From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene

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From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene

by

JOSEPH D. KEARNEY*

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Introduction and Overview

As one of the cornerstones of regulation in the information age,

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the Telecommunications Act of 1996\(^1\) has already attracted substantial academic attention\(^2\) and provoked sharp legal debate.\(^3\) This attention is appropriate, for enactment of the Telecommunications Act was the most important transformative event in telecommunications law since January 1, 1984: on that date, the Bell System was broken up under the terms of a 1982 consent decree which had been entered into by the federal government and the American Telephone and Telegraph Company ("AT&T").\(^4\) This demise of the vertically integrated telecommunications giant also attracted substantial academic and popular attention befitting such a landmark event.\(^5\) Neither the break-up of the Bell System in the early 1980's nor the Telecommunications Act of 1996, in short, has wanted for examination.

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Structural regulation of the telecommunications industry between these landmark events is another story. The period from 1984 to 1996 is of central importance in understanding the current regulatory debates in the telecommunications industry. These twelve years witnessed not only the birth of AT&T's progeny—the so-called "Baby Bells" or Regional Bell Operating Companies ("RBOCs")—but also these companies' attempts to expand beyond local telephony to other businesses. Today, each of the RBOCs is a giant telecommunications company in its own right, but the Telecommunications Act of 1996 largely continues the 1982 consent decree's prohibition of the RBOCs from the business they most long for: the long-distance business. Because the consent decree, known as the Modification of Final Judgment ("MFJ"), spoke to and in numerous instances prohibited this RBOC expansion, it provided the primary structural regulation of the telecommunications industry.

Despite the MFJ's centrality to the telecommunications industry's structure and its highly controversial restrictions excluding the RBOCs from long distance and other lines of business, Judge Harold H. Greene's administration of the MFJ has escaped a comprehensive scholarly treatment.\(^6\) The critiques that have been offered instead are impressionistic or at best anecdotal assessments frequently tinged—if not imbued—with partisan color. For example, Peter Huber, a well-known commentator on public policy issues who doubles as an RBOC lawyer,\(^7\) has been especially critical of the

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7. See Joseph D. Kearney, *Twilight of the FCC?*, 1 GREEN BAG 2D 327, 328 (1998). Huber's role with regard to the MFJ is even more complex than set forth in the text above. See infra text preceding note 130 (describing Huber's role as a consultant to the Department of Justice in the triennial review proceeding). I do not suggest that Huber's
actions that Judge Greene took during the twelve-year life span of the MFJ. Huber has contended that “[g]etting an answer to a simple question often took years” and, with characteristic flair, referred to one proposal by the Department of Justice to loosen the MFJ’s restrictions as a “Son-of-Sam decree.”

Notwithstanding the lack of disinterest on the part of Huber and many other MFJ critics, their characterizations of the MFJ’s tenure were uncritically accepted to the point that the Telecommunications Act generally came to be thought necessary to end abuses that arose under the MFJ.

It required only slight hyperbole, for example, for one of Judge Greene’s rare defenders to say even early in the lifespan of the MFJ that “Greene is treated like some ill-tempered troll intent on blocking the way of the regional Bell firms.”

In these circumstances, the time is right for a comprehensive, end-of-the-day assessment of Judge Greene’s administration of the MFJ. Was Judge Greene the one-man regulatory commission, bound by no law and engaged in fly-specking oversight of the RBOCs’ multifarious roles disqualify him from opining on the MFJ. The story of the MFJ is sufficiently complex that any disqualification would eliminate almost all people who have the knowledge necessary to relate it. Indeed, such a disqualification would also apply to the current Article. Prior to entering academe, I worked in private practice for some six years at a law firm that provided AT&T’s primary outside counsel. Five of these years (running from 1990 to 1995) were during the tenure of the MFJ, and I spent a substantial amount of time working on MFJ-related matters for AT&T. I have no continuing relationship with AT&T (other than as its customer), and the MFJ has now become part of our collective legal past. The reader nonetheless should be aware of my possible bias.


9. See, e.g., SBC Communications, Inc. v. FCC, 154 F.3d 226, 231 & n.6 (5th Cir. 1998) (and sources cited); Leslie Cauley, Bells Prepare to Ask Judge Greene to Give Up Oversight, WALL ST. J., July 5, 1994, at A3 (news article characterizing MFJ as having “controlled nearly every aspect of [RBOC] existence for the past decade”); Dingell Scores FCC and Kennard, Recommends Downsizing of Agency, 75 Antitrust & Trade Reg. Rep. (BNA) 702 (Dec. 24, 1998) (quoting Democrat John Dingell of the House of Representatives as saying that Judge Greene is “the only fellow who has done a worse job on telecommunications than the FCC”); Larry Downes, Microsoft’s Best Defense Is a Lack of a Good Remedy, USA TODAY, Nov. 23, 1998, at 23A (“No one wants to repeat the tragedy of Judge Harold Greene trying to run the American telecommunications industry from his chambers, which he did for over 10 years after the AT&T case.”); Phillip D. Mink, Half of Congress Ready to Answer the Call, WALL ST. J., Mar. 13, 1989, at A14 (opinion piece characterizing Judge Greene as “relying on archaic economic theory and ideological animus”); Glen O. Robinson, The “New” Communications Act: A Second Opinion, 29 CONN. L. REV. 289, 306 (1996) (terming Judge Greene a “regulatory czar” and “an obstacle to competition” not only in long distance, information services, and manufacturing, but also in local exchange service); see also infra note 240. These citations could be multiplied manifold.

activities from 1984 to 1996, as his detractors contend? Or, by contrast, was his administration of the MFJ largely characterized by sober application of the basic antitrust principles on which the MFJ was premised and from which judicial deviation would have been unjustified? In addressing this period from 1984 to 1996 (and the relevant antecedent events), this Article attempts to answer these questions and, in the process, to set forth a basic account of the administration of the MFJ upon which subsequent scholars can rely.11

Before sketching out the course of the Article, it may be noted that this project is not merely of historical interest. First, the 1996 Telecommunications Act adopts many of the MFJ's core concepts as Judge Greene had interpreted them.12 In order fully to comprehend the current disputes before the Federal Communications Commission ("FCC") and state public utility commissions, it is therefore necessary to understand and appreciate the way in which the MFJ was administered.

Furthermore, the current importance of antitrust concepts in telecommunications regulation requires a retrospective of regulation under the MFJ. For example, section 601 of the 1996 Telecommunications Act establishes a regime under which antitrust at least potentially has broader application than was the case under the original Communications Act of 1934,13 and the massive

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11. It should be noted that no attempt is made to discuss or even cite every proceeding or controversy that came before the district court under the MFJ. This would be a nearly impossible undertaking, given the many hundreds of opinions and orders that the court entered in the more than twelve years between divestiture and the ultimate termination of the MFJ. In any event, the gains in comprehensiveness from such an account would be more than offset by the losses in comprehensibility. This Article instead describes the most important controversies under the MFJ and thereby also provides a framework within which any other controversies can be more readily understood.

12. It is for this reason that, for example, the Federal Communications Commission has determined in certain instances to look to precedent under the MFJ in interpreting the Telecommunications Act's restrictions on RBOC involvement in long-distance service. See, e.g., AT&T Corp. v. Ameritech Corp., 13 FCC Rcd 21438, 21474 n.168 (1998).

13. Two aspects of section 601 may lead to this result. First, section 601(b)(1) provides that, with certain limited exceptions, "nothing" in the Communications Act of 1934 or its amendments in the Telecommunications Act of 1996 "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, § 601(b)(1), 1996 U.S.C.C.A.N. (110 Stat.) 56, 143 (1996), 47 U.S.C.A. § 152 note (West Supp. 1999). Depending on how it is interpreted, this provision may mean that, regardless of the ultimate resolution of the question whether telecommunications carriers must or may file tariffs containing their rates, see generally Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated Industries Law, 98 COLUM. L. REV. 1323, 1330-40 & n.64 (1998) (describing filed-rate system and possible effect of Telecommunications Act on that system), the limited antitrust immunity conferred by the rate-filing provisions of Title II of the Communications Act has been eliminated, cf. Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986) (reaffirming antitrust immunity provided by rate-filing system). Second, section 601(b)(2) repeals section 221(a)
consolidation that has occurred in some sectors of the economy has visited the telecommunications industry as well. Indeed, completed and pending RBOC mergers not only create aspects of the market structure that the MFJ sought to eliminate—in particular, nationwide end-to-end conglomeration—but also present (through the Hart-Scott-Rodino process) the opportunity for explicit antitrust planning of telecommunications markets through consent decrees. An evaluation of the life of the MFJ, which is now regarded as the granddaddy of antitrust consent decrees, is the only appropriate starting point.

More generally, evaluating the MFJ may yield insights into the role of judges in administering consent decrees. The proper functions and responsibilities of the judiciary have received a substantial amount of academic attention in recent decades. An examination of the MFJ is an appropriate addition to this literature, for it is unlikely that any consent decree has had a greater impact on the American economy and society; indeed, few litigated trial-court judgments have had as large an effect as the MFJ. While most of that effect may have derived from the divestiture and not from the prospective line-of-business restrictions (and thus from the initial implementation of the MFJ and not its post-divestiture administration), these remedies were regarded by the parties and the court as inextricably linked. And most of the criticism of the MFJ and thus the perceived need for the 1996 Telecommunications Act arose from Judge Greene’s post-1984 administration of the decree.


