FINAL, FILED 3/24/98 No. 98-10140

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SBC COMMUNICATIONS INC., et al.,
Plaintiffs-Appellees,

US WEST COMMUNICATIONS, INC., and
BELL ATLANTIC CORPORATION,
Plaintiffs-Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Defendants-Appellants,

MCI TELECOMMUNICATIONS CORP., et al.,
Defendants-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE FEDERAL APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

The district court ruled that key provisions of the Telecommunications Act of 1996 violate the Bill of Attainder Clause. Because that decision, if affirmed, would invalidate important federal legislation, oral argument is warranted, and this Court has tentatively scheduled argument for July, 1998.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Northern District of Texas (Kendall, J.). The plaintiffs invoked the district court's subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its final judgment on February 11, 1998, and the government filed its notice of appeal on February 13, 1998. That notice was timely pursuant to Federal Rule of Appellate Procedure 4(a)(1).

STATEMENT OF THE ISSUE

Whether certain provisions of the Telecommunications Act of 1996 that apply to the activities of the Bell Operating Companies (47 U.S.C. §§ 271-75) violate the Bill of Attainder Clause of the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

In 1982, a federal district court entered a consent decree terminating an antitrust action brought by the United States against the American Telephone and Telegraph Company (AT&T) and its subsidiaries (AT&T Consent Decree). Under the Consent Decree, AT&T divested its wholly-owned local telephone company subsidiaries, the Bell Operating Companies (BOCs). The AT&T Consent Decree prohibited the BOCs from providing long-distance telephone service, manufacturing telecommunications equipment, and providing information services. See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

In the Telecommunications Act of 1996 (the 1996 Act), Congress comprehensively overhauled federal telecommunications regulation. The 1996 Act opened local telephone markets to competition, prospectively terminated the effect of the AT&T Consent Decree, and immediately lifted some of the restrictions imposed on the BOCs by that decree. It also provides for the lifting of the remaining restrictions in a transitional period to a competitive environment. In the transitional period, the BOCs must obtain the approval of

the Federal Communications Commission (FCC) to provide long-distance telephone service to their local customers and to manufacture and provide telecommunications equipment. The BOCs must show that their local exchange markets have been opened up to competition in accordance with the public interest and a number of specific statutory requirements, including a multipoint competitive checklist. Congress also imposed limited and temporary restrictions on BOC provision of electronic publishing services and alarm monitoring services. These transitional provisions are codified at 47 U.S.C. §§ 271-75.

On July 2, 1997, plaintiff SBC Communications Inc., together with several of its subsidiaries (SBC), filed this facial challenge to the constitutionality of 47 U.S.C. §§ 271-75 against the United States and the FCC (the government). SBC claimed that Sections 271-75 violate the Bill of Attainder and Equal Protection Clauses, and that Section 274 also violates the First Amendment.

On cross-motions for summary judgment, the district court granted summary judgment for plaintiffs, holding that Sections 271-75 violate the Constitution's prohibition of bills of attainder. R. 1820-21; Record Excerpts (R.E.), Tab 5, at 18-19. In subsequent orders, the court held that the provisions are severable from the remainder of the 1996 Act (R. 2756, R.E., Tab 4, at 1) and stayed its order pending appeal (R. 2754, R.E., Tab 6, at 1).

The government and defendants-intervenors filed timely notices of appeal. This Court granted a joint motion for expedition filed

by plaintiffs and the government and consolidated the appeals for briefing and argument.

B. Statement of Facts and Relevant Statutory Provisions.

1. The AT&T Consent Decree

For many years, most telephone service in the United States — both local and long-distance — was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981).

In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local telephone operations, consisting of twenty-two Bell Operating Companies. The newly independent BOCs — grouped into seven "regional Operating Companies," United States v. AT&T, 552 F. Supp. at 142 n.41, or "RBOCs" — continued to provide monopoly local exchange service in their respective regions, while AT&T provided nationwide long-distance service.

The consent decree, among other things, prohibited the BOCs from providing long-distance telephone service. See id. at 227. In approving the restrictions on long-distance service, the district court explained that a BOC, if permitted to enter the long-distance market, could use its monopoly control over the local telephone exchange facilities (which are essential to long-distance

service) to harm competition by subjecting competitors to discriminatory terms of access to the local network and by cross-subsidizing its own long-distance operations with its monopoly local revenues. Id. at 188.

To implement the decree's restriction on the provision of long-distance services, the district court established "exchange areas," also known as "local access and transport areas" or "LATAs," denoting the geographic areas within which the BOCs were permitted to provide telephone service. United States v. Western Elec. Co., 569 F. Supp. 990, 994 (D.D.C. 1983). The BOCs were permitted to provide telephone service "only between points within a single LATA, providing what is, basically, the traditional local telephone service." See United States v. Western Elec. Co., 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993).[1]

The decree also precluded the BOCs from manufacturing telecommunications and customer premises equipment (such as telephones), as well as providing information services, including electronic publishing and alarm monitoring services. 552 F. Supp. at 227. The information services restriction was later lifted. See United States v. Western Elec. Co., 993 F.2d 1572, 1582 (D.C.

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[1] Following the terminology of the AT&T Consent Decree, the challenged provisions of the 1996 Act refer to "interLATA" rather than "long-distance" services. See 47 U.S.C. § 271; id. § 153(21). For ease of exposition, we refer to interLATA calls as "long-distance calls." However, such calls should not be confused with the somewhat larger category of "toll calls," which includes some intra-LATA calls that the BOCs are authorized to carry under the 1996 Act as they were under the Consent Decree.

Cir.), cert. denied, 510 U.S. 984 (1993). However, the BOCs remained subject to detailed FCC regulations governing the provision of information and other "enhanced" services, that is, services beyond basic voice transmission. See generally In re Computer III Further Remand Provisions: Bell Operating Company Provision of Enhanced Services, 10 F.C.C.R. 8360 (1995).

