1999

Constitutional Law-Bill of Attainder-Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder

Thomas H. Lee
Fordham University School of Law, thlee@law.fordham.edu

RECENT CASES

CONSTITUTIONAL LAW — BILL OF ATTAINDER — FIFTH CIRCUIT HOLDS THAT THE SPECIAL PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996 ARE NOT A BILL OF ATTAINDER. — *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

Neither Congress nor the states may pass bills of attainder.[1] Insofar as it enjoins legislatures from the judicial task of imposing punishments on specific persons, this proscription has both structural and substantive dimensions.[2] The Bill of Attainder Clauses seem a particularly promising source for novel constitutional claims given the current Supreme Court's receptiveness to arguments based on separation of powers[3] and unexplored but substantively germane text.[4] SBC Communications, a regional telephone company, successfully invoked the attainder provisions when it persuaded a district court in Texas[5] to invalidate line-of-business restrictions imposed by the Telecommunications Act of 1996.[6] In *SBC Communications, Inc. v. FCC*,[7] however, the Fifth Circuit reversed.[8] Though it rejected SBC's challenge, the court declined to question the applicability of attainder protections to corporations contesting particularized economic legislation, and instead relied on the infirm distinction between "punishment" and "regulation" to decide the case. In so doing, it imprudently left the door open to future bill of attainder attacks on economic legislation in a vital, fluid industry. Instead, the court should have clarified that the Clauses protect a targeted group's political freedoms, not its economic rights.

Acknowledging the lack of a coherent regulatory scheme for the sprawling telecommunications industry, and seeking to substitute the legislature's imprimatur for the judicial consent decree then controlling

---

[1] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder.").

[2] *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-4 to 10-6, at 641–63 (2d ed. 1988) (describing the history and role of the bill of attainder provisions).

[3] *See, e.g.*, Clinton v. City of New York, 118 S. Ct. 2091, 2108–10 (1998) (Kennedy, J., concurring) (concluding that the line-item veto violates the separation of powers).

[4] Justice Thomas appears to be the member of the Court most amenable to new doctrinal challenges. *See, e.g.*, Printz v. United States, 521 U.S. 898, 938 (1997) (Thomas J., concurring) (intimating that federal gun control statutes might violate the Second Amendment); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (urging the Court to abandon the dormant commerce clause and decide the constitutionality of a discriminatory state tax under the Import-Export Clause).

[5] *See* SBC Communications, Inc. v. FCC, 981 F. Supp. 996, 1008 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

[6] The relevant provisions are codified at 47 U.S.C. §§ 271–275 (Supp. II 1997).

[7] 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

[8] *See id.* at 247.

the dissolution of AT&T's local monopolies,[9] Congress passed the Telecommunications Act of 1996 (the "1996 Act").[10] Sections 271 to 276 of the 1996 Act, the "Special Provisions Concerning Bell Operating Companies" (the "Special Provisions"), imposed line-of-business restrictions on the Bell operating companies ("BOCs")[11] that had emerged from the break-up of AT&T to control telephone networks in designated local access and transport areas ("LATAs").[12] The BOCs, by name, were prohibited from competing in long distance and other markets until they had fulfilled a list of conditions intended to ensure fair competition in their respective local markets.[13]

One of the BOCs, SBC Communications, filed suit in the United States District Court for the Northern District of Texas alleging that the Special Provisions were a bill of attainder in which Congress sought to punish the BOCs for the anticompetitive practices of their parent, AT&T.[14] The trial court agreed that proscribing the BOCs from immediate entry into interLATA markets was an attainder.[15]

In a 2–1 decision, the Court of Appeals for the Fifth Circuit reversed.[16] Judge Jolly[17] applied a two-pronged attainder test, asking, first, whether "the legislature [had] acted with specificity" by singling out individuals or groups, and, second, whether it had "imposed punishment."[18] The court chose not to address the question whether the specificity prong was satisfied, or the question whether the attainder provisions applied at all to corporate entities,[19] deciding that the punishment prong was dispositive.[20] The court assessed "punishment" for attainder purposes by applying a three-factor test: "(1) whether the

---

9 *See* SBC Communications Inc. v. FCC, 138 F.3d 410, 412–13 (D.C. Cir. 1998); United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226–34 (D.D.C. 1982) (setting forth the consent decree), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

10 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151–614 (Supp. II 1997)).