15. A similar statement could be made of AT&T. Through its merger with one of the nation’s two largest cable companies (Telecommunications, Inc. or TCI) and a proposed joint venture with the other (Time-Warner), AT&T is coming one vertical step closer to being able to offer nationwide end-to-end service that bundles, among other things, local and long-distance service. See Kearney & Merrill, supra note 13, at 1373 n.238 (and sources cited) (AT&T-TCI merger); Seth Schiesel, Time Warner Joins Forces with AT&T, N.Y. TIMES, Feb. 2, 1999, at C1.

of the MFJ and the structural separation it imposed on the Bell System. No attempt is made to reiterate the entire history of the United States' lawsuit against AT&T.\textsuperscript{17} To assess the administration of the MFJ, however, it is necessary to describe in some detail both the United States' litigation theories in that lawsuit and some of the alternative, rejected proposals for a settlement. This part also describes Judge Greene's approval of the MFJ in 1982 insofar as that is relevant to its later administration. Particular attention is paid to the line-of-business restrictions that prevented the divested RBOCs from participating in the long-distance, manufacturing, and information-services sectors of the telecommunications industry and indeed limited them initially to providing local common-carriage service. Once divestiture was completed on January 1, 1984, these restrictions were a continual source of controversy and satellite litigation until the Telecommunications Act was enacted more than twelve years later. This part finally considers the substantive text and procedures involved for RBOC requests for relief from the line-of-business restrictions.

Part II discusses the administration of the MFJ in the first several years after the January 1, 1984 divestiture. This discussion encompasses Judge Greene's procedures for RBOC requests for relief from the MFJ's line-of-business restrictions and, as a component of those procedures, the Department of Justice's ongoing role in administering the MFJ. During these first several years after divestiture, the RBOCs made clear the extent of their unhappiness with the line-of-business restrictions. Towards the end of this time period, the Department of Justice also revealed a discomfort with these restrictions. This part thus concludes by discussing the tenuous hold on life that the line-of-business restrictions appeared to possess at the end of 1986.

Part III focuses on the ensuing massive struggle among the parties to the MFJ and other industry players over whether the line-of-business restrictions should be removed. This struggle took the form of the so-called "triennial review," which was spearheaded by the Department of Justice and initially culminated in a report to the court in 1987—three years after divestiture and adoption of the line-of-business restrictions. Although Judge Greene ruled in the triennial review in 1987 that the so-called "catch-all" restriction, which essentially prevented the RBOCs from engaging in any business other than the common carriage of local telecommunications, should be

\textsuperscript{17} This history (or aspects of it) can be found in numerous other places. See, e.g., authorities cited supra note 5; Mark C. Rosenblum, \textit{The Antitrust Rationale for the MFJ's Line-of-Business Restrictions and a Policy Proposal for Removing Them}, 25 Sw. U. L. Rev. 605, 606-15 (1996).
lifted, he retained the long-distance, manufacturing, and information-services bans. These important issues were not conclusively determined, however, until the D.C. Circuit in 1990 affirmed the retention of the long-distance and manufacturing restrictions and, following a remand from that court, Judge Greene lifted the information-services restriction in 1991. The triennial review finally ended when the D.C. Circuit affirmed this removal of the information-services restriction in 1993 and the Supreme Court denied review later that year.

Part IV concludes the history of the MFJ. First, it provides a brief overview of the litigation in the district court that arose in the aftermath of the D.C. Circuit's 1990 triennial review ruling. Although no broad-based assault on the MFJ was litigated to a judgment after the triennial review, the RBOCs made a series of requests for declaratory rulings or piecemeal waivers of the decree (for example, to provide long-distance service in connection with their authorized cellular services). Several of these requests were potentially far-reaching, not only because of the services that the RBOCs wanted explicitly authorized, but also because the legal theories on which they rested would have supported much broader relief.

Second, this part of the Article describes the RBOCs' ultimately successful effort to get out of Judge Greene's courtroom. Largely unsuccessful in the courtroom and on appeal, the RBOCs began seeking congressional legislation shortly after they came into existence in the mid-1980's and continued to lobby Congress and the executive branch for a decade. The end-product of this process was the Telecommunications Act of 1996: after its passage, Judge Greene terminated the MFJ. Although the RBOCs were now free of Judge Greene, this legislation was not an unalloyed victory. Several of the MFJ's restrictions—including most notably the long-distance injunction—were carried over into the legislation (with jurisdiction over them granted to the FCC), and the RBOCs were required to permit the development of competition with their local services.

Part V synthesizes the foregoing account into a comprehensive assessment of Judge Greene's tenure. Contrary to the loudest criticisms, Judge Greene administered the MFJ efficiently and in accord with its letter and purposes. Many of Congress's actions in the Telecommunications Act of 1996 approve Judge Greene's work, although some limited contrary inferences can also be drawn from this legislation. More importantly, the decade of rulings by the D.C. Circuit in MFJ appeals generally confirms the conclusion that Judge Greene's superintendence of the MFJ was legally sound. At the end of the day, to the extent that there was a substantial problem with the MFJ, as the RBOCs and their supporters long claimed, it derived either from the shifting and inconsistent views of the Department of
Justice concerning the wisdom of the MFJ’s line-of-business restrictions or from the failure of the political branches to assert primacy on the issue of the proper structure of the telecommunications industry. The MFJ’s lasting lesson for public policy is that, at least in the antitrust context, reliance on a structural consent decree that is premised on an articulable economic theory and is administered by a court committed to that theory can be a defensible judicial enterprise.

I. The Government, the Bell System, and Judge Greene

The history of telecommunications regulation for most of this century is a history of regulation of the Bell System.\(^{18}\) This history has been the subject of much scholarly examination, and it does not require repeating here.\(^ {19}\) For the same reason, it is also not necessary to recount all details of the government’s lawsuit against AT&T that culminated in the MFJ.\(^{20}\) This part instead addresses that background to the extent necessary to understand the decree that settled the litigation (i.e., the MFJ) and to evaluate the way in which that decree was administered in the ensuing decade and a half. In particular, the following describes the essential theory of the government’s case—regulatory failure—and the way in which the MFJ closely hewed to that theory by imposing a structural remedy of divestiture and going-forward line-of-business restrictions on the divested companies that retained the ability to impede competition (i.e., the BOCs).

18. The structure of the Bell System can be summarized as follows. AT&T was the parent company. Its subsidiaries or divisions included (a) the more than twenty Bell Operating Companies (“BOCs”), such as New York Telephone, Illinois Bell, and Pacific Telephone and Telegraph, through which more than eighty percent of Americans received their local telephone service; (b) AT&T Long Lines, through which the Bell System provided “intercity” or “long distance” service to virtually all Americans (given that non-BOC local carriers, such as GTE Corp., would interconnect their customers to this long-distance service); and (c) Western Electric Co., which manufactured both customer premises equipment, such as telephones, which the BOCs would lease to their customers, and telecommunications equipment, such as the switches that the BOCs and AT&T would use in providing service. Another component of the Bell System was Bell Telephone Laboratories, Inc., which was half-owned by AT&T directly and half-owned by AT&T’s subsidiary, Western Electric, and which, among other things, designed and developed both customer premises equipment and telecommunications equipment.


20. See, e.g., authoritites cited supra note 5. For a particularly sophisticated explication of each side’s theories and evidence, see Noll & Owen, supra note 5, at 295-326.
A. The Lawsuit

On November 20, 1974, the United States filed an action against AT&T in federal district court in Washington, D.C. under section 2 of the Sherman Act. This was not the federal government's initial antitrust effort against the Bell System. The immediately preceding lawsuit, brought in the District of New Jersey in 1949, had been settled by a consent decree in 1956. This consent decree had provoked controversy because of the perception that the government had bowed to pressure mounted by AT&T. The principal provisions of this decree limited AT&T to providing common-carriage communications service—i.e., local and long-distance telephone service. It also required AT&T to license Bell System patents and permitted it to manufacture telecommunications equipment.

The 1974 lawsuit was sweeping in its allegations. The government claimed that AT&T had used its vertically integrated organization to impede competition in telecommunications industry segments that by their nature should not have been served by a single provider—specifically, long-distance service and equipment manufacturing. At the time, AT&T possessed, through its Bell Operating Companies, state franchises to provide local telephone service to more than eighty percent of the nation's subscribers and invariably did so on a monopoly basis. Though not challenging the

21. 15 U.S.C. § 2 (1994). The statute proscribes monopolizing, attempting to monopolize, or combining or conspiring to monopolize any part of the nation's interstate or foreign commerce.

22. The first such lawsuit was begun in 1913 and settled in 1914 under a consent decree that embodied the so-called "Kingsbury Commitment," which required AT&T to connect customers of "independent" (i.e., non-BOC) local telephone companies to AT&T's long-distance network. See KELLOGG ET AL., supra note 19, §§ 1.3.3, 4.2, at 16, 199-201; Kearney & Merrill, supra note 13, at 1342 n.79, 1350-51.


25. See KELLOGG ET AL., supra note 19, § 4.3, at 203-04. An exception permitted the Bell System to provide other services to the federal government. See id.

26. See id. at 203.

existence of these monopolies, the United States alleged that AT&T had used the monopolies unlawfully to leverage into the long-distance service and the equipment markets, thereby impeding competition in those markets.

It is important to appreciate that, in the decades leading up to its antitrust action, the government had attempted to rely on regulation to prevent the Bell System's monopolization of potentially competitive markets. This was true of both manufacturing and long distance. With regard to the former, the FCC engaged in massive proceedings intended to ensure that non-Bell System manufacturers could compete on the merits with Western Electric (the Bell System's manufacturing arm) for BOC equipment purchases. The FCC thus adopted rules and regulations intended to prevent the BOCs from releasing technical and other information in a way that discriminated in favor of Western Electric, and to prevent the BOCs from allocating excessive product development costs to their monopoly ratebase.28

Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 F.C.C.2d 1117, 1138-39 (1983), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984). The nation's remaining subscribers were served by non-Bell telephone companies, collectively referred to as "independents." The largest of these independents was GTE Corporation, which was not only far smaller than the Bell System but also served "mostly rural, widely scattered areas." Id.; see also United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) (Greene, J.) (approving consent decree in antitrust case that adopted separate-subsidiary and injunctive provisions but not divestiture and explaining why GTE was thus treated differently from the Bell System). Each of the nation's local exchange companies—whether a BOC or an independent—possessed a license (or a "franchise") from its state to provide telecommunications service. See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 726 (1999).