2. The Telecommunications Act of 1996

In the 1996 Act, Congress terminated the prospective effect of the Decree as part of a comprehensive overhaul of telecommunications regulation that sought to "open[] all telecommunications markets to competition." H.R. CONF. REP. NO. 104-458, at 1 (1996), reprinted in 1996 U.S.C.C.A.N. at 124. In a number of interrelated provisions, Congress for the first time established a framework for opening local telephone markets to competition and lifting the restrictions that had precluded the BOCs from providing long-distance telephone service.[2]

In the "local competition" provisions of the Act, Congress imposed a duty on all incumbent local exchange carriers (LECs) — including the BOCs — to permit new entrants to compete for local telephone customers using the incumbent's existing network, and set forth the procedures for doing so. See 47 U.S.C. §§ 251, 252.

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[2] The 1996 Act defines "Bell operating company" as the existing local telephone companies that had been wholly-owned subsidiaries of the pre-divestiture AT&T (identified by name), as well as "any successor or assign of any such company that provides wireline telephone exchange service." 47 U.S.C. 153(4). The definition includes "Southwestern Bell Telephone Company," "Pacific Bell," and "Nevada Bell," ibid., all wholly-owned subsidiaries of SBC Communications Inc.

In section 601(a) of the 1996 Act, Congress terminated the prospective effect of the AT&T Consent Decree. _See_ Pub. L. No. 104-104, § 601(a), 110 Stat. 143 (1996). But to achieve orderly progress to the statutory goal of full competition in telecommunications, and to ensure that the BOCs had strong incentives to help realize that goal, Congress maintained a transitional regulatory framework — contained in 47 U.S.C. §§ 271-75 — governing the BOCs' entrance into new markets.

Section 271 authorizes the BOCs immediately to provide "out-of-region" long-distance services — that is, long-distance services originating outside the states in which a BOC was authorized to provide local telephone service on the date of the statute's enactment. 47 U.S.C. § 271(b)(2). Section 271 also provides that the BOCs can immediately begin to provide, to customers located anywhere in the country, "incidental" long-distance services, _id_. § 271(b)(3), including audio and video programming and commercial mobile services, "gateway information services" linking local customers to information service clearinghouses, and centralized signaling service. _See_ _id_. § 271(g).

Section 271 introduces a procedure under which the BOCs may apply to the FCC for authorization to provide, for the first time, non-incidental long-distance telephone service to customers within their "in-region" states. The FCC is to grant such an authorization if it finds that: (1) the BOC has satisfied certain statutory requirements, including a "competitive checklist" designed to open the BOC's local exchange market to fair competition (47 U.S.C.

271(c)), (2) the BOC will, for an interim period, conduct its long-distance operations in accordance with the structural separation requirements set forth in 47 U.S.C. § 272, and (3) granting the application "is consistent with the public interest, convenience, and necessity" (47 U.S.C. § 271(d)(3)).

Section 273 allows a BOC to manufacture and provide telecommunications equipment upon the FCC's determination that the BOC has satisfied the conditions set out in Section 271(d) for providing long-distance service.[3]

Sections 274 and 275 impose short-term restrictions on BOC electronic publishing and alarm monitoring services. Under Section 274 a BOC or BOC affiliate may not, until February 8, 2000, disseminate electronic publishing by means of the BOC's basic telephone service except through a "separated affiliate" or joint venture. Id. § 274(a), 274(g)(2). Section 275 requires BOCs that were not providing alarm monitoring services as of November 30, 1995, to wait until February 8, 2001, to begin doing so. Id. § 275(a).[4]

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[3] Even before a BOC has obtained such approval, it is free to engage in research related to manufacturing, to engage in "close collaboration" with manufacturers with regard to design and development of telecommunications equipment, and to enter into royalty agreements with telecommunications equipment manufacturers. 47 U.S.C. § 273(b).

[4] Finally, Section 272 requires the BOCs to set up separate affiliate companies if they wish to engage in manufacturing, origination of non-incidental in-region long-distance services not previously authorized by the consent decree court, or long-distance information services other than electronic publishing or alarm monitoring. Id. § 272(a), (b). Most of § 272's requirements (continued...)

C. Proceedings Below

1. SBC Communications Inc., through its wholly-owned subsidiaries (Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell), provides local telephone service to customers in Texas, Missouri, Oklahoma, Arkansas, Kansas, California and Nevada. On April 11, 1997, SBC filed an application with the FCC pursuant to section 271 to provide in-region long-distance telephone service in Oklahoma. The FCC denied that application, concluding that SBC had not satisfied Section 271's threshold competitive requirements. 12 F.C.C.R. 8685 (1997). The court of appeals affirmed the FCC's decision. SBC Communications, Inc. v. FCC, 1998 WL 121492 (D.C. Cir. Mar. 20, 1998).

2. On July 2, 1997, SBC, along with its wholly-owned BOC subsidiaries and several other affiliates, filed this challenge to the constitutionality of 47 U.S.C. §§ 271-75 on bill of attainder, separation of powers and equal protection grounds. In addition, SBC argued that Section 274's electronic publishing restrictions violate the First Amendment. Both sides, joined by various intervenors, moved for summary judgment.

On December 31, 1997, the district court (Kendall, J.) issued a memorandum opinion and order holding that the challenged provisions are unconstitutional bills of attainder. SBC Communications,

[4](...continued)
expire (barring an FCC extension) either on February 8, 2000 (for information services), or three years after a BOC or its affiliate obtains FCC approval under § 271(d) (for long distance or manufacturing). Id. § 272(f). See Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044, 1046 (D.C. Cir. 1997).

Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997), R. 1803-21, R.E. Tab 5. In light of its bill of attainder holding, the court expressly declined to reach SBC's equal protection and First Amendment arguments. R. 1820-21, R.E. Tab 5, at 18-19.

On February 11, 1998, the court entered a final judgment invalidating 47 U.S.C. §§ 271-75, but stayed its decision pending appeal. In issuing its judgment, the court held that the provisions it invalidated were severable from the remainder of the 1996 Act.

The government and defendant-intervenors filed timely notices of appeal. This Court granted a joint motion for expedition and has consolidated the appeals for briefing and argument.

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 effects a comprehensive overhaul of the telecommunications industry. Its provisions are regulatory in purpose and effect, and in no sense constitute legislative "punishment" prohibited by the Bill of Attainder Clause.

