of the wrongs for which the punishment is inflicted and a

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extend to legislation carrying penalties less severe than death, i.e., bills of pains of penalties. *Id.* at 138.

[37] *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[38] *Cummings*, 71 U.S. (4 Wall.) at 277.

[39] *Id.* at 318-19.

[40] *Id.* at 316.

[41] *Id.* at 318-20.

[42] *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[43] *Id.* at 377.

legislative declaration of guilt. Unlike the English practice of including the penalty of death, forfeiture of property, corruption of blood, etc., the Court defined bills of attainder simply as "legislative act[s] which inflict punishment without a judicial trial."[44]

The next two significant Supreme Court cases to consider the Bill of Attainder clause occurred over two decades later. In contrast to *Cummings* and *Garland*, the Court decided that the statutes in *Dent v. West Virginia*[45] and *Hawker v. New York*[46] were not politically motivated and presented no bill of attainder problems.

In *Dent*, the Court upheld a Virginia statute requiring graduation from an accredited medical school to practice medicine. Soon thereafter, the *Hawker* Court applied the same principle to a New York statute barring convicted felons from practicing medicine.[47] The Court held that these statutes were not punitive, because they were reasonably related to the qualifications to practice medicine. In both cases, the Court accepted the *Cummings-Garland* rationale and found that if the legislature's deprivation of rights was reasonably related to the regulated activities, then it did not constitute punishment.[48]

After these two cases, the Bill of Attainder Clause lay dormant until 1946 when the Court decided *United States v. Lovett*.[49] In this case, the Court struck down a rider to the Urgent Deficiency Appropriation Bill of 1943, which cut off the salaries of three named individuals. Justice Black's majority opinion emphasized that if legislative acts applied either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial, then [they were] bills of attainder.[50] Justice Black also identified three distinctions between bills of attainder and legitimate legislative classifications:

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[44] *Cummings*, 71 U.S. (4 Wall.) at 323.
[45] Dent v. West Virginia, 129 U.S. 114 (1889)
[46] Hawker v. New York, 170 U.S. 189 (1898).
[47] *Id.* at 191.
[48] *Dent*, 129 U.S. at 125-28; *Hawker*, 170 U.S. at 198.
[49] United States v. Lovett, 328 U.S. 303 (1946).
[50] *Id.* at 315.

(1) specificity (2) punishment and (3) absence of a judicial trial's procedural safeguards. This was the first time that Congress declared individuals subject to a statutory penalty. The *Lovett* decision was followed by three cases concerning statutes conditioning the rights of individuals on a proclamation of loyalty to the United States.[51]

The first case, *Garner v. Board of Public Works*,[52] upheld a statute requiring city employees to affirm that they had not advocated the violent overthrow of the Government during the preceding five years. Nine years later, the *Flemming v. Nestor*[53] Court upheld section 202(n) of the Social Security Amendments of 1954. This section authorized the termination of Social Security benefits for any alien deported because of Communist Party membership. In the third case, *Communist Party v. Subversive Activities*,[54] the Court upheld an order by the Subversive Activities Control Board ordering the Communist Party to register with the Attorney General. These decisions left the bill of attainder doctrine in a state of disarray because the Court failed to follow a consistent analytical framework and continued to expand the doctrine to include a broader range of statutes.[55]

The next major development occurred in 1964 when the Court struck down section 504 of the Labor-Management Reporting and Disclosure Act of 1959 in *United States v. Brown*.[56] This Act precluded Communist Party members from holding a union office. Congress passed this Act in an effort to reduce or prevent the likelihood of politically motivated strikes interrupting the flow of commerce.[57] Chief Justice Warren's majority opinion emphasized that the Bill of Attainder Clause was intended to re-enforce separation of powers as well as reflect the Framers'

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[51] *See* Wilson, *supra* note 13, at 223-28.

[52] Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951).

[53] Flemming v. Nestor, 363 U.S. 603 (1960).

[54] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961).

[55] *See Wilson*, *supra* note 13, at 228.

[56] United States v. Brown, 381 U.S. 437 (1965).