All of this, of course, was in addition to the numerous state proceedings in which the BOCs’ rates were reviewed to ensure, among other things, that they were based only on the reasonable costs of providing service and did not include, for example, unreasonably high prices incurred in transactions with affiliated enterprises such as Western Electric.\(^{29}\) With regard to the long-distance market, the FCC had similarly attempted to develop various regulatory means for ensuring that the BOCs could not either use their bottleneck local facilities to frustrate the efforts of AT&T’s long-distance competitors to obtain comparable access to end-users or use their monopoly revenues to cross-subsidize AT&T’s own long-distance services.\(^{30}\)

The premise of the Department of Justice’s antitrust action in 1974 was that these regulations had proved incapable of ensuring competition in the manufacturing and long-distance markets. The Justice Department concluded that only a structural remedy of divestiture could accomplish this end.\(^{31}\)

The government’s action was originally assigned to Judge Joseph C. Waddy. Although there were initial skirmishes between the

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29. See generally Kearney & Merrill, supra note 13, at 1360-61 & nn.170-71 (and sources cited) (describing this traditional function of regulators).


31. See United States v. AT&T, Civ. No. 74-1698 (D.D.C.), Complaint, Prayer, paras. 1, 3-5 (Nov. 20, 1974). The government was open to the possibility of AT&T’s divestiture of both Western Electric and some or all of the BOCs. See id., paras. 3, 5.
parties, and Judge Waddy issued some preliminary rulings,\(^{32}\) the most significant events within the first few years of the litigation were the death of Judge Waddy and the subsequent reassignment of the lawsuit to Judge Greene.\(^{33}\) Given the immensity of the case, commentators of the period were skeptical that the case would ever reach trial.\(^{34}\)

This skepticism proved unfounded, primarily because of Judge Greene. Riding herd on the lawyers involved in the case,\(^{35}\) Judge Greene imposed aggressive discovery deadlines and implemented various procedural devices to narrow the issues in the case.\(^{36}\) The

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33. For an observation of how history might have been different if Judge Waddy's docket had been distributed slightly differently after his death, see Huber, supra note 8, at 89-90 (contrasting reassignments of government lawsuit to Judge Greene and of Southern Pacific's private antitrust action against AT&T to Judge Richey); Kearney & Merrill, supra note 13, at 1376-77 (same). The government's case was assigned to Judge Greene on June 22, 1978. See United States v. AT&T, 461 F. Supp. 1314, 1320 (D.D.C. 1978).

34. See, e.g., THOMAS D. MORGAN, ECONOMIC REGULATION OF BUSINESS 826 (1976) (assumption that government's then-pending antitrust claim against the Bell System "is ever litigated" would be "a bold assumption given the scope of discovery alone which would be involved"); Vietor, supra note 19, at 79 (noting that Judge Greene "surprised observers by tenaciously moving the antitrust case through discovery, stipulations, contentions, and proof to trial on January 15, 1981"); see also TEMIN, supra note 5, at 115 ("The logistics of this suit—the number of people and papers involved—were unbelievably complex, and AT&T had to organize a special department, Administration D, just to provide support for its lawyers."). For some sense of the massive size of the Bell System, see infra notes 222-23 and accompanying text (describing size of the divested RBOCs). For some entertaining contrasts in views of the Bell System in its day, compare JOSEPH C. GOULDEN, MONOPOLY (1968), and JOHN PATRICK PHILLIPS, MA BELL'S MILLIONS (1970) with JOHN BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS (1976), and FOR NOTEWORTHY PUBLIC SERVICE: THEODORE N. VAIL NATIONAL AWARDS (1950). Their very titles connote these books' differing takes on the Bell System.

35. The term "herd" is apt. By the time of trial, the Department of Justice had about sixty lawyers on the case. See TEMIN, supra note 5, at 210. The Bell System almost certainly had an even greater number. Cf. United States v. AT&T, 1982-1 Trade Cas. (CCH) ¶ 64,465 (D.D.C. 1982) (post-trial comment by Judge Greene that "[u]nlike the usual case where the United States is the party, it appears that in this particular instance the balance of resources may have favored the Government's opponents").

36. In particular, Judge Greene required the United States and the Bell System each to submit a series of lengthy statements of contentions and proof, which summarized the evidence that the filing party was prepared to introduce, and then, in order to narrow the issues for trial, further required them to negotiate a series of stipulations. See TEMIN, supra note 5, at 202-03; see also infra note 37 (citing various procedural pre-trial rulings by Judge Greene).
effect of these actions was to make clear to the parties that Judge Greene would not be deterred by the size or complexity of the lawsuit and further would actively ensure that the case would go to trial.

Judge Greene's decisions in *United States v. AT&T* in the late 1970's were not limited to procedure. His most important pre-trial ruling rejected AT&T's claim that the Bell System's regulation by the FCC and the states immunized its actions from antitrust scrutiny. By the end of 1980, as a result of Judge Greene's active judicial

The government used this process to justify its request for a structural remedy of divestiture, see supra note 31 and accompanying text, as opposed to injunctive relief. For example, the Department of Justice explained as follows:

The government contends that injunctive relief cannot be effective because defendants' illegal monopolization and exclusionary behavior flow inherently from their structure. AT&T's integrated structure gives it the incentive and ability to frustrate any injunctive relief in order to preserve its illegal monopolies. AT&T's control of both Long Lines and the Bell operating companies, for example, gives AT&T the incentive and ability to utilize the Bell operating companies' monopoly of local distribution services to prevent other intercity carriers from competing effectively. Likewise, AT&T's control of Western Electric, Long Lines, and the Bell operating companies gives AT&T the incentive and ability to protect Western's monopoly of telecommunications equipment. As long as the incentive and ability to engage in such exclusionary conduct remain, there is no reason to expect that injunctive relief directed at exclusionary conduct will be effective. Only relief that eliminates the existing inherent, structural incentive and ability of AT&T to monopolize telecommunications services and telecommunications equipment will be effective to restore competition in these markets.

United States v. AT&T, Civ. No. 74-1698 (D.D.C.), Plaintiff's First Statement of Contentions and Proof, at 526-27 (Nov. 1, 1978). The Department proceeded to detail the structural relief that it sought, which included both divestiture and a provision under which "[t]he local operating companies would be prohibited from owning any intercity facilities" or from "be[ing] affiliated with any owner of intercity facilities." *Id.* at 527.

management and expeditious resolution of the parties' ancillary disputes, the case was ready to be tried.

Trial commenced on January 15, 1981, and proceeded for most of that year, with several recesses or postponements along the way.\textsuperscript{38} Having been required to stipulate to a wide variety of undisputed facts and contentions, the parties had narrowed their factual disputes to 82 segments or episodes, which in turn structured the presentation of evidence at trial. The government introduced evidence that AT&T had monopolized both the long-distance telecommunications market and the market for telecommunications products (which included switches used in internal telephone company operations, as well as telephones and other customer premises equipment used by residential and business customers). The means for this monopolization, the government contended, was the Bell System's leveraging its monopoly control over the local exchanges into the potentially competitive long-distance and manufacturing markets by cross-subsidizing the competitive enterprises with revenues from the monopoly sectors and by further using various forms of discrimination (particularly with regard to local exchange access). The Department of Justice further introduced evidence that public utility regulation was simply not up to the task of preventing this anti-competitive conduct. So central was the argument of regulatory failure to the government's case that it even called various former high-ranking FCC employees to testify that regulators were overmatched in trying to supervise the Bell System's mix of monopoly and competitive (or potentially competitive) lines of business.\textsuperscript{39}

In essence, the underlying question throughout the trial was whether the problems of which the government complained were properly addressed by regulation, as AT&T claimed, or instead required an antitrust solution, as the Department of Justice argued. Indeed, AT&T claimed not only that regulation was the proper solution to any of the Bell System's shortcomings but even that many actions of which the government complained were actually required


\textsuperscript{39} See United States v. AT&T, 524 F. Supp. 1381, 1385 & nn.7-8 (D.D.C. 1981) (opinion considering government objections to AT&T's plan to call FCC employees to testify and listing various former FCC employees that government had called itself); United States v. Western Elec. Co., 673 F. Supp. 525, 530-31 (D.D.C. 1987) (recounting how "[t]he FCC's efforts to regulate the Bell System constituted a major part of the evidence adduced during the eleven-month trial of this case, and many witnesses and a large number of documents pointed to the FCC's lack of success in that regard"), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990).
by regulation. The Bell System particularly contended that its actions in seeking to prevent the development of a competitive long-distance market were necessary to prevent competitors from "creamskimming," or siphoning off the Bell System’s most profitable customers. Creamskimming was possible, the Bell System argued, because federal requirements of rate-averaging and state requirements of universal service and cheap rates for residential customers required the Bell System to charge some other customers above-cost rates. Permitting competitors to creamskim, the argument went, would frustrate these regulatory policies and would further be unfair to AT&T.\(^{40}\) With regard to manufacturing, the Bell System’s basic defense was that the individual procurement decisions made throughout the Bell System were overseen by numerous regulators (i.e., the FCC and the state public utility commissions). To the extent that its rate-regulated operating companies such as the BOCs and AT&T nonetheless purchased an overwhelming percentage of equipment designed by Bell Labs and manufactured by Western Electric, AT&T contended, such decisions had been based on superior price or quality.

The parties discussed the possibility of settlement at various times before and during the trial.\(^{41}\) Two of the settlement proposals—each of which would have subjected AT&T and the BOCs to continuing detailed supervision by the district court or associated personnel—deserve particular attention. The first, which prompted a recess in the trial immediately after it had begun with opening arguments on January 15, 1981, proposed a mix of both divestiture and regulatory requirements. AT&T would have had to spin off roughly half of Western Electric and several operating companies, though only one of these operating companies (Pacific Telephone and Telegraph Co.) was majority-owned by AT&T (AT&T had a minority interest in the other two).\(^{42}\) By their very nature, the proposed regulatory requirements cannot be summarized so succinctly. They included an injunction governing the manner in which the BOCs could purchase equipment and a detailed interconnection agreement specifying how companies such as MCI and other long-distance carriers could obtain access to the local telephone network controlled by the BOCs. This proposed decree

\(^{40}\) See, e.g., AT&T, 524 F. Supp. at 1357-60; AT&T, 552 F. Supp. at 161-62. For an explication of the economic theory of creamskimming and an assessment of the Bell System’s argument, see William A. Brock & David S. Evans, Creamskimming, in BREAKING UP BELL: ESSAYS ON INDUSTRIAL ORGANIZATION AND REGULATION 61 (David S. Evans ed., 1983); see also Kearney & Merrill, supra note 13, at 1347 (discussing cross-subsidization, universal service, and creamskimming).