1. In reshaping the regulatory landscape, Congress sought to open the local and long-distance telephone markets to full competition for the first time. In so doing, Congress was required to address the restrictions that the AT&T Consent Decree had imposed on the BOCs. Congress concluded that the BOCs' continuing monopoly power over local exchange facilities in broad geographic areas provided them with the incentive and the ability to frustrate the statute's goal of across-the-board competition.

Accordingly, while Congress lifted some of the Consent Decree's restrictions immediately, it conditioned the BOCs' full entry into the long-distance telephone market on the dismantling of their longstanding monopoly control over their local telephone markets. These transitional restrictions are classic economic regulation designed to advance the wholly legitimate legislative purpose of fostering across-the-board competition.

2. These transitional regulations do not implicate the Bill of Attainder Clause, which prohibits only legislative "punishment," and does not circumscribe Congress's power to enact forward-looking economic regulation of the kind challenged here. In this nation's history, the Supreme Court has struck down only five statutes as bills of attainder, and in each case, the legislature unmistakably had sought to punish individuals for past acts of political subversion. The Bill of Attainder Clause is not implicated merely because Congress directs its regulations to a limited group. As the Court has made clear, when Congress acts to regulate and not to punish, it may even single out one individual by name without running afoul of the Bill of Attainder Clause.

To be sure, SBC and its sister BOCs would have preferred that Congress lift the restrictions of the AT&T Consent Decree without imposing any statutory substitutes, and they urge that the challenged provisions are unnecessary to protect competition. But such contentions in no way alter the fact that Congress enacted wholly legitimate economic regulation and that the legislative

record is devoid of any hint that Congress sought to "punish" the BOCs.

3. Plaintiffs urge that if Congress deemed the challenged restrictions to be necessary, it should have applied them to every incumbent local exchange carrier, and not only to the dominant telephone service providers that had been governed by the AT&T Consent Decree.

The BOCs' contention that the statute is underinclusive does not convert the statute's economic regulation into punishment. Congress concluded that the BOCs, and the BOCs alone, possess market power to a degree that requires special statutory safeguards. Moreover, as the Supreme Court has made clear, the Bill of Attainder Clause is not a variant of the equal protection doctrine, condemning nonpunitive legislation on the ground that it might have been applied more broadly. Plaintiffs' quarrel with Congress's policy judgment cannot transform legislation designed to safeguard competition into proscribed legislative punishment.

ARGUMENT

Standard of Review

Whether the challenged provisions violate the Bill of Attainder Clause is a question of law that this Court reviews de novo. United States v. Hebert, 131 F.3d 514, 524 (5th Cir. 1997).

I. 47 U.S.C. §§ 271-75, WHICH ESTABLISH TRANSITIONAL REGULATIONS TO ENSURE A COMPETITIVE MARKET FOR TELEPHONE SERVICES, DO NOT VIOLATE THE BILL OF ATTAINDER CLAUSE.

A. The Bill Of Attainder Clause Proscribes Only Legislative Punishment Based On A Congressional Determination Of Guilt.

The Constitution provides that "[n]o Bill of Attainder * * * shall be passed." U.S. CONST., art. I, § 9, cl. 3. A constitutionally forbidden bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977); Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 846-47 (1984).

"The proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group." Selective Serv. Sys., 468 U.S. at 851 (emphasis added). Accord Nixon, 433 U.S. at 472-73; Flemming v. Nestor, 363 U.S. 603, 613 (1960). Thus, even a statute that imposes burdens on a single individual — identified in the statute by name — is not a forbidden bill of attainder if it does not impose punishment within the meaning of the constitutional proscription. Nixon, 433 U.S. at 472-73.

Nor does the fact that a statute imposes a burden on a person or group mean that the statute imposes punishment forbidden by the Constitution, since "there may be reasons other than punitive for such deprivation." Selective Serv., 468 U.S. at 851 n.8 (quoting United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J.,

concurring)). As this Court has explained, "[t]he prohibitions of Article I, § 9, relate only to penal laws which are described as those laws which inflict a disability for the purpose of punishment. If the disability is designed to accomplish some other legitimate governmental purpose, it should stand." United States v. Donofrio, 450 F.2d 1054, 1056 (5th Cir. 1971)(per curiam), reh'g granted on other grounds, 450 F.2d at 1056 (1972).

Because the Bill of Attainder Clause prohibits only legislative punishment — not mere regulation of private conduct — it has rarely been invoked to condemn legislation. The Supreme Court has struck down statutes on bill of attainder grounds only five times in this nation's history. In each case the government had sought to punish "members of a political group thought to present a threat to the national security." United States v. Brown, 381 U.S. 437, 453 (1965). Three 19th century cases involved Civil War era laws imposing statutory disabilities on persons who would not take an oath that they had not supported the Confederacy. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872). The two 20th century cases holding federal statutes to be unconstitutional bills of attainder involved congressional attempts to punish "subversives" or members of the Communist Party by barring them from certain jobs. United States v. Lovett, 328 U.S. 303 (1946); United States v. Brown, 381 U.S. 437 (1965).

In these cases, the Court found that the legislature had "assumed the guilt and adjudged the punishment" of certain persons for their past conduct, Cummings, 71 U.S. at 325, and found no basis for the contentions that the statutes were designed to avert prospective harm, id. at 319. See also Dent v. West Virginia, 129 U.S. 114, 126 (1889).

The three-part test the Supreme Court has articulated to determine whether an Act of Congress constitutes legislative "punishment" within the meaning of the Bill of Attainder Clause derives from these basic principles. The Court considers:

> (1) whether the 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."

Selective Serv. Sys., 468 U.S. at 852; see also Nixon, 433 U.S. at 473, 475-76, 478. These three interrelated inquiries all lead ineluctably to the conclusion that the provisions of the 1996 Act are not "punishment," but were instead enacted to advance the wholly proper legislative purpose of achieving a competitive market for the provision of all telecommunications services.

B. The Challenged Provisions Are Part Of A Comprehensive Regulatory Reform Statute That Bears No Resemblance To Historical Punishment.

1. The provisions of the 1996 Act — including the sections challenged here — are quintessential economic regulation. Economic regulation, particularly in a highly-regulated industry, often

includes restrictions designed to foster competition or to promote other legitimate public purposes. Such forward-looking regulations, designed to address present concerns and future developments, have never been considered "punishment" that could implicate the Bill of Attainder Clause.