[57] *See generally Wilson*, *supra* note 13, at 248.

belief that the legislative branch was not as qualified as politically independent judges and juries to rule on guilt and to levy appropriate punishment. The *Brown* decision is significant because it contains the Court's most extensive discussion and expansive application the Bill of Attainder Clause.[58]

The Court's most recent pronouncements concerning the Bill of Attainder Clause were *Nixon v. Administrator of General Services*[59] and *Selective Services v. Minnesota Public Interest*.[60] In *Nixon*, the Court upheld a statute requiring the General Services Administration to confiscate Richard Nixon's presidential materials for screening, in order to speed the release of materials of historical interest.[61] This decision limited the Bill of Attainder Clause's prohibition to laws not rationally advancing legitimate (i.e. nonpunitive) legislative purposes and announced a three-part test to determine whether the congressional action constituted impermissible punishment:

> (1) whether the statute imposes punishment traditionally judged to be prohibited by the Clause; (2) whether the statute, viewed in terms of the type and severity imposed, can be said to further nonpunitive legislative purposes; and (3) whether the legislature expressed a punitive intent.[62]

In *Minnesota*, the Court upheld the "Solomon Amendment," which compelled applicants for financial aid to affirm their compliance with the Selective Service registration requirements with their educational institution, and denied financial aid to all those who failed to do so.[63] The Court found that (1) Congress' denial of financial aid did not fall within the historical meaning of legislative punishment; (2) the Act did not further nonpunitive

[58] *See Wilson*, *supra* note 13, at 248.

[59] Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

[60] Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984).

[61] *Nixon*, 433 U.S. at 429.

[62] *Id.* at 475-78.

[63] *Selective Service*, 468 U.S. at 855-56.

goals; and (3) remarks by certain members of Congress did not reveal an obvious intent to punish.[64] Both *Nixon* and *Minnesota* demonstrate the Court's deference to Congress when asked to decide the constitutionality of statutes governing economic rights under the federal Bill of Attainder Clause.

The Supreme Court has not passed upon the Bill of Attainder Clause since these two decisions. As mentioned above, however, several recent decisions concerning the Clause have been decided in the Federal District and Federal Appellate Court levels.

IV. RECENT LOWER COURT APPLICATION TO THE 1996 TELECOMMUNICATIONS ACT

A. SBC Communications v. FCC

On July 2, 1997, SBC Communications filed an action against the Federal Communications Commission ("FCC") in the federal district court of Wichita Falls, Texas challenging the constitutionality of Subtitle B, Title I of the 1996 Act, codified as 47 U.S.C. §§ 271-275 ("Act" provisions). Since these provisions are directly related to the antitrust action brought against AT&T in 1974[65], a discussion of the pertinent facts in AT&T is necessary.

In the AT&T action, the Justice Department alleged, *inter alia*, that AT&T violated the Sherman Act by using its market power to restrict competitors from entering into several markets within the telecommunications industry.[66] In 1982, after an extensive legal battle, the case was settled by a Consent Decree, otherwise known as, the Modification of Final Judgment ("MFJ").[67]

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[64] Harvard Law Review Association, *Draft Registration and Federal Educational Aid*, 98 HARV. L. REV. 87, 89 (1984).

[65] U.S. v. AT&T, 461 F. Supp. 1314 (D.D.C. 1978).

[66] For a brief summary of this action, *see* SBC Communications v. FCC, No. 98-10140, 1998 U.S. App. LEXIS 21646 (5th Cir. September 4, 1998).

[67] U.S. v. AT&T, 552 F. Supp 131, 222-34 (D.D.C 1982).

As a part of the MFJ, AT&T agreed to divest itself from the twenty-four Bell Operating Companies ("BOCs") by 1984.[68] The Consent Decree also imposed certain restrictions on the regional Bell Operating Companies ("RBOCs"). For example, the RBOCs were prohibited from providing information services; any nontelecommunications services; and from manufacturing telecommunications equipment. The restrictions placed on the RBOCs by the MFJ served as a basis for the enactment of §§ 271-275 of the 1996 Act.[69]

SBC Communications alleged that §§ 271-275 of the Act violated various constitutional principles: including the separation of powers, the First Amendment, and the Equal Protection Clause.[70] SBC Communications also argued that because the special provisions singled-out specific corporations and burdened those corporations, they necessarily constituted a bill of attainder.