11 The 1996 Act identifies the "Bell operating compan[ies]" by name at 47 U S.C. § 153(4).

12 *See id.* §§ 271–276. The restrictions covered interLATA services by the BOCs (§ 271) and their affiliates (§ 272), equipment manufacture (§ 273), electronic publishing (§ 274), alarm monitoring (§ 275), and pay telephones (§ 276). SBC did not challenge section 276 of the Act. *See* SBC Communications, Inc. v. FCC, 981 F Supp. 996, 999–1000 (N.D. Tex. 1997), *rev'd*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

13 *See, e.g.*, 47 U.S.C. § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.").

14 *See SBC Communications*, 981 F. Supp. at 1007. SBC also claimed that the Special Provisions violated the principle of separation of powers and the Equal Protection Clause, and that section 274's restrictions on electronic publishing offended the First Amendment *See id.* at 999–1000. The district court did not reach these claims, *see id.* at 1008; however, the Fifth Circuit denied them on appeal, *see SBC Communications*, 154 F.3d at 244–47.

15 *See SBC Communications*, 981 F. Supp. at 1008.

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

17 Judge Barksdale joined Judge Jolly's opinion.

18 *SBC Communications*, 154 F.3d at 233.

19 *See id.* at 234.

20 *See id.* at 235, 244.

challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'"[21]

Judge Jolly answered all three questions in the negative.[22] First, he found no punishment, as the word has historically been defined, because the Special Provisions allow the BOCs access to interLATA markets if they meet specified conditions,[23] and thus "do not impose a perpetual bar on the BOCs' entry into any of life's avocations."[24] Second, Judge Jolly found a qualifying "nonpunitive purpose" in that the Special Provisions were enacted "to ensure fair competition" in the telecommunications markets.[25] Third, he concluded that neither the legislative history nor the express terms of the Special Provisions presented "the 'smoking gun' evidence of punitive intent necessary to establish a bill of attainder."[26] In addition to the three-factor test, the court emphasized that the Special Provisions were "part of a larger quid pro quo" in which the BOCs and regulators had negotiated a "hard-fought compromise" that "contained both good and bad elements for the BOCs."[27] Certainly, Judge Jolly reasoned, the BOCs' participation, input, and acquiescence in the political process impeached the claim that the resultant legislation was punitive.[28]

In dissent, Judge Smith maintained that the Special Provisions were an unconstitutional bill of attainder.[29] First, he contended that the majority was wrong in implying that "prophylactic" measures against future antitrust violations did not constitute punishment for attainder purposes.[30] He argued, rather, that employment bars fit the historical definition of punishment whether or not they are retributive,[31] and that because the Special Provisions constituted such a bar, they were an attainder.[32] Second, Judge Smith asserted that the prohibition against bills of attainder was necessary to preserve the separa-

---

[21] *Id.* at 242 (quoting Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984) (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 475–76, 478 (1977)). For an earlier application of the test to an attack on section 274 of the 1996 Act, see *BellSouth Corp. v. FCC*, 144 F.3d 58, 64 (D.C. Cir. 1998).

[22] *See SBC Communications*, 154 F.3d at 242–44.

[23] *See* 47 U.S.C. § 271(c) (Supp. II 1997).

[24] *SBC Communications*, 154 F.3d at 242–43.

[25] *Id.* at 243.

[26] *Id.*

[27] *Id.* at 244; *see also* SBC Communications Inc. v. FCC, 138 F.3d 410, 413 (D.C. Cir. 1998) ("As might be expected for an issue of this economic significance, an extended lobbying struggle [produced] a compromise between the competing factions.").

[28] *See SBC Communications*, 154 F.3d at 244.

[29] *See id.* at 247–53 (Smith, J., dissenting).

[30] *See id.* at 248–51.

[31] *See id.* at 250–51.