In overhauling federal telecommunications regulation, Congress sought to create across-the-board competition in the local and long-distance markets. In so doing, Congress had to address the restrictions imposed by the AT&T Consent Decree. The Consent Decree had sought to advance the public interest in competition by preventing the BOCs from abusing their local monopoly power. 552 F. Supp. at 222-25. In crafting a new regulatory scheme that would replace the restrictions of the Consent Decree, Congress recognized that the local exchange was still a crucial bottleneck facility for long distance and other telecommunications services. See SBC Communications Inc. v. FCC, 1998 WL 121492, at *1 (D.C. Cir. Mar. 20, 1998). Congress concluded that the BOCs' continuing market power posed a significant threat to the fully competitive markets that the 1996 Act seeks to achieve.

Accordingly, Congress concluded that the new regulatory structure should not simply lift all of the Decree's restrictions immediately. Instead, Congress conditioned the BOCs' full entry into long-distance and other telecommunications markets on the dismantling of their longstanding monopoly control over their local telephone markets.

The 1996 Act's transitional regulations are no different from any number of statutes that prohibit corporations from engaging in specified lines of business in order to preserve or foster competition or other economic goals, none of which has been thought to be "punitive" or to implicate the Bill of Attainder Clause. See, e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (affirming FCC regulation proscribing cross-ownership of television station and newspaper in same market); Banking Act of 1933, 12 U.S.C. § 24(7) (prohibiting banks from underwriting or issuing securities); Federal Credit Union Act, 12 U.S.C. § 1759 (restricting federal credit union membership to groups having a common bond of association or occupation, or groups within a well-defined community); Bank Holding Company Act, 12 U.S.C. § 1843(a)(2) (prohibiting bank holding companies, with certain exceptions, from acquiring or retaining "direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company"); see also Board of Governors v. Agnew, 329 U.S. 441, 449 (1947) (upholding § 32 of the Banking Act of 1933, which prohibits a partner or employee of a firm primarily engaged in securities underwriting from being a director of a national bank).

Nor does the identification of corporations by name transform economic regulation into historical punishment. See, e.g., Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 728 (9th Cir. 1992) (rejecting bill of attainder challenge to California statute that barred specific brands of assault weapons because

"[t]he type of economic punishment about which [the weapons' manufacturers] complain is not of the type 'traditionally judged to be prohibited by the Bill of Attainder Clause'"); *Long Island Lighting Co.* v. *Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987) (rejecting bill of attainder challenge to New York law that "target[ed]" corporate plaintiff "by name" in the course of establishing a state agency to acquire it), *vacated as moot*, 888 F.2d 230 (2d Cir. 1989); *United Nuclear Corp.* v. *Cannon*, 553 F. Supp. 1220, 1226-28 (D.R.I. 1982) (rejecting bill of attainder challenge to Rhode Island statute requiring specific nuclear power company to post $10 million decontamination bond). *See Nixon*, 433 U.S. at 429, 484. Indeed, as one court has observed, if "modern legislation regulating the economic activities of specific groups" were considered punishment, "the bill of attainder clause * * * could be used to cripple the ability of legislatures to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem." *Long Island Lighting Co.*, 666 F. Supp. at 403.

Until the decision below, no court had ever found economic burdens imposed on corporations to constitute historical punishment — much less struck down any such statute as a bill of attainder. "[C]ourts have consistently regarded the Bill of Attainder Clause * * * and the principle of the separation of powers only as protections for individual persons and private groups, those who are

peculiarly vulnerable to nonjudicial determinations of guilt." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

None of the five statutes invalidated under the Bill of Attainder Clause bears any resemblance to regulations governing the activities of corporations engaged in the highly regulated businesses at issue here. Each of the statutes found to be a forbidden bill of attainder was directed at "members of a political group thought to present a threat to the national security," Brown, 381 U.S. at 453, i.e., "persons considered disloyal to the Crown or State," Nixon, 433 U.S. at 474. By contrast, the BOCs have been — and are now — subject to regulation, not because of political disloyalty or any other similar offense, but because the business in which they engage has long been thought to affect the public interest, and because they wield power in the marketplace by virtue of their control over local telephone service in large areas across the country.

2. The BOCs' assertion that the 1996 Act inflicts forbidden "punishment" misperceives the plainly regulatory nature of the legislation. Their contention is particularly groundless because the statute significantly expands the BOCs' ability to enter markets from which they had previously been barred by the AT&T Consent Decree. When Congress removes existing restrictions and confers substantial benefits — even if it does not do so all at once — it cannot plausibly be said to have enacted punitive legislation, historical or otherwise.

As an immediate result of the 1996 Act, the BOCs are now free to provide long-distance telephone service to customers outside their local service regions. 47 U.S.C. § 271(a), (b)(2). In addition, the 1996 Act permits the BOCs to provide "incidental" long-distance services, id. § 271(b)(3) — including audio and video programming and commercial mobile services, "gateway information services," and centralized signaling services, id. § 271(g) — to customers located anywhere in the country. Finally, the statute makes it possible for the BOCs to offer "in-region" long-distance services for the first time, as soon as they demonstrate to the FCC that they have opened their local exchange markets to competition in accordance with the requirements set out in Section 271.

The Act also expands the opportunity for the BOCs to engage in activities related to the manufacture of telecommunications equipment. 47 U.S.C. § 273. The BOCs may engage in "close collaboration" with equipment manufacturers during the design and development of related hardware and software, perform research activities related to manufacturing, and enter into royalty agreements with telecommunications equipment manufacturers, 47 U.S.C. § 273(b). All of these activities had been either foreclosed or of uncertain legality under the Consent Decree. See United States v. Western Elec. Co., 12 F.3d 225, 233 (D.C. Cir. 1993) (royalties); United States v. Western Elec. Co., 894 F.2d 1387, 1394 (D.C. Cir. 1990) (design and development). In addition, the 1996 Act permits a BOC to engage directly in the manufacture and provision of telecommunications equipment once the FCC

authorizes it or an affiliate to provide long-distance telephone services under § 271(d). 47 U.S.C. § 273(a).