The FCC countered SBC Communication's claims with several arguments. The following three arguments are the most important for this discussion. First, the FCC argued that these provisions did not constitute a bill of attainder because they were

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[68] Under the MFJ, AT&T agreed to divest itself from the twenty-two Bell Operating Companies (BOCs). The MFJ further provided for the amalgamation of the BOCS into seven Regional Bell Operating Companies (RBOCs). SBC Communications, Inc. is an RBOC as well as the parent company of several BOCs. *Id.* at 142.

[69] *See* SBC Communication v. FCC, 981 F. Supp. 996, 1002 (N.D. Tex. 1997).

[70] The following is a brief summary of the Sections of the 1996 Act at issue in the SBC Communications action.

> Section 271 prohibits the RBOCs from providing interLATA services without satisfying a series of requirements. Section 272 requires, *inter alia*, the RBOCs to establish a separate affiliate for manufacturing activities. Section 273 prohibits the RBOCs from manufacturing and supplying telecommunications equipment until they satisfy the requirements of Section 271. Section 274 forbids the RBOCs from engaging in electronic publishing through the use of their basic telephone service. Finally, Section 275 prohibits the RBOCs from engaging in alarm monitoring services until February 8, 2001.

Id. at 1001.

not a legislative punishment but rather appropriate economic regulation. Second, the FCC argued that the purpose of the 1996 Act was to provide for a pro-competitive national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunication markets to competition.[71] Third, the FCC argued that the purpose of the Act was not to punish either the BOCs or RBOCS, but rather to replace the MFJ.[72]

On December 31, 1997, the district court concluded that Sections 271-75 of the Act are an unconstitutional bill of attainder.[73] In reaching its conclusion the court made several findings. The court first ruled that the protections afforded by the Bill of Attainder Clause apply to corporations.[74] The court then found that the specification element of the bill of attainder analysis was met, because the provisions by their terms applied solely to RBOCs.[75] The court then noted that RBOCs have not had any judicial trial for their past or future conduct.[76]

To answer the question of whether the provisions crossed the boundary between lawful regulation and impermissible punishment, the court applied the three-step analysis announced in *Nixon*.[77] First, the court found that under an historical analysis, the burdens imposed on the RBOCs by the provisions necessarily constituted punishment.[78] The court then determined that although the defendants identified several nonpunitive purposes of the special provisions, the special provisions constituted punishment because they did not apply to all local exchange carriers.[79] Finally, the court found that AT&T's prior

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[71] *See* Defendant's Cross-Motion for Summary Judgment. at 10, SBC Communications v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997)

[72] *Id.*

[73] 981 F. Supp. 996 (N.D. Tex. 1997).

[74] *Id.* at 1003.

[75] *Id.* at 1004.

[76] *Id.*

[77] *See generally* 433 U.S. 425 (1977).

[78] 981 F. Supp. at 1005.

[79] *Id.* at 1006.

allegedly anticompetitive conduct was the basis for the special provisions.[80] Indeed, the court reached the conclusion that the Congress intended §§ 271-275 to punish the RBOCs for their former parent AT&T's transgressions over two decades.[81]

Immediately following the *SBC Communications* decision, the court stayed the decision and it was certified for expedited appeal. On September 4, 1998, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision.[82]

The circuit court reversed the decision primarily because it disagreed with the district court's conclusion that the special provision constituted punishment.[83] The circuit court also discussed the protective or "prophylactic" exception to the Bill of Attainder Clause. This so-called exception seeks to protect rather than punish. In this case, the special provisions do not protect the market from anti-competitive behavior.

The circuit court advanced four arguments why the special provisions furthered nonpunitive legislative purposes. First, the special provisions do not impose a perpetual bar, but rather stiff criteria, on the BOCs' entry into certain markets.[84] Second, special provisions attempt to ensure fair competition in the markets for local service, long distance, telecommunications equipment, and information services.[85] Third, the legislative history presents no evidence of punitive intent.[86] And fourth special provisions are part of a larger quid pro quo.[87] All arguments made by the court lead to the single conclusion that the Act was not punitive in nature.