\(^{41}\) See TEMIN, supra note 5, at 217-76; COLL, supra note 5, at 291-344.

\(^{42}\) See TEMIN, supra note 5, at 211.
became "more and more detailed and . . . longer and longer" as it was being negotiated, and it was "essentially a regulatory solution."\textsuperscript{43} Primarily for this reason, the Department of Justice dropped the proposal, and presentation of evidence commenced on March 4, 1981.\textsuperscript{44}

The parties took up another settlement proposal late in 1981 after Judge Greene denied AT&T's motion to dismiss upon close of the government's case-in-chief.\textsuperscript{45} This proposal did not require any divestiture. Instead, AT&T would be subjected to an "immensely complex injunctive settlement."\textsuperscript{46} Specifically, although the Bell System would remain under common ownership, its constituent parts would be divided into fully separated affiliates consisting of separate competitive and monopoly elements. This proposal rested on an assumption that such separate-subsidiary requirements, coupled with a wide range of rules and regulations concerning books and records, contracts, information flow, patent licensing, and numerous other matters, could permit the development of competition in the telecommunications markets in which the Bell System allegedly had used its local monopolies to foreclose competition. The parties ultimately did not agree to the proposal.

These two proposals became known to the parties as "Quagmire I" and "Quagmire II."\textsuperscript{47} The monikers reflected the parties' dislike for any resolution of the case requiring ongoing judicial supervision of the details of everyday events and transactions within the telecommunications industry. No doubt, the parties had separate reasons for this judgment. AT&T was already extensively regulated by the FCC and the state public utility commissions with respect to such events and transactions; it believed that a permanent additional layer of bureaucracy would hamstring its efforts to compete. Nor would any of these proposed solutions address the Department of

\textsuperscript{43} Id. at 214-15.

\textsuperscript{44} See id. at 215-16; AT&T, 552 F. Supp. at 140.

\textsuperscript{45} See United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981). This major ruling had a number of components, including a determination that the court would not separately determine the sufficiency of evidence in each contested episode. See id. at 1343-44; supra text following note 38 (explaining "episodes"). Indeed, Judge Greene stated that the fact that the court would divide the evidence for analytical purposes into various categories "should not obscure the fact . . . that the Court will be considering the evidence in the context of a single Sherman Act claim on a course-of-conduct basis." AT&T, 524 F. Supp. at 1345. Judge Greene then considered at length and rejected the bulk of the Bell System's arguments that the government had failed to prove various aspects of its antitrust claims. See id. at 1345-81.

\textsuperscript{46} COLL, supra note 5, at 253.

\textsuperscript{47} See TEMIN, supra note 5, at 209-16 (Quagmire I); id. at 254-56, 260-61 (Quagmire II). The latter proposal was said to have become "so long that it resembled a telephone book." Id. at 256.
Justice’s fundamental concerns. Judge Greene later articulated one of these concerns:

It would be difficult to formulate an [injunctive] order that would effectively deal with all of the different kinds of anticompetitive behavior that are claimed to have occurred over a considerable period of time, in various geographical areas, and with respect to many different subjects. There is evidence which suggests that AT&T’s pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development. In view of this background, it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that AT&T might employ in the future.48

Accordingly, the parties on several occasions rejected a prospective regulatory injunction as a possible resolution of the government’s historic antitrust suit.

B. The Settlement

In contrast, the parties ultimately reached a settlement elegant in its conceptual simplicity: a structural consent decree. The decree’s essential provisions mandated a divestiture and imposed a prospective structural injunction. Specifically, AT&T (as parent company of the Bell System) agreed to divest itself of all ownership and control of the BOCs, and the various companies were enjoined from combining monopoly and competitive telecommunications businesses after divestiture. This approach was designed to ensure the economic separation of the companies with the ability to impede competition (i.e., the BOCs, by virtue of their local exchange monopolies) from the companies with the incentive to do so (i.e., Western Electric and AT&T Long Lines, by virtue of their participation in competitive or potentially competitive markets such as manufacturing and long distance). In short, although the details varied slightly from its original prayer for relief, the Department of Justice obtained by a consent decree the structural relief that it had long sought.

Section I of the MFJ mandated the structural separation of the Bell System. This separation required AT&T to submit to the Department of Justice a plan of reorganization for the Bell System. The plan would provide for the transfer from AT&T to the BOCs of “sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications and exchange access functions,” and

for the division of the BOCs' assets between exchange and exchange access functions and other functions.49 AT&T was further required under section I of the MFJ to terminate various contracts, which had economically integrated the BOCs and other components of the Bell System, and then to divest itself of ownership of the BOCs, which would take with them the assets related to exchange and exchange access functions (or so-called "local functions") and leave behind assets related to other functions.50 Section I finally forbade AT&T, after divestiture, from "acquir[ing] the stock or assets of any BOC."51

Section II of the MFJ imposed prospective injunctive requirements on the post-divestiture BOCs. Under section II(A), the BOCs were affirmatively ordered not to favor the post-divestiture AT&T in the provision of access to local exchanges. Rather, they were required to provide to all long-distance and information-service providers what became known as "equal access"—that is, access to the local exchange that was "equal in type, quality, and price to that provided to AT&T and its affiliates."52 However, the MFJ did not simply rely on this equal access injunction to control the BOCs' future conduct.

More controversially both at the time and in the decade and a half to come, section II(D) of the MFJ imposed so-called "line of business" restrictions on the BOCs. In particular, it affirmatively banned the divested BOCs, "directly or through any affiliated enterprise," from providing long-distance service,53 manufacturing or

51. Id. § I(D), reprinted in AT&T, 552 F. Supp. at 227. Years later, section I(D) would become an unexpected source of controversy when AT&T sought in 1994 to acquire McCaw Cellular Communications, Inc., which had not been part of the Bell System but nonetheless fell within the definition of a "BOC" in section IV(C) of the MFJ. See United States v. Western Elec. Co., 154 F.R.D. 1 (D.D.C. 1994) (granting BellSouth's request for declaratory ruling that AT&T's acquisition of McCaw would violate section I(D)); United States v. Western Elec. Co., 569 F. Supp. 990, 1002 n.54 (D.D.C. 1983). These LATAs, which totalled 164 in number and whose precise boundaries were hammered out in the massive reorganization that followed Judge Greene's approval of the MFJ, were the areas within which the post-divestiture BOCs were to be permitted to provide end-to-end telecommunications service.
52. MFJ § II(A), reprinted in AT&T, 552 F. Supp. at 227.
53. Id. § II(D)(1), reprinted in AT&T, 552 F. Supp. at 227; see AT&T, 552 F. Supp. at 188-89 (approving this restriction). The long-distance ban on the BOCs was, in technical terms, a prohibition on BOC provision of "interexchange" or "interLATA" service. The MFJ called for the division of the BOCs' service territories into separate "exchange areas," later renamed "local access and transport areas" or "LATAs," which were defined according to "communities of interest" and other socio-economic characteristics. See MFJ § IV(G)(1), reprinted in AT&T, 552 F. Supp. at 229; United States v. Western Elec. Co., 569 F. Supp. 990, 1002 n.54 (D.D.C. 1983).
providing telecommunications equipment or customer premises equipment, or providing so-called “information services.” Indeed, lest there be any doubt on the matter, the BOCs were further barred from “provid[ing] any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.” This last line-of-business restriction would be known as the catch-all restriction and was essentially carried over from the 1956 decree that the MFJ replaced.

The parties’ agreement required Judge Greene’s ratification. A

InterLATA service, in other words, was to be reserved to long-distance companies such as the post-divestiture AT&T and MCI, with the BOCs providing originating access (i.e., carriage from the calling party to a long-distance company) and terminating access (i.e., carriage from the long-distance company to the called party) on interLATA calls. The opposite was not true: intraLATA toll service was not reserved under the MFJ to the post-divestiture BOCs. See United States v. Western Elec. Co., 569 F. Supp. 1057, 1108 (D.D.C. 1983), aff'd mem. sub nom. California v. United States, 464 U.S. 1013 (1983). The decision whether to allow intraLATA competition was rather reserved to state regulators, save in those few circumstances where LATAs crossed state borders. See Western Elec. Co., 569 F. Supp. at 1002 n.54.

54. MFJ § II(D)(2), reprinted in AT&T, 552 F. Supp. at 227. But see infra note 65 and accompanying text (describing modification to proposed decree to permit BOCs to provide but not manufacture customer premises equipment). The terms “telecommunications equipment” and “customer premises equipment” respectively referred to equipment used by telecommunications service providers for internal functions and to the equipment such as handsets used by customers at their homes or places of business (traditionally pursuant to a lease from the telephone company). See MFJ § IV(E), (N), reprinted in AT&T, 552 F. Supp. at 228, 229; AT&T, 552 F. Supp. at 190-93 (approving manufacturing restriction).

55. MFJ § II(D)(1) (barring BOC provision of information services), reprinted in AT&T, 552 F. Supp. at 227; see id. § IV(J) (defining “information service” essentially as “the offering of a capability for . . . making available information which may be conveyed via telecommunications”), reprinted in AT&T, 552 F. Supp. at 229; AT&T, 552 F. Supp. at 189-90 (approving this restriction).

56. MFJ § II(D)(3), reprinted in AT&T, 552 F. Supp. at 228; see id. § IV(F), (G) (defining “exchange” and “exchange access”), reprinted in AT&T, 552 F. Supp. at 228-29.