Congress did not "punish" the BOCs when it declined to lift all of the restrictions of the AT&T Consent Decree immediately, and instead established a transitional regulatory regime. Indeed, Professor Tribe, one of plaintiffs' counsel, himself acknowledged in congressional testimony that the Bill of Attainder Clause does not prohibit Congress from substituting equal or lesser restrictions for those contained in the AT&T Consent Decree:

> [I]nsofar as MFJ [i.e., Consent Decree] restrictions are left in place pursuant to the decision of the D.C. Circuit, Congress has authority to lift such restrictions in whole or in part, replacing them with equivalent or less restrictive regulatory alternatives that single out the parties to the AT&T litigation, as an exercise of its authority * * *. Because such parties have already been singled out through enforcement activity of the executive branch, in litigation supervised by the judicial branch, Congress may likewise address its legislative substitute for the MFJ to those parties in particular, again provided that it avoids imposing more burdensome restrictions, or restrictions that violate the First Amendment.

Telecommunications Policy Act, pt. 1: Hearings before the Subcomm. on Communications and Finance of the House Comm. on Energy and Commerce Concerning the Telecommunications Policy Act of 1990, 101st Cong. 416 (1990).

3. The district court nonetheless found that 1996 Act's transitional provisions "necessarily constitute punishment" of the BOCs "[u]nder a historical analysis." R. 1814; R.E., Tab 5, at 12. In doing so, the court analogized the provisions to "forbidden legislation preventing individuals or groups from engaging in a

profession or business" and laws effecting a "depriv[ation]" of "rights previously enjoyed." Ibid. The court failed to recognize, however, that the Supreme Court has found such exclusions or deprivations to impose punishment within the meaning of the Bill of Attainder Clause only when they bear "no possible relation" to a legitimate legislative objective. Cummings, 71 U.S. at 319.

Thus, the Court has upheld statutory employment prohibitions against bill of attainder challenges where the prohibitions were justified by legitimate legislative policies. See DeVeau v. Braisted, 363 U.S. 144 (1960) (upholding statute barring felons from holding office in waterfront labor organization); Hawker v. New York, 170 U.S. 189 (1898) (upholding statute barring felons from the practice of medicine); see also Siegel v. Lyng, 851 F.2d 412, 418 (D.C. Cir. 1988) (upholding bar to employment by licensed agricultural shipper). In short, "[e]ven where a fixed identifiable group * * * is singled out and a burden traditionally associated with punishment — such as permanent exclusion from an occupation — is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and nonpunitive ends and was not clearly the product of punitive intent." Dehainaut v. Peña, 32 F.3d 1066, 1071 (7th Cir. 1994), cert. denied, 514 U.S. 1050 (1995).

C. The Challenged Provisions Plainly Further The Nonpunitive Purpose of Promoting Competition In Telecommunications.

There can be no serious question that the provisions that are challenged in this case "reasonably can be said to further nonpuni-

tive legislative purposes." Selective Serv. Sys., 468 U.S. at 852; Nixon, 433 U.S. at 475-76.

1. When Congress terminated the prospective effect of the AT&T Consent Decree, it did so as part of a comprehensive regulatory enactment designed to promote competition in all telecommunications markets and to allow all players to compete on a level playing field. Congress found that the BOCs continued to have the ability to control access to local telephone networks to the disadvantage of competitors. See H.R. REP. NO. 104-204, pt.1, at 49 (1995), reprinted in 1996 U.S.C.C.A.N. at 12 ("The seven BOCs provide over 80% of local telephone service in the United States. Several hundred other carriers provide the balance of local service. While some competition has developed in the local business service and exchange access markets, local residential service remains a monopoly service.").

As Congress was informed, it was crucial "to have local competition before allowing the local telephone monopoly into long distance." 141 CONG. REC. H8276 (daily ed. Aug. 2, 1995) (remarks of Rep. Holden). "Without real competition in the local loop prior to entry into long distance, a company can control long-distance service provider access to their long-distance customers because all long-distance calls must traverse the local loop to reach telephone customers." Ibid.

Congress was accordingly concerned "that the regional Bell operating companies will take undue advantage of their ownership of local telephone networks to compete unfairly in the long distance

market." 142 Cong. Rec. S721 (daily ed. Feb. 1, 1996) (remarks of Sen. Chafee). The statute therefore contains "provisions to ensure that the local telephone market [i]s open to competition before the RBOC's enter[] long distance." Id. at S697 (remarks of Sen. Kerrey). See id. at S688 (remarks of Sen. Hollings) ("[T]he RBOC's should not be permitted to enter the long-distance market while they retain a monopoly over local telephone service. * * * I am pleased that the conference agreement recognizes that the RBOC's must open their networks to competition prior to their entry into long distance."). Thus, the provisions relating to BOC long-distance service originating in each in-region state, as well as those relating to telecommunications equipment manufacture, terminate at the point that the BOC demonstrates that it has opened its local exchange markets to competition. See 47 U.S.C. §§ 271, 273.

As the Senate Committee on Commerce, Science and Transportation explained, these measures were designed to "replace the current antitrust prohibition with regulatory safeguards designed to prevent the RBOCs from engaging in anticompetitive behavior." S. REP. NO. 103-367, at 30 (1994). The "regulatory provisions are necessary," the Committee stated, "to ensure that the RBOCs will not enter the long distance industry at the expense of competition and telephone service ratepayers." Ibid. "Removing the restrictions under any other circumstances," Senator Kerrey stated, "would give the local telephone company the incentive and ability to recreate the vertical monopoly that the Department of Justice and

many others worked so long and hard to dismantle." 141 CONG. REC. S8138 (daily ed. June 12, 1995).[5]

The temporary restrictions contained in Sections 274 and 275 are likewise designed to ensure that competition in the markets for electronic publishing and alarm monitoring has a chance to mature before the BOCs are allowed unfettered entry. As the House Judiciary Committee explained, Congress was concerned that, with the lifting of the Consent Decree's restrictions, the many "competitive enterprises now thriving in the information service" and other industries "face the prospect of their future prosperity being decided by seven giant corporations who have monopoly 'bottleneck' control over the local telephone exchange on which all these competitive enterprises must depend, for now and at least some time in the future." H.R. REP. NO. 103-559, pt. 2, at 25 (1994).