[32] *See id.* at 253.

tion of powers.[33] He cautioned that Congress's role was to enact general laws for courts to enforce against specific individuals, and that by targeting the BOCs, the legislature had clearly usurped the proper function of the judiciary.[34]

Though the Fifth Circuit prudently rejected SBC's attack, its reliance on the two-pronged attainder inquiry overstates the potential reach of the bill of attainder provisions and thus invites continued challenges to the 1996 Act. Rather, the court should have made clear that the Bill of Attainder Clauses protect political minorities from targeted punishment by majoritarian legislatures; they do not protect corporations that have participated in the generative political process from particularized economic legislation.

The modern attainder test is unworkable. First, it is unclear whether the specificity prong — the requirement that bills of attainder must single out individuals or groups[35] — is merely a formal tripwire triggered by naming per se, or a more functional test in which naming is relevant but not dispositive. The majority here,[36] and the two twentieth-century Supreme Court cases in which an attainder was found,[37] imply a formal naming requirement, but the current Court has suggested otherwise.[38] If, as *Nixon* indicates, the specificity prong can be avoided by any naming — even of one person — for which Congress can offer a rational, nonpunitive basis,[39] the prong seems toothless and theoretically indistinguishable from the punishment prong. At the same time, using naming as a per se trigger makes the test too rigid — both missing attainders phrased in deceptively general language, and catching nonattainders in which parties are nonetheless named, as in *Nixon*. Thus, whether applied formally or functionally, the specificity prong defers any real analytical work to the punishment prong.

But the punishment test, too, is indeterminate. The characterization of suspect legislation as punishment or regulation turns on how one defines baseline entitlements. Because the majority assumed that

---

[33] *See id.* at 252.

[34] *See id.* at 252–53.

[35] *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 469–72 (1977).

[36] *See SBC Communications*, 154 F.3d at 234 n.12 (stating in dicta that it is "probably a safe assumption" that the Special Provisions satisfy the specificity requirement because they "identify the burdened parties by name").

[37] *See* United States v. Brown, 381 U.S. 437, 438–39 n.1 (1965) (striking down as a bill of attainder a law that made it a crime for anyone "who is or has been a member of the Communist Party" to serve as an officer or employee of a labor union); United States v. Lovett, 328 U.S. 303, 305 n.5 (1946) (finding unconstitutional a statute prohibiting payment of government salaries to alleged Communists "Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett").

[38] *Cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) ("[L]aws that impose a duty or liability upon a single individual or firm are not on that account invalid — or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause . . . .").

[39] *See Nixon*, 433 U.S. at 472 (reasoning functionally that the specificity test was not met by a law that targeted "former President Richard M. Nixon" because the naming could be "fairly and rationally understood" as designating a "legitimate class of one").

the BOCs had no absolute right to long distance market access,[40] it logically concluded that Congress could place reasonable temporary conditions on such access.[41] The dissent, in contrast, assumed that the BOCs had an unqualified right to market access and likened the Special Provisions to unconstitutional incarceration, unredeemed by the temporary and conditional nature of the restrictions.[42]

Given the indeterminacy of the attainder test, the Fifth Circuit should have decided the case on the threshold issue of whether attainder protection is available to corporations fighting particularized economic legislation of the type at issue in the 1996 Act.[43] It should not be. For the Bill of Attainder Clauses to fulfill their jointly structural and substantive function, and to reconcile the relevant caselaw, the attainder test should ascertain whether the legislature has imposed punishment on specified individuals or groups for countermajoritarian political activities or beliefs. The clauses serve to check the state or federal legislature's power to impose punishments on specified persons and thereby perpetuate the majority's political judgments against unpopular or powerless individuals or groups.[44] Specific punishment is thus reserved for the judiciary, the countermajoritarian branch of government; the encroachment of the legislature, the majoritarian branch, upon this paradigmatic countermajoritarian function is the essence of objectionable interference with the separation of powers.