B. BellSouth v. FCC

[80] *Id.* at 1006-07.
[81] *Id.* at 1007.
[82] SBC Communications v. FCC, 154 F.3d 226 (5th Cir.1998).
[83] *Id.* at 229.
[84] *Id.* at 242.
[85] *Id.* at 242-43.
[86] *Id.* at 243.
[87] *Id.*

In addition to the *SBC Communications v. FCC* case, BellSouth Corp. recently challenged the FCC order implementing Section 274 of the 1996 Act based on the Bill of Attainder Clause and other constitutional grounds. On May 15,1998, the Court of Appeals for the District of Columbia ("D.C. Circuit"),[88] rejected BellSouth's challenge and held that Section 274 did not constitute a bill of attainder.[89] The D.C. Circuit's decision began by providing a brief historical overview of the MFJ, the 1996 Act, and bills of attainder.[90] The decision then applied the three-part test announced in Nixon.[91]

First, the D.C. Circuit stated that the restrictions imposed by Section 274 are nothing "like the classic attainders known to the Framers."[92] The D.C. Circuit then explained why line-of-business restrictions pose no bill of attainder problems.[93] Based on this analysis, the D.C. Circuit concluded that although the RBOCs may be burdened by Section 274, these burdens do not approach the burdens that have traditionally accompanied bills of attainder.[94]

Second, the D.C. Circuit illustrated why Section 274 can reasonably be said to further nonpunitive legislative purposes. The D.C. Circuit noted that "section 274 is less severe than the analogous pre-1991 MFJ provisions."[95] Section 274, in sharp contrast to the earlier provision, "applies only to electronic publishing rather than to information services as a whole, it expires after five years rather than continuing indefinitely, and it

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[88] BellSouth Corp v. FCC, 1998 U.S. App. LEXIS 9769, (D.C. Cir. May 15, 1998). Section 274 limits the ability of BOCs to provide electronic publishing.

[89] *Id.* at *2.

[90] *Id.* at *3-4.

[91] *Id.* at *15-16. *See also* Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

[92] *BellSouth Corp.*, 1998 U.S. App. LEXIS 9769 at *17.

[93] *Id.* at *20. Line-of-business restrictions are also not uncommon. For example, the Glass-Stegall Act precludes commercial banks from entering the investment banking business. *Id. See also* United States v. Brown, 381 U.S. 437, 453-55 (1965).

[94] *BellSouth Corp.*, 1998 U.S. App. LEXIS 9769 at *21.

[95] *Id.* at *27.

mandates structural separation rather than complete exclusion."[96] The D.C. Circuit then concluded that the differential treatment of the BOCs under Section 274 is not evidence of punitive purposes noting that differential treatment is necessary to promote competition because the BOCs have a significantly greater opportunity to capitalize on their position in the relevant market.[97] For these and other reasons, the D.C. Circuit concluded that Section 274 furthers nonpunitive purposes.

Third, the D.C. Circuit concluded its application of the three part *Nixon* test by stating that BellSouth failed to produce any "unmistakable evidence whatsoever of punitive intent."[98] Such evidence, as noted above, is necessary before legislation may be declared unconstitutional pursuant to the Bill of Attainder Clause.[99] Because BellSouth failed to meet the requirements under the *Nixon* analysis, the D.C. Circuit concluded that Section 274 presented no bill of attainder problems.[100]

V. CONCLUSION

As illustrated by the discussion above, the application of the Bill of Attainder Clause in *SBC Communications* and *BellSouth* rests on a somewhat muddled background. Neither relatively extensive common law principles nor fairly limited Supreme Court decisions appeared to provide strong precedential guidance for determining when a law crosses the line between legislation and impermissible punishment.

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[96] *Id.*

[97] *Id.* at *29.

[98] *Id.* at *32. *See also* Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984); Fleming v. Nestor, 363 U.S. 603 (1960).

[99] *Id.* at *30.

[100] *Id.*

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If the district court's and the dissent in SBC's reasoning goes no further, it may be just another legal oddity, gone and soon forgotten. If adopted by other and higher courts, however, it may create a wide-open and undisciplined approach to traditional Due Process, Equal Protection, First Amendment and separation of powers issues. That is, of course, until the Supreme Court agrees to decide the issue.

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