57. See supra notes 22-26 and accompanying text (describing the 1956 decree).

58. The story of how jurisdiction to approve the MFJ became vested in Judge Greene is itself an interesting one and has been recounted by Temin. See TEMIN, supra note 5, at 274-76, 279-80. It entailed a transfer of jurisdiction over the 1956 decree (the “Final Judgment”) from the District of New Jersey to Judge Greene. Because the 1956 decree bore the caption “United States v. Western Electric Co.,” and because Judge Greene technically dismissed the government’s 1974 action against the Bell System (which had borne the caption “United States v. American Telephone and Telegraph Co., Civil Action No. 74-1698”) when he approved the Modification of Final Judgment, see United States v. AT&T, 1982 U.S. Dist. LEXIS 10645 (D.D.C. Aug. 24, 1982), all subsequent proceedings both before and after divestiture would go down in history under the caption “United States v. Western Electric Co., Civil Action No. 82-0192.” Unless otherwise indicated, all citations in this Article of filings between January 8, 1982 and August 24, 1982 are of materials filed under both case names and numbers, and all citations of filings after
1974 law popularly known as the Tunney Act requires judicial approval of any consent decree settling a civil antitrust suit brought by the United States. The parties and hundreds of interested non-parties accordingly engaged in an extensive process of filing comments and briefs on whether the proposed decree was "in the public interest." Throughout this so-called Tunney Act proceeding, the Department of Justice argued that the structural relief upon which it had insisted in the MFJ was superior to various regulatory alternatives. It particularly defended the line-of-business restrictions to be imposed on the divested BOCs, explaining at length its view that "regulatory mechanisms ... are not sufficient to control the long term incentives and abilities the BOCs would have to disadvantage competitors in related markets." For example, after recounting how "the FCC struggled for more than 20 years unsuccessfully to solve the problem" of cross-subsidization between the Bell System's monopoly and competitive enterprises, the Department of Justice also detailed the BOCs' continuing ability to discriminate against non-affiliated long-distance and manufacturing competitors:

Nor is it likely that regulation could effectively ensure non-discriminatory access to essential local exchange facilities. Again, as a number of commenters pointed out, this is a subject that has preoccupied regulation for more than a decade with little success. Particularly in a technologically dynamic industry such as telecommunications, there is little possibility that regulation is capable of detecting or preventing the very subtle forms of discrimination that would be available to the BOCs. Thus, even were it possible to prescribe in detail the appropriate technical parameters of interconnection under current technological conditions, regulators would have to have sufficient foresight to determine in advance the discriminatory potential inherent in...

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60. 15 U.S.C. § 16(e).


tomorrow's technology, effectively to ensure fair competition. Even if it were possible, moreover, effectively to monitor the technical aspects of interconnection in an evolving technological environment, there would remain still more subtle means of discrimination in operational activities, such as the timely provision, maintenance, testing, and restoration of facilities. In short, the BOCs, if permitted to engage in competitive activities, would have substantial ability to frustrate regulatory attempts to prevent discriminatory conduct.63

The propriety of the line-of-business restrictions thus received substantial attention in the extensive Tunney Act proceedings in the first half of 1982.

At the end of this process, Judge Greene essentially approved the decree that the parties had submitted.64 Before entering it, however, he required the parties to add an additional section to the MFJ to address various objections raised by interested third parties or by Judge Greene himself during the Tunney Act proceedings. The new section VIII of the MFJ did such miscellaneous but important things as to permit the BOCs "to provide, but not manufacture, customer premises equipment,"65 to permit them to produce yellow page telephone directories,66 to forbid AT&T from engaging in electronic publishing for seven years from entry of the MFJ,67 and to

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63. Id. at 57-58.
65. MFJ § VIII(A), reprinted in AT&T, 552 F. Supp. at 231; see AT&T, 552 F. Supp. at 191-93.
66. See MFJ § VIII(B), reprinted in AT&T, 552 F. Supp. at 231. The decision to permit the RBOCs to produce yellow page directories was in large part based on the concern in 1982 that the RBOCs might not be financially viable after divestiture and the theory that the yellow pages would continue to be used to provide a subsidy to local telephone rates. See AT&T, 552 F. Supp. at 193-94. See generally TEMIN, supra note 5, at 283-91 (describing Tunney Act proceeding, including migration of yellow pages provision from proposed congressional legislation to the MFJ). Not only did the post-divestiture financial performance of the RBOCs relative to AT&T make this concern appear ironic in retrospect, but the subsidy theory also turned out to be erroneous. See United States v. Western Elec. Co., 1989-1 Trade Cas. (CCH) ¶ 68,433 (D.D.C. 1989) (explaining that "once [yellow pages] authority had been transferred to them from AT&T, a number of the Regional Companies set up their Yellow Pages operations in such a way that the profits from those operations flowed not to the ratepaying public but to the companies' other, more 'conglomerate' ventures"); United States v. Western Elec. Co., 673 F. Supp. 525, 581 n.252 (D.D.C. 1987) (to same effect), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990); United States v. Western Elec. Co., 592 F. Supp. 846, 865-66 (D.D.C. 1984) (further explication of same point), appeal dismissed, 777 F.2d 23 (D.C. Cir. 1985).
67. See MFJ § VIII(D), reprinted in AT&T, 552 F. Supp. at 231; AT&T, 552 F. Supp. at 180-85. As section VIII(D) contemplated, this restriction was removed, at AT&T's request, seven years after the entry of the MFJ. See United States v. Western Elec. Co., 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. 1989).
require court approval of the plan of reorganization. 68

The recurring post-divestiture significance of the additions required by Judge Greene lay in his establishment of the standard for removing the line-of-business restrictions imposed on the BOCs in section II(D) of the MFJ. Section VIII(C) set forth this standard. In the opinion accompanying his approval of the MFJ (conditional upon the parties’ agreeing to the addition of section VIII), Judge Greene explained that the line-of-business restrictions should not be permitted to outlive the premise upon which they were predicated. This premise (which Judge Greene had ratified earlier in the opinion in approving the line-of-business restrictions) was that the BOCs, if permitted to enter the long-distance, manufacturing, or information-services market (or, indeed, any market other than local exchange service), would use their monopoly power over the local exchange bottleneck to impede competition in the competitive market. But this might not be true forever, Judge Greene noted:

It is probable that, over time, the Operating Companies will lose the ability to leverage their monopoly power into the competitive markets from which they must now be barred. This change could occur as a result of technological developments which eliminate the Operating Companies’ local exchange monopoly or from changes in the structures of the competitive markets. 69

Judge Greene stated that he would therefore apply the same standard in deciding whether to remove the restrictions that he had applied in approving them. Thus he proposed section VIII(C) of the MFJ, which provided in its entirety as follows: “The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.” 70

The parties quickly stipulated to section VIII, and on August 24, 1982, Judge Greene entered the MFJ. 71 The ensuing sixteen months were devoted to the largest corporate reorganization in history and to associated legal matters. As part of this process, AT&T submitted to the court the more than 160 local access and transport areas, or LATAs, into which it proposed to divide the Bell System’s territory. These divisions were central to the post-divestiture provision of telecommunications, for the BOCs were to provide intraLATA communications and were restricted from providing interLATA

68. See MFJ § VIII(J), reprinted in AT&T, 552 F. Supp. at 232; AT&T, 552 F. Supp. at 214-17.
69. AT&T, 552 F. Supp. at 194.
70. MFJ § VIII(C), reprinted in AT&T, 552 F. Supp. at 231; see AT&T, 552 F. Supp. at 195.
71. See AT&T, 552 F. Supp. at 131.
communications (which would be the domain of long-distance carriers such as AT&T and MCI). The court required some modifications, but essentially approved the proposed LATAs.

AT&T also submitted to the court a lengthy plan of reorganization, which divided the Bell System’s assets and functions between newly created Regional Holding Companies, which would own the BOCs, and the post-divestiture AT&T, which would provide long-distance service and also own Western Electric and Bell Labs. Here, again, the court approved the proposed plan of reorganization after certain modifications.

Both the entry of the MFJ and the approval of the plan of reorganization were summarily affirmed by the Supreme Court.

72. See supra note 53.
74. See United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983), aff’d mem. sub nom. California v. United States, 464 U.S. 1013 (1983). One modification was Judge Greene’s assignment of the “Bell” name and logo to the BOCs, as opposed to AT&T. Although the Bell System’s plan was for all the divested entities (both AT&T and the RBOCs) to be able to use the Bell name and logo for certain purposes, Judge Greene rejected this approach. He reasoned that “[t]he decree is designed to effect a radical separation of the Operating Companies from AT&T” and that it therefore would “hardly do to continue to have the various divested entities of the Bell System hold themselves out as if they were all still part of the same complex.” Id. at 1076-77. On this basis, Judge Greene concluded that “the ‘Bell’ name and the Bell logo must belong either to AT&T or to the Operating Companies—but not to both.” Id. at 1077. Judge Greene then allocated the Bell name and logo to the RBOCs, primarily on the ground that it would help to ensure their financial viability. See id. at 1078-81; see also supra note 66 (explaining similar rationale in yellow pages decision); KELLOGG ET AL., supra note 19, § 4.5, at 219-20 & n.44 (providing succinct summary of modifications to plan of reorganization that Judge Greene required).
75. See Maryland v. United States, 460 U.S. 1001 (1983) (summarily affirming entry of MFJ); California v. United States, 464 U.S. 1013 (1983) (summarily affirming approval of plan of reorganization). Justice Rehnquist, joined by two other members of the Court, dissented from the summary affirmance of the MFJ. He was concerned by the claim of some states (such as Maryland) that the MFJ preempted certain of their regulation of the telecommunications industry in contravention of the “state action” exemption from the Sherman Act established by Parker v. Brown, 317 U.S. 341 (1943). See Maryland v. United States, 460 U.S. 1002 (1983) (Rehnquist, J., dissenting). More fundamentally, he suggested that the Tunney Act’s requirement that a district court make a determination whether entry of an antitrust consent decree is “in the public interest,” 15 U.S.C. § 16(e), might allocate a non-judicial function to the court. See Maryland v. United States, 460 U.S. 1002-06 (Rehnquist, J., dissenting). Justice Rehnquist therefore would have declined to affirm summarily, but would rather have set the appeals for oral argument. The Supreme Court’s action was the only appellate review of Judge Greene’s entry of the MFJ and approval of the plan of reorganization because these matters went directly to the Court from the district court under the Expediting Act, 15 U.S.C. § 29(b). See United States v. Western Elec. Co., 1982-83 Trade Cas. (CCH) ¶ 65,130 (D.D.C. Nov. 10, 1982) (certifying MFJ for direct appeal under the Expediting Act); United States v. Western Elec. Co., 1983-2 Trade Cas. (CCH) ¶ 65,596 (D.D.C. Sept. 7, 1983) (same for plan of reorganization); see also United States v. AT&T, 714 F.2d 178 (D.C. Cir. 1983) (after the Supreme Court’s
C. The World on January 1, 1984

As of January 1, 1984, the Bell System belonged to history. From the consumer's perspective, eight entities succeeded to its various pieces. Seven of them were the new Regional Holding Companies, which would be known by a variety of names and related acronyms: Bell RHCs, Regional Bell Operating Companies or RBOCs, Bell Companies, and Baby Bells. These new companies—Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell, and U S West—owned the 22 BOCs that AT&T had been required to divest. The BOCs and their RBOC owners continued to be local exchange carriers, enjoying franchises granted by various state regulators. They were excluded from essentially every other market by the line-of-business restrictions in section II(D) of the MFJ.