The core right implicated by the Bill of Attainder Clauses, then, is a political freedom from the majority's power to single out political minorities for punishment, not a right to be free from particularized bars to market access. The landmark cases in the Supreme Court's attainder jurisprudence have uniformly assumed that, to be struck down, legislative punishment must be politically motivated, usually by doubts about a political minority's loyalty.[45] Although majoritarian punish-

---

[40] *See SBC Communications*, 154 F.3d at 243–44 (characterizing the Special Provisions as "a prophylactic, compromise regulation of the BOCs' *local* market power" (emphasis added)).

[41] *See id.* at 242–43.

[42] *See id.* at 249 (Smith, J., dissenting) ("[T]he Bill of Attainder Clause cannot be avoided simply by inserting into the statute a means of escape. The fact that the federal government holds the key to the Baby Bells' prison is irrelevant.").

[43] While the Fifth Circuit did not decide this issue, because it found that the Special Provisions were not punishment, Judge Jolly speculated that the attainder protections applied to corporations, reasoning by analogy to other constitutional rights that had been made available to corporations. *See SBC Communications*, 154 F.3d at 234 n.11 (citing United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (double jeopardy); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (freedom of speech)).

[44] *See, e.g.*, United States v. Brown, 381 U.S. 437, 453 (1965) (noting that "the overwhelming majority of English and early American bills of attainder" targeted political groups); *cf.* Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 476 (1984) ("[The] constitutional purpose [of the Clause] is best found in shielding political activity protected by the first amendment from retroactive legislative sanctions.").

[45] Several cases have assumed that the Bill of Attainder Clauses protect against improper, politically motivated punishment of specific persons. *See* Nixon v. Administrator of Gen. Servs., 433

ment has frequently taken the form of employment bars, such bars should not be deemed bills of attainder when enacted for economic motives against politically empowered corporations.[46]

By persuading the court to decide a novel challenge under the traditional two-pronged attainder test, the BOCs have cleared the way for future bill of attainder challenges to particularized economic legislation.[47] The prospect of an ultimately successful attainder attack on the Telecommunications Act of 1996 harks back to the now-discredited jurisprudence of the *Lochner*[48] era. Just as the *Lochner*-era Court was forced to decide upon the constitutionality of uniform wage[49] and work hour[50] regulations that facially burdened the "right of free contract,"[51] today's courts must decide the constitutionality of particularized legislation that implicates the Bill of Attainder Clauses by naming specific parties. Confronted with this dilemma, courts should jettison old, unworkable tests[52] and deny attainder protection to corporations challenging particularized economic legislation. Congress and the administrative agencies may need such customized regulatory tools to restrain specific companies likely to "lock in" insurmountable positions in emerging markets due to their current dominance in technologically proximate markets.[53] The Bill of Attainder Clauses, accordingly, should be reserved for an extraordinary and constitutionally paramount purpose: the protection of political minorities singled out for punishment by majoritarian legislatures.

U.S. 425, 474–75 (1977) (characterizing employment bars that constitute attainders as "a mode of punishment commonly employed against those legislatively branded as disloyal"); *Brown*, 381 U.S. at 443 (describing the constitutional protection against bills of attainder as a "bulwark against tyranny"); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327 (1867) (invalidating, as a bill of attainder, loyalty oaths for the ministry "intended especially to operate upon parties who . . . had aided or countenanced the [Confederate] Rebellion").

[46] Of course, the protections may still be available to groups generally and to corporations specifically insofar as challenged legislation effects a punishment for political disloyalty.

[47] Another BOC, BellSouth, focused an earlier attack on section 274 of the 1996 Act. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 60 (D.C. Cir. 1998). BellSouth subsequently filed another attack on section 271, which the D.C. Circuit denied. *See* BellSouth Corp. v. FCC, 162 F.3d 678, 680 (D.C. Cir. 1998).

[48] Lochner v. New York, 198 U.S. 45 (1905).

[49] *See* Adkins v. Children's Hosp., 261 U.S. 525, 539–40 (1923).

[50] *See Lochner*, 198 U.S. at 53.

[51] *Id.* at 57.

[52] *Cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 777 (1996) (Souter, J., concurring) ("[A]ppreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology . . . .").

[53] *See generally* W. BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY 1–29 (1994) (theorizing about lock-in effects in a high-technology economy).