Even so, Section 274 does not prevent a BOC from disseminating electronic publishing, but simply requires that, until February 8, 2000, if it does so by means of its own basic telephone service, it

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[5] See also 142 Cong. Rec. S711 (daily ed. Feb. 1, 1996) (remarks of Sen. Thurmond) ("The Bell companies certainly should be allowed to enter long distance markets under appropriate circumstances, for it is generally desirable to have as many competitors as possible in each market. The issue is how to determine the point at which entry by Bell companies will help rather than harm competition."); H.R. CONF. REP. NO. 104-204, at 203, reprinted in 1996 U.S.C.C.A.N. at 96 (additional views of Reps. Dingell, et al.) ("These provisions govern, for a limited period of time, the manner in which the RBOCs can engage in manufacturing activities. This architecture preserves existing 'rules of the road' while market forces are permitted to develop, but which cease to have effect when those forces have developed to the point that they are sufficient to protect consumers.").

must use a "separated affiliate" or joint venture. 47 U.S.C. § 274(a), 274(b), 274(g)(2). These temporary protections, which recognize that electronic publishers remain dependent on local telephone lines to distribute their information, were formulated to "guard against discrimination [and] to prevent cross subsidization" by the BOCs "in providing electronic publishing services." H.R. REP. NO. 103-559, pt. 1, at 25 (1994).[6]

Finally, under Section 275 a BOC may not provide alarm monitoring services until February 8, 2001, unless the BOC was directly or through an affiliate engaged in the provision of such services on November 30, 1995. 47 U.S.C. 275(a). Again, Congress was informed that "[t]he services provided by the alarm industry are dependent upon the local telephone exchange monopoly," because "[t]here is no practical reliable alternative" to the use of local phone lines to provide such service. S. REP. NO. 103-367, at 11-12 (1994). "[B]ecause this thriving small business industry would be highly susceptible to anticompetitive activities," the Senate Committee on Commerce, Science and Transportation believed that "alarm companies would be placed in great jeopardy if the Bell Operating

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[6] <u>See</u> 140 CONG. REC. H5212 (daily ed. June 28, 1994) (remarks of Rep. Bryant) ("the separate subsidiary provisions for electronic publishing * * * will go a long way to ensuring that the regional Bell operating companies do not exploit their monopolies to unfairly disadvantage competitors in the electronic publishing field"); <u>id</u>. at E1390 (daily ed. June 30, 1994) (statement of Rep. Hughes) ("this measure allows the Bell companies to enter into the electronic publishing business, while adhering to important safeguards protecting against the development of any unfair competitive advantage in providing those services").

Companies were permitted to provide alarm monitoring services today." Id. at 12.[7]

The restrictions on provision of electronic publishing and alarm monitoring contained in §§ 274 and 275 — unlike the restrictions contained in §§ 271-73 — had been removed from the AT&T Consent Decree prior to enactment of the 1996 Act, although the BOCs remained subject to substantial and specific FCC regulations regarding the provision of such "enhanced services." See 10 F.C.C.R. 8360 (1995). As discussed, however, these restrictions are no more "punishment" than the long distance and manufacturing restrictions contained in Sections 271 and 273. All of these restrictions were intended to provide a brief period of protection from BOC entry for particular industries that were determined to be especially vulnerable to the BOC local telephone monopoly.

2. The district court improperly dismissed Congress's evident purposes, opining that "[i]f establishing the telecommunications market and increasing competition were the goals of Congress, those ends have been addressed through other provisions of the Act such as § 251, which applies generally to all telecommunications carriers * * *." R. 1819; R.E. Tab 5, at 17.

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[7] See also H.R. REP. NO. 102-850, at 95 (1992) ("[D]ue to the small size of virtually all alarm service businesses and their utter reliance on the immediate responsiveness of the local telephone exchange, they were virtually helpless against anticompetitive abuses by the Bell monopolies") (summarizing remarks of Rep. Bryant); 142 CONG. REC. S714 (daily ed. Feb. 1, 1996) (remarks of Sen. Harkin) (Section 275 "prevents the Bell operating companies from entering into the alarm monitoring industry before a level playing field exists").

The district court's observation reflects a fundamental misunderstanding of the statutory scheme as well as the nature of the judicial role in assessing a claim under the Bill of Attainder Clause. Section 251 establishes a general framework for opening local telephone markets to competition, but one that Congress recognized would not result in full competition overnight.[8] Congress concluded that by reason of their dominance of local exchange service in large and contiguous geographic areas, the BOCs posed a special problem for competition. By linking removal of the remaining restrictions on BOC long-distance telephone and other services to the opening of their local markets to competition, Congress provided the BOCs with a crucial additional incentive to comply with Section 251's market-opening obligations. That strategy for securing compliance with the statute's goals was well within Congress's legislative prerogatives. The district court's apparent policy preference for exclusive reliance on Section 251's general market-opening provisions, rather than the balance Congress struck among the key provisions of the 1996 Act, provides no legal basis for the court's bill of attainder holding.

Congress's assessment of the BOCs' market power is not an adjudication of "guilt," as the district court believed. R. 1819; R.E. Tab 5, at 17. Transitional restrictions designed to promote

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[8] See, e.g., 141 CONG. REC. S8138 (daily ed. June 12, 1995) (remarks of Sen. Kerrey); id. at S8161 (daily ed. June 12, 1995) (letter from State Attorneys General) ("New entrants * * * may take some time before they can offer [combined local and long-distance] services, and only after they incur significant capital expenses will they be able to develop such capabilities").

competition based on current and evolving market conditions do not in any sense constitute "punishment." Without ascribing unlawful conduct to any BOC, Congress could properly "assume that a monopoly firm wishes to maximize its profits" and "'intends' to extend the duration of its monopoly by excluding new firms from the market or by maximizing the current revenue stream." I PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 113 (1997). In short, the 1996 Act makes clear that Congress's motivating concern was with the BOCs' present market power and with their incentive to use that power.