The eighth company was American Telephone and Telegraph or AT&T. It retained virtually all of the components of the Bell System that had been engaged in the competitive or potentially competitive provision of products or services. The post-divestiture AT&T thus possessed the basic long-distance facilities that had been operated by AT&T Long Lines or the BOCs. It further retained the Bell System's manufacturing arm, Western Electric, and its renowned research facility, Bell Laboratories. The vertical integration binding these components with the BOC monopolies by both ownership interests and contract arrangements, however, had been eradicated.

A substantial part of the regulatory structure within which the service providers operated was new. The Bell System's territory had been divided into 164 LATAs. The BOCs would provide service

affirmance, dismissing separate appeal related to entry of the MFJ).


77. Although the number of LATAs under the MFJ has been variously reported as being 160, see KELLOGG ET AL., supra note 19, § 4.8, at 227 n.1, and as 163, see id. § 4.8, at 234, the correct number appears to be 164. See United States v. Western Elec. Co., 569 F. Supp. 990 (D.D.C. 1983) (taking AT&T's 161 proposed LATAs, eliminating three, and creating six others); United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983) (considering further LATA questions, eliminating one LATA that had been judicially created, recreating one that had been judicially eliminated, eliminating one other, and
within the LATAs, but this area was not reserved to them by the MFJ. InterLATA communications, by contrast, were to be provided solely by long-distance carriers, which would also be known as interexchange carriers.

II. Early Administration of the MFJ

The MFJ was designed to "allo[w] the more rapid and certain development of competition in those telecommunications markets where competition, in the present state of technology, is possible." As recounted above, the means whereby the government—which had basically dictated the terms of the MFJ—sought to accomplish this goal was the structural separation of the Bell System and, as "the opposite side of the divestiture coin," the line-of-business restrictions on the RBOCs. The government contended that these provisions of the MFJ would "remov[e], clearly and efficiently, the structural problems that have given rise to the controversies between the United States and AT&T over the [previous] three decades.

It soon became clear, however, that the antitrust and regulatory controversies that preceded the MFJ would be replaced by controversies under the MFJ. These new controversies can be

creating one other), aff'd mem. sub nom. California v. United States, 464 U.S. 1013 (1983). The discrepancy between the number 163 and the actual number 164 may have arisen because, in ordering the recreation of a LATA in Winchester, Kentucky, that he had previously eliminated, compare Western Elec. Co., 569 F. Supp. at 1034-35, 1057, with Western Elec. Co., 569 F. Supp. at 1105, 1130-31, Judge Greene required that the LATA be "associat[ed]... with the independent area around Lexington served by GTE." 569 F. Supp. at 1105 & n.210. Winchester was nonetheless a separate LATA. See id. at 1105 n.210, 1130.


79. See supra notes 48-57 and accompanying text; Transcript at 25178-79 (June 29, 1982) (statement of James Denvir, Department of Justice attorney) (explaining that "[the MFJ] contains two central remedies: [d]ivestiture and a ban on reintegration," noting that the first remedy "completely solves the problem [for the present] of the incentives and abilities that result when a firm is engaged in both regulated monopoly and competitive markets," and stating that the second remedy did the same for the future and that thus, "[i]n a very real sense, the [line-of-business] restrictions are simply the opposite side of the divestiture coin, they are an integral part of the divestiture and proceed on precisely the same theory that divestiture proceeds on").


81. In addition to the United States' lawsuit, numerous private antitrust actions were filed against the Bell System prior to its break-up in 1984 (although, of course, the MFJ did not terminate these private suits). See Kearney & Merrill, supra note 13, at 1375-77; see, e.g., Essential Communications, Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979); Litton Sys., Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983); MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983); Southern Pac. Communications Co. v. AT&T, 740 F.2d 980,
grouped into two basic types. Some were inevitable: The reorganization of the Bell System was the largest and most complex corporate reorganization ever. Thus, even though the reorganization lasted some sixteen months, some issues either had not been addressed or had not been resolved to all parties' satisfaction by the time of divestiture. Other controversies arose not because the MFJ or the reorganization had been silent on some points, but rather because they had been quite specific on one point—these controversies arose, that is, because the newborn RBOCs chafed at the MFJ's line-of-business restrictions and wanted to expand beyond local telephony. Perhaps these controversies were inevitable, too, but if so for a different reason: viz., that any attempt to limit the fields in which powerful businesses may compete is bound to meet resistance and provoke controversy.82

A. Early Skirmishes

Many of the early skirmishes among the parties to the MFJ required Judge Greene's attention because the underlying issues had not been adequately dealt with in the reorganization or because aspects of the reorganization collided with the larger world. Although such differences of opinion among the parties needed to be resolved, they did not, in retrospect, create major fault lines for which Judge Greene can now be criticized.

Some of these unanticipated problems arose even before divestiture was complete on January 1, 1984. For example, AT&T (still speaking for the Bell System, including its subsidiary BOCs) filed a request with the district court in 1983 seeking a waiver of the MFJ's interLATA restriction insofar as it applied to cellular telephone calls.83 When the Department of Justice opposed the request, the BOCs' petition, as Judge Greene would later state, was

983 (D.C. Cir. 1984). Indeed, the existence of these suits and the likelihood of a continuation of similar private suits in seeming perpetuity were among the reasons that AT&T agreed to the MFJ. See Kearney & Merrill, supra note 13, at 1376, 1407 & n.381.

82. Cf. TEMIN, supra note 5, at 215 (recounting pessimistic comment of Department of Justice economist involved in Quagmire I settlement negotiations that "incentives would always win out over injunctions").

83. The Bell System's cellular assets had been allocated to the post-divestiture BOCs. See United States v. Western Elec. Co., 578 F. Supp. 643, 644 n.4 (D.D.C. 1983). The primary component of these assets, which were just then being deployed to offer services to the public, generally consisted of one of the two cellular licenses for each area where the BOCs provided local telephone service. The FCC had created two cellular licenses for various areas in the country, and, in order to ensure the speedy deployment of cellular services, it reserved one license for the local wireline carrier (which in most of the country was a BOC). See An Inquiry into the Use of the Bands 825-845 MHz & 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 482-83 (1981) (subsequent history omitted).
either clarified or modified, depending upon the point of view.\textsuperscript{84} Whatever the scope of the original petition, the revised request for a waiver was merely "to construct and operate [cellular] systems . . . in only nine specific geographic areas," each of which constituted one metropolitan complex but spread beyond a single LATA.\textsuperscript{85} Although the Department of Justice continued to oppose the request, Judge Greene granted the waiver, subject to various conditions, after concluding that under those conditions the RBOCs had satisfied the section VIII(C) standard of demonstrating that there was no substantial possibility that they would be able to impede competition in the interLATA or mobile radio service markets. This ruling in some ways seems dubious in light of later rulings that "piecemeal" waivers of the MFJ would not be permitted,\textsuperscript{86} but it must also be noted that the ruling favored the restricted BOCs. In all events, it was, as Judge Greene stated at the time, a "pragmatic" approach designed to address a problem that arose as the divestiture date loomed.\textsuperscript{87}

Not all controversies were as potentially economically significant as the application of the long-distance restriction to cellular telephony or were brought to the court by the parties. In November 1983, with divestiture less than two months away, Judge Greene requested that the parties "apprise [the court] of the [post-divestiture] plans of the various entities regarding the provision of time and weather information to the public and as to the legal status of such plans."\textsuperscript{88} Although it may seem a distant memory in this era of "900 service" and "976 calls," the BOCs traditionally had provided time and weather information to their local customers at no charge (or none beyond the cost of a local telephone call). Those services, however, fell within the MFJ's "information services" line-of-business restriction.\textsuperscript{89} Judge Greene proceeded to grant a waiver of the MFJ to permit time and weather announcements by the BOCs after divestiture.

Judge Greene's apparent purpose in the time-and-weather ruling was to ensure against any subsequent public criticism that the MFJ had required the BOCs to abandon these services. He stated at the end of his analysis that, "[i]n view of the waiver, if any telephone company ceases to provide time and weather services, that would be its own business decision, and the decree would simply be an excuse

\textsuperscript{84} See Western Elec. Co., 578 F. Supp. at 647.
\textsuperscript{85} Id. at 647-48.
\textsuperscript{86} Cf. infra note 193 and accompanying text.
\textsuperscript{87} Western Elec. Co., 578 F. Supp. at 652-53.
\textsuperscript{89} See supra note 55.
for an action which the company decided to take for its own commercial reasons." And, lest there be any possibility that Judge Greene had not covered himself, he went on to state that "[i]n that respect the use made of the decree would be similar to its use by some local companies as a justification for substantial rate increases." Although here, too, the section VIII(C) analysis of the "market" the BOCs would be entering by virtue of the waiver lacked the sophistication that would accompany later waiver requests and decisions, the time-and-weather ruling both favored the BOCs and was a one-time action that attempted to ensure a minimum of disruption of public expectations as divestiture loomed.

Of course, Judge Greene did not always rule in favor of the BOCs. One notable contrary instance was an eve-of-divestiture motion by the Department of Justice seeking to amend the plan of reorganization and to permit a temporary waiver of the MFJ's interexchange restriction. The Department's goal was to require AT&T to make available to the RBOCs its common channel interoffice signalling ("CCIS") database so that the RBOCs could sort and route the "800 Service" calls of interexchange carriers other than AT&T. This sophisticated new database enabled AT&T to offer "800 Service" subscribers innovative service offerings such as use of 800 numbers with verbal significance (e.g., 800-CAR-RENT) and time-of-day routing (e.g., sending a call to a company's West

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In this regard, it may also be noted that after divestiture, when Judge Greene invoked concerns about local rates in deciding requests for waivers of the MFJ's line-of-business restrictions, the D.C. Circuit held that this approach was generally improper. See United States v. Western Elec. Co., 900 F.2d 283, 296-97 (D.C. Cir. 1990). The court of appeals conceded that in 1982 the Department of Justice had urged Judge Greene to consider the interests of local ratepayers in evaluating and implementing the MFJ, but the court explained that the MFJ's design was to ensure the development of competition in markets such as long distance and manufacturing, not to protect local ratepayers. See id. (stating that "we see no clear evidence that ratepayer protection was part of the 'contemporaneous understandings of [the decree's] purposes'" and that "[c]oncern for the ratepayers' welfare is primarily the responsibility of the FCC and state regulators, not the district court") (quoting United States v. Western Elec. Co., 846 F.2d 1422, 1427 (D.C. Cir. 1988)); infra text accompanying notes 170-72.
Coast office after the close of business on the East Coast).

Judge Greene denied the Department’s motion to require AT&T to make the CCIS database available to the RBOCs. He reasoned that using the RBOCs as a centralized purveyor of non-monopoly services to interexchange companies was incompatible with the MFJ, for “cost-benefit analysis by the interexchange carriers in deciding whether, where, when, and how to offer various sorts of interexchange service is precisely what is contemplated by the decree.” The MFJ’s purpose was not to punish AT&T or to remove all competitive disadvantages other interexchange carriers might suffer, but only to eliminate those advantages that AT&T had enjoyed because of its control over the BOC monopolies. Interexchange carriers wishing to compete with the post-divestiture AT&T would have to do so “by developing their own technology and marketing strategy.”

The desire for a competitive interexchange market thus was necessarily leading to more rulings under the MFJ not against AT&T, but rather against the RBOCs to the extent that they were seeking to get into that market.

One brief ruling less than two weeks before divestiture reflects Judge Greene’s desire both to administer the MFJ after divestiture in accordance with basic legal principles and, correlative, not to be engaged in “unwarranted interference with the operations of the various Bell System units.” This was Judge Greene’s termination of the intervenor status that he had granted to more than 100 entities in the course of the Tunney Act proceeding. The court made clear that, after divestiture, the Department of Justice, AT&T, and the divested

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93. Id. at 324 (emphasis added).
94. See id.
95. Id.
96. Judge Greene also ruled against one of the RBOCs in an eve-of-divestiture dispute between Bell Atlantic and AT&T over a contract that Bell Atlantic had entered into with the federal government’s General Services Administration (“GSA”). Under the contract’s terms, Bell Atlantic agreed to sell to GSA embedded customer premises equipment (e.g., telephones) located on the government’s property in the Bell Atlantic area pursuant to a lease from the Bell System. See United States v. Western Elec. Co., 578 F. Supp. 680, 681 (D.D.C. 1983). Bell Atlantic also committed to provide “follow on” services with respect to maintaining this customer premises equipment and on this basis intended to retain several hundred Bell System employees who otherwise would have been reassigned to AT&T upon divestiture. See id. at 680. With respect to the sales agreement, Judge Greene had difficulty pinpointing provisions in the MFJ or plan of reorganization that this contract contravened, see id. at 681-83, but he was not similarly constrained in finding that “Bell Atlantic’s actions ... represent a plain violation of [the MFJ’s] design, [its] purposes” concerning the marketing of customer premises equipment, id. at 684. This pre-divestiture tussle foreshadowed the scores of post-divestiture controversies between AT&T and the RBOCs over the scope of the RBOCs’ permissible activities.
RBOCs all retained their rights, granted by the MFJ, to request court action. And third parties could continue to respond to motions. But the termination of the third parties' status as intervenors meant most prominently that they would be required to apply to the Department of Justice for enforcement of the MFJ, and the court would thereafter consider their application only if they "demonstrate[d] to the Court that, although the application is meritorious, the Department has refused, in bad faith, to commence enforcement proceedings."  This ruling was surely appropriate as a legal matter. Furthermore, as a contextual matter, perhaps Judge Greene understood, as divestiture loomed, that post-divestiture life would be complicated enough with just nine parties to the MFJ (the government, AT&T, and the seven RBOCs).

B. Waivers of the Line-of-Business Restrictions

Matters were about to get even more complicated: the RBOCs were poised to launch a series of small-scale assaults on the line-of-business restrictions. These took the form of motions for "waivers" of the MFJ to permit particular activities.

The first wave of waiver requests came shortly after the RBOCs' January 1, 1984 birth date. Within four months of that date, the RBOCs had filed nine requests for waivers of the MFJ's line-of-business restrictions. The RBOCs sought to engage in activities ranging from real-estate services to providing interexchange service for NASA. Many of the RBOCs' waiver requests implicated the MFJ's catch-all line-of-business restriction, which essentially limited the RBOCs to providing local telecommunications service and access service, although one of the requests ran up against the more specific restriction on interexchange services. It was also clear that more waiver requests were on their way.

Judge Greene did not hesitate to make known his surprise and displeasure at the pace and scope of these requests. In mid-1984, he collected the various RBOC waiver requests together and issued a decision disposing of the motions. The decision expressed Judge Greene's dismay at the series of waiver requests:

No one connected with the negotiation, the drafting, or the modification of the decree envisioned that the Regional Holding Companies would seek to enter new competitive markets on a broad scale within a few months, let alone a few weeks after

98. *Id.*
100. *See id.* at 868-69; *Western Elec. Co.*, 777 F.2d at 24-25.
Judge Greene does not appear to have been motivated in these comments by a simplistic "big is bad" mentality. His opinion and his previous comments made clear his lack of concern as to whether AT&T, larger than any single RBOC, engaged in any business that it might like, and this disparate treatment was sound under the theory of the MFJ. "The reason is simple: [the RBOCs], unlike AT&T, retain what is in law and in reality a monopoly over a critical aspect of the nation's telephone service." Judge Greene's primary motivation was a concern that the RBOCs were becoming increasingly interested in, and devoting substantial resources to, lines of business having nothing to do with local telecommunications and that this unexpected focus would mean, among other things, a lack of commitment to implementing the MFJ's equal access provision.

Notwithstanding Judge Greene's unhappiness with the unexpected state of events, the primary action taken in this mid-1984 opinion was not the rejection of most of the pending requests but rather the establishment of procedures for handling these and any subsequent RBOC requests for waivers of the line-of-business restrictions. These procedures required the RBOCs to submit any

102. Id. at 858.
103. Id. at 874. For other statements explaining the disparate treatment of the RBOCs and post-divestiture AT&T, see, e.g., United States v. AT&T, 552 F. Supp. 131, 170-86 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983); Reply Brief of the United States, at 19-26 (June 24, 1982); Brief of the United States in Response to the Court's Memorandum of May 25, 1982, at 37-52 (June 14, 1982).
104. See, e.g., Western Elec. Co., 592 F. Supp. at 859 ("[T]his Court which ... was directly involved in approving the decree and in defining its meaning—which, indeed, drafted and required the parties to incorporate section VIII(C)—did not have the slightest belief or intention that within a very short period of time, the Regional Holding Companies would seek to transform themselves from custodians of the nation's local telephone service into conglomerates for which such service was at best a pedestrian sideline."); id. at 861-67 (section of opinion concerning RBOC provision of local telephone service, commenting that "the vast and diverse [other] programs the Regional Holding Companies are formulating, and the priorities the companies seem to be assigning to these programs, constitute a serious threat to their obligations under the decree and the implementing documents").
105. The establishment of procedures was not the only action taken. Judge Greene denied the one pending request for a waiver to provide interexchange services (viz., BellSouth's motion in connection with a bid to provide telecommunications services and products to NASA) and stated that "[t]he Court will not even consider the substantive merits of a waiver request seeking permission to provide interexchange services until such time as the Regional Holding Companies lose their bottleneck monopolies and there is substantial competition in local telecommunications service." Id. at 868. He then tersely stated: "That is not now." Id. Similar statements were made of the information-services and manufacturing markets, for "[n]o significant technological or structural changes have
requests for a waiver of the line-of-business restrictions to the Department of Justice. The Department would then conduct an analysis of the request, including consulting with interested parties. If the Department concluded that the RBOC had met its burden under the section VIII(C) standard, the Department would file a motion with the court requesting the waiver. If the government did not reach that conclusion, it would nonetheless send the RBOC's request to the court, together with the Department's own comments and any supporting and opposing materials it had received.106

The RBOCs and their supporters roundly criticized these procedures. But the procedures were quite defensible in theory. First, the Department of Justice, as the "Prime Mover" of the litigation and the MFJ, in all events would be involved in any proceeding concerning the line-of-business restrictions. Thus, the mere requirement of a Justice Department analysis and recommendation affords little ground for criticism. Second, the parties themselves had agreed to the line-of-business restrictions, which thus constituted part of a final judgment. Affording the party that had insisted on the restrictions' inclusion in the judgment a particular opportunity to formulate its position on a request for relief from the judgment seems reasonable. Finally, it could be argued that the requirement that waivers of the line-of-business restrictions be funnelled through the Department of Justice served the same interests as had the Tunney Act proceeding in which those restrictions had been approved. The Tunney Act was passed to bring proposed antitrust consent decrees into the sunshine—to create a mechanism for informed public commentary.107 Public commentary is no less desirable on proposed waivers of approved consent decrees (if anything, it is even more desirable, given that the decrees have already been affirmatively found to be "in the public interest").