D. The Legislative Record Contains No Evidence Of Punitive Intent.

Ignoring the wealth of evidence that the 1996 Act's transitional provisions were enacted to foster competition rather than to punish the BOCs, the district court relied on unspecified "references" in the legislative history "to the AT&T Consent Decree and the alleged antitrust violations of AT&T" to conclude that "Congress intended §§ 271-275 to punish the BOCs for their former parent AT&T's transgressions over two decades ago or for crimes yet to be committed by the BOCs." R. 1820; R.E. Tab 5 at 18.

Because one of the purposes of the 1996 Act was to create a legislative and regulatory replacement for district court oversight under the AT&T Consent Decree, it is hardly surprising that references to the Decree may be found in the legislative history, and that Congress debated whether and how quickly to remove its restrictions. Such discussion was necessary to determine approp-riate forward-looking regulations directed to the present-day

activities of the BOCs. It in no respect supports the district court's view that the transitional provisions punish any BOC for the "sins of the parent" (R. 1814; R.E. Tab 5, at 12) "over two decades ago" (R. 1820; R.E. Tab 5, at 18).

Nor is there any evidence that Congress intended to punish the BOCs "for crimes yet to be committed" by them. Ibid. As shown above, Congress acted to guard against the potential that the BOCs' use of their market power in the telecommunications industry would defeat or delay competition in adjacent markets, while providing for removal of the restrictions as their market power ebbed under the influence of the Act's market-opening provisions. Congress is not motivated by a punitive intent when it acts to protect the marketplace from future conduct that might frustrate competition. Indeed, such a preventative legislative motivation is the hallmark of regulation, not punishment.

In any event, where the Bill of Attainder Clause is concerned, the legislative record cannot support the conclusion that a law is motivated by a desire to "punish" affected persons unless it presents "unmistakable evidence of punitive intent." Selective Serv., 468 U.S. at 856 n.15 (emphasis added). The district court's reliance on unspecified "references" in the legislative record to the AT&T Consent Decree (R. 1820; R.E. Tab 5, at 18) falls far short of raising, much less establishing, a legislative intent to punish the BOCs. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have

transcended its powers." Flemming, 363 U.S. at 617 (quoting Fletcher v. Peck, 11 U.S. (6 Cranch) 87, 128 (1810)).[9]

What the legislative record plainly reflects is not congressional desire to punish the BOCs, but careful efforts to balance the concerns raised by all segments of the telecommunications industry while advancing the public interest in a competitive marketplace. As the court of appeals observed in SBC Communications, Inc. v. FCC, 1998 WL 121492, at *2 (D.C. Cir. Mar. 20, 1998), the question of how to achieve the goal of open competition "was the subject of great debate" and "[t]he end product was a compromise between the competing factions." See also 142 CONG. REC. H1145 (daily ed. Feb. 1, 1996) (remarks of Rep. Linder) (the Act "is a complex piece of legislation that is the product of many long months of negotiation" and "a balanced bill which equalizes the diverse competitive forces in the telecommunications industry"). Although the BOCs plainly would have preferred to have all restrictions on their activities lifted at once, their representatives clearly understood that Congress could provide something less than immediate and total relief without "punishing" them.

Thus, as the bill's sponsor noted shortly before the Act was passed, "[w]e now have the regional Bell companies supporting the

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[9] Thus, in Selective Service, the Supreme Court refused to find that the challenged statute was punitive even though opponents of the measure considered it punitive and there were "several isolated statements" among the statute's supporters "expressing understandable indignation over the decision of some nonregistrants to show their defiance of the [draft] law." 468 U.S. at 856 n.15.

bill and we have the long-distance companies supporting the bill. That is an unusual, rare moment in American history * * *." 142 CONG. REC. S393 (daily ed. Jan. 26, 1996) (remarks of Sen. Pressler). Indeed, the legislative history is replete with statements that the final version of the 1996 Act as a whole was supported by the BOCs, their holding company parents, and the other local telephone companies. See id. at S696 (daily ed. Feb. 1, 1996) (statement of Senator Kerrey) (the legislation was "very unusual * * * in that the demand for it is * * * coming from the corporations * * * RBOC's, long-distance, cable, broadcast [companies] * * * that feel the current law, which does not allow them to do a variety of things, is too restrictive."); id. S699 (daily ed. Feb. 1, 1996) (statement of Sen. Lott) ("[t]he telephone companies" as well as the "long-distance companies" supported passage of the legislation because, although "both of them would like to have a little more in their sections * * * basically they know this is good legislation."); id. at S717 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings); id. at S703 (statement of Sen. Heflin).

E. Transitional Restrictions Designed To Foster Competition Are Not Transformed Into Bills Of Attainder Simply Because Congress Did Not Apply Them To All Local Exchange Carriers.

Ultimately, there can be no serious question that Congress enacted the challenged restrictions as economic regulation designed to foster competition. Plaintiffs' challenge, at bottom, is based on their assertion that the restrictions are underinclusive because

they apply only to the BOCs and not to all incumbent local exchange carriers.

This contention, of course, is the basis of plaintiffs' equal protection claim, which the district court did not reach. Congress's distinction easily passes the rational basis scrutiny accorded to economic regulation. See, e.g., Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 461 (1981); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). Plaintiffs' effort to conflate the equal protection and bill of attainder inquiries is, in any event, fundamentally misguided.

The touchstone of a bill of attainder inquiry is whether Congress has acted to punish persons based on a legislative determination of past guilt, rather than, for example, to regulate a market or profession on the basis of prospective concerns. Although alleged underinclusiveness may raise an issue regarding punitive intent, it cannot establish such an intent, because, as we have explained, a person or a group can be singled out for reasons that are not punitive. Selective Service Sys., 468 U.S. at 851 n.8; Donofrio, 450 F.2d at 1056. It is thus settled that the Bill of Attainder Clause is "not * * * a variant of the equal protection doctrine, invalidating every Act of Congress or of the States that legislatively burdens some persons or groups but not all other plausible individuals." Nixon, 433 U.S. at 471 (the clause "does not * * * limit[] Congress to the choice of legislating for the universe, legislating only benefits, or not legislating at all"). In this case, the 1996 Act's transitional restrictions would not be

any more or less punitive if they had extended to every incumbent local exchange carrier — in either case, the restrictions would constitute economic regulation designed to foster competition. In short, that a provision is assertedly underinclusive does not transform regulation into punishment.

Just as the legislative record is barren of any evidence that Congress intended to "punish" the BOCs, it makes plain that Congress applied the transitional restrictions to the BOCs because of its assessment of the BOCs' market power and unique circumstances. Congress determined that the BOCs continued to have the ability to control access to local telephone networks in broad geographic areas at the expense of competition. See H.R. REP. NO. 103-559, pt. 2, at 93 (1994) ("the Bells alone exercise immense local exchange monopoly power concentrated throughout a vast geographical region; the local exchange operations of even the Bells' closest runners-up are widely dispersed"). The transitional restrictions are premised on Congress's assessment of the BOCs' singular market power and the potential for its abuse.

In contrast, Congress concluded that other local carriers — including GTE — do not exercise the same market power and do not pose the same threat to competition in the local exchange market. For example, as the House Judiciary Committee explained, "GTE serves less than three percent of America's urban markets," and its operations are chiefly located in "widely dispersed small- and medium-sized cities and suburban and rural territory." H.R. REP. NO. 104-203, pt. 1, at 31 (1995). By contrast, "the BOCs are [in]

regions of contiguous states which together serve almost all of the large population centers in the country." Id. at 32. See also H.R. REP. NO. 103-559, pt. 2, at 93 (1994) (the local exchange areas controlled by GTE do not span large, contiguous areas or concentrations of subscribers comparable to those controlled by each of the RBOCs).

The differences apparent to Congress in 1996 paralleled distinctions that previously had been recognized by the same district court that supervised the AT&T Consent Decree. That court approved an antitrust consent decree arising out of GTE's acquisition of Southern Pacific's Sprint long-distance telephone service, despite objections that its terms were less restrictive than those imposed by the AT&T Consent Decree. See United States v. GTE Corp., 603 F. Supp. 730, 737 (D.D.C. 1984). The court found that "[e]ach of the Bell regional companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered." Ibid. "Moreover," the court stated, the RBOCs "also have the facilities to provide all the inter-city * * * traffic throughout their regions, while the GTE Operating Companies control little by way of intercity facilities." Ibid. Accordingly, GTE was never subject to the same restrictions that the AT&T Consent Decree imposed on the BOCs.

Congress concluded that the BOCs continued to wield unique monopoly power in 1996, as they had in the past. Because of that assessment, Congress declined to lift all restrictions on the BOCs

immediately, and found no need to impose those restrictions for the first time on corporations such as GTE, which had never been barred from providing long-distance service. Plaintiffs' quarrel with the wisdom of Congress's course cannot convert nonpunitive economic legislation into a constitutionally forbidden bill of attainder.

II. THE CHALLENGED PROVISIONS CANNOT BE SEVERED FROM SECTION 601.

The district court also erred in holding, without explanation, that the transitional provisions contained in Sections 271-75 are severable from the rest of the 1996 Act, including Section 601(a)(1), the provision that terminates the prospective effect of the AT&T Consent Decree. As we have shown, the transitional regulations were designed in major part to deal with the competitive implications resulting from the prospective termination of the Decree. The transitional provisions thus are integrally linked with the termination provision and cannot be severed from it.

It has long been established that provisions may not be severed where it "is evident that the Legislature would not have enacted those provisions which are within its power'" absent the provisions held invalid. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). An altered legislative regime whereby the BOCs are freed from the AT&T Consent Decree without any of the restrictions deemed necessary by Congress would not "function in a manner consistent with the intent of Congress." Id. at 685 (emphasis omitted).

No reasonable argument can be made that Congress would have enacted Section 601(a)(1) of the Act, which freed the BOCs from the oversight of the consent decree court, if had it thought it could not regulate the BOCs as it did through Sections 271-75 of the Act. As it debated, drafted, revised and voted on the Act and its predecessors over a number of years, Congress never agreed to lift the AT&T Consent Decree restrictions without establishing rules governing the BOCs' entry into the markets for long-distance and other telecommunications services. There is no question that Congress considered the pro-competitive safeguards to be an essential concomitant to releasing the BOCs from the AT&T Consent Decree. To strike down any or all of the challenged provisions and yet leave Section 601(a)(1) of the Act standing would thus be fundamentally contrary to Congress's intent.

To be sure, the Communications Act of 1934 contains a severability clause, which provides that if any of its "provision[s] * * * or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision[s] to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608. At most, however, this severability clause raises "a presumption" that the two provisions are severable, Alaska Airlines, 480 U.S. at 686, which in this case is rebutted by the fact that the two provisions are obviously and inextricably intertwined. Moreover, Section 601(a)(1) of the 1996 Act is not contained in the chapter of the United States Code to which the severability clause refers, but is

merely referred to in the codifier's historical notes. See 47 U.S.C. § 251 note. Cf. Alaska Airlines, 480 U.S. at 686 n.8 (casting doubt on the applicability of the Federal Aviation Act's severability clause to a provision contained in the Airline Deregulation Act which did not "amend any pre-existing statute, but instead establishe[d] a new program").

While the challenged provisions and § 601(a)(1) must stand or fall together, these provisions are not inseparable from the remainder of the statute, including the local competition provisions of Sections 251 and 252. Those provisions apply to all incumbent LECs and for that reason were not tied to the removal of the AT&T Consent Decree. Moreover, the severability clause of the 1934 Act plainly does apply to the local competition provisions, and they are not "incapable of functioning independently." Id. at 684-86. "[A] court should refrain from invalidating more of [a] statute than is necessary," id. at 684, and thus invalidation of Sections 601(a)(1) and 271-75 should have no effect on the Act's remaining provisions.

CONCLUSION

For the foregoing reasons, the district court's judgment that 47 U.S.C. §§ 271-75 violate the Bill of Attainder Clause should be reversed.

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Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b), for the following reasons:

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I hereby certify that on this 24th day of March, 1998, I filed the foregoing Brief for the Federal Appellants by causing seven copies of the brief to be sent by Federal Express to the Clerk of the Court. I further certify that on this same day I served two copies of the foregoing brief by the methods described below to the following counsel:

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