Referral of RBOC waiver requests to the Department of Justice, occurred in these markets to justify a relaxation of these line of business restrictions." Id. This varying treatment of catch-all waiver requests and those directed at the long-distance, manufacturing, and information-services bans makes sense because each of the latter line-of-business restrictions tends to correspond to a discrete antitrust market whereas the "catch-all" provision does not.

106. See id. at 873-74; see also United States v. Western Elec. Co., Civ. No. 82-0192 (D.D.C. Mar. 13, 1986) (modifying procedure to provide for approval of "me too" waiver requests where one RBOC sought a waiver along lines of a waiver another RBOC had already obtained); United States v. Western Elec. Co., 1991 U.S. Dist. LEXIS 14799 (D.D.C. July 30, 1991) (modifying procedure in light of D.C. Circuit's triennial review decision so that, following Justice Department's investigation, petitioning RBOC would present its own waiver motion to the court).

which would then notify the public on a weekly basis of pending waiver requests, created a mechanism, akin to the Tunney Act, for public notice and afforded the opportunity for the public to lobby a more appropriate body than the district court.

At least at this point in the tenure of the MFJ, the waiver procedures were defensible in practice as well. The RBOCs amended their waiver requests to conform to four structural safeguards that Judge Greene had announced that he would require for waiver of the catch-all restriction.\textsuperscript{108} When the Department of Justice returned six of the eight requests to the court and recommended their approval, Judge Greene approved all six.\textsuperscript{109} The RBOCs withdrew the two requests that the Justice Department indicated that it would not support.\textsuperscript{110} All of this was accomplished in less than six months. It was clear thus far that, where the parties could work out their differences, Judge Greene would not seek to overturn their agreement.\textsuperscript{111}

The other major decision concerning the line-of-business restrictions within the first three years of divestiture was handed down in early 1986.\textsuperscript{112} The decision grouped together and disposed of a number of RBOC motions, not so much for waivers of the MFJ, as for "clarification[s]."\textsuperscript{113} This proceeding merits extended discussion, for it provides a representative snapshot of the Department of Justice's approach to the MFJ in the years immediately after divestiture, and it additionally affords revealing insights into Judge Greene's conception of the MFJ. The particular motions before the court sought rulings on whether, absent a section VIII(C) waiver, the MFJ barred the RBOCs from providing "shared tenant services" (where a developer or building owner would hire the RBOCs or another carrier to provide telecommunications and related services, including the selection of long-distance carriers, to unrelated tenants on a shared centralized basis) or from providing basic exchange service or cellular telephone service outside of their regions (e.g.,

\textsuperscript{108} These were, as later summarized by the court of appeals, "(1) the establishment of separate subsidiaries; (2) guarantees that the competitive enterprises would obtain their own debt financing on their own credit; (3) limitation of estimated net revenues of the proposed competitive enterprises to 10% of the [RBOCs'] total estimated net revenues; and (4) submission to [Justice Department] monitoring of the enterprises." United States v. Western Elec. Co., 777 F.2d 23, 25 (D.C. Cir. 1985) (footnote omitted).


\textsuperscript{110} See id. at 259 n.14.

\textsuperscript{111} One of the RBOCs (U S West) appealed Judge Greene's order establishing these procedures for considering line-of-business waiver requests. The D.C. Circuit (Bork, J.) dismissed the appeal as not being from a final judgment. See Western Elec. Co., 777 F.2d at 24.


\textsuperscript{113} Id. at 1093.
whether midwestern-based Ameritech could provide such service in California.114

The Department of Justice opposed the RBOCs with regard to shared tenant services. In its opposition, the Department set forth what it termed "the fundamental lesson" of the MFJ, which included the proposition "that, given both the ability and the incentive to hinder a competitor's access, the local exchange company, despite the best efforts of regulators and courts, can be expected to find a means of impeding its competitors' access to local exchange customers."115 It then explained: "Thus, the key feature of the decree is that it contains a structural remedy, and not a behavioral or regulatory approach, to the anticompetitive conditions that had existed within the telecommunications industry."116 The Department was more equivocal on the question whether the MFJ permitted the RBOCs to provide extraregional exchange service.117

Judge Greene was unequivocal. He denied all of the motions for clarification and ruled that the RBOCs needed waivers of the MFJ in order to participate in the activities they proposed. Before doing so, he set forth some general considerations that undergirded his ruling. At its core, Judge Greene wrote, the MFJ was the insurance that a telecommunications company with the ability to impede competition in competitive markets through cross-subsidization and discrimination—by use of a bottleneck monopoly—did not have the incentive to use that ability.118 This was Judge Greene's consistent view of the MFJ's purpose, and it was later endorsed by the D.C. Circuit.119

114. See id. at 1093 n.1. Another motion presented a third issue: viz., whether the RBOCs could provide voice storage and retrieval services to cellular customers. See id.
115. Response of the United States to Ameritech's Motion for Clarification and Waiver of the Decree Regarding the Provision of Shared Telecommunications and Other Services, at 2-3 (June 29, 1984).
116. Id. at 3-4.
118. Judge Greene noted that the BOCs' bottleneck monopolies "merely changed hands" at divestiture. Western Elec. Co., 627 F. Supp. at 1095.
Judge Greene was on solid legal ground in this early 1986 decision in ruling that the RBOCs could not offer "shared tenant services" without a waiver of the MFJ. Shared tenant services were themselves, or at least included, interexchange services, and Judge Greene's discussion is a trenchant and succinct analysis, in a specific context, of the dangers of RBOC involvement in the interexchange market. Under their plan, the RBOCs at a minimum would be aggregating demand within a building and on that basis purchasing bulk interexchange service for resale, just as an interexchange reseller would do, and the RBOCs would therefore necessarily be selecting interexchange carriers for their shared tenant customers. This latter component of shared tenant services was particularly problematic because it posed a substantial threat to the MFJ's equal access provision—the requirement that the RBOCs treat all interexchange carriers on an evenhanded basis. As Judge Greene stated, "it is clear that the functions involved—the selection of carriers and the procurement of interexchange services—constitute integral parts of the interexchange business," and that, if they performed these functions, the RBOCs "would be directly competing with the interexchange carriers for that business."

Unlike his approach to the catch-all restriction, Judge Greene's attitude toward the MFJ's interexchange restriction was categorical: the shared tenant services ruling once again indicated that he was not willing to permit RBOC involvement in long distance. This was entirely consistent with the ruling, a year and a half earlier, in which Judge Greene had indicated that he was receptive to properly

121. Id. at 1102. Like the question of RBOC provision of extraregional exchange services, which was part of the same opinion, the question of shared tenant services was appealed to the D.C. Circuit. On this latter question, however, the court of appeals concluded that it lacked jurisdiction, for the company (Ameritech) that had sought the shared tenant services ruling from Judge Greene did not appeal and U S West (which had not sought such a ruling but nonetheless had appealed) was held to lack standing to raise the question on appeal. See United States v. Western Elec. Co., 797 F.2d 1082, 1092 (D.C. Cir. 1986). The D.C. Circuit's decision is also notable because it rejected U S West's claim that the MFJ did not bind the RBOCs (i.e., the Regional Holding Companies or "RHCs"). See id. at 1087-89. U S West had argued, among other things, that the application to the RBOCs of the MFJ (including most notably the line-of-business restrictions) violated due process because the RBOCs did not have separate representation when the MFJ was agreed to. The court of appeals dismissively pointed out that the BOCs were wholly owned subsidiaries of AT&T at the time of the MFJ's negotiation, entry, and implementation, and it noted that "US West cites no authority... for the remarkable proposition that a parent may not bind its wholly owned subsidiaries without affording them independent legal representation." Id. at 1087-88.
conditioned catch-all waiver requests, but would "not even consider" requests for waivers of the interexchange, manufacturing, and information-services restrictions so long as the RBOCs continued to possess bottleneck monopolies.\(^{122}\)

Judge Greene's denial in this 1986 decision of RBOC authority to offer out-of-region exchange and cellular service was less supportable, and the D.C. Circuit reversed him on this point.\(^{123}\) In this regard, what is notable about Judge Greene's "general considerations" adverted to above was the depth of his unhappiness with the RBOCs' expanding interests beyond—and, in his view, at the expense of—local telephony. The following passage, in which Judge Greene explains his statement that notwithstanding their smaller size the RBOCs may present "dangers to competition that are in some respects even greater than those presented by th[e] [Bell] System," is particularly striking:

AT & T was imbued with a service mentality, a tradition dating from the days of the chairmanship of Theodore Vail and continued through that of John deButts and Charles Brown. Although the company may have engaged in some or all of the anticompetitive activities with which it was charged, the balance wheel of the service tradition was always present. By contrast, the Regional Companies, or some of them, indicate by their public statements, their advertisements, and their rush to diversification, combined with their relative lack of interest in basic telephone service itself, that an ascent into the ranks of conglomerate America rates far higher on their list of priorities than the provision of the best and least costly local telephone service to the American public. Anyone faced with the prospect of permitting these companies to enter competitive markets, particularly the interexchange and the information markets, would therefore have to exercise considerable caution lest the companies be empowered, even encouraged, to use their local monopoly advantage as a means to decimate the competition in these markets and thus to enhance further their conglomerate ambitions.\(^{124}\)

Judge Greene's conception that the RBOCs should behave as traditional public utility companies was the premise for his ruling that the MFJ prohibited the RBOCs from offering local exchange service outside of their home regions. His textual basis was section II(D)'s provision that, in addition to being unable to engage in long distance, information services, or manufacturing, the RBOCs might not "provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural

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monopoly service actually regulated by tariff.' This catch-all provision did not specify that the RBOCs could provide the contemplated exchange and exchange access services only in particular areas, but Judge Greene so interpreted it.

Although Judge Greene's interpretation was plausible, and he set forth eight different reasons for concluding that the RBOCs were intended to be limited to their franchised local areas in providing service, one of these reasons especially stands out as reflective of the traditional conception of a public utility company in the telecommunications context. The court explained that the policy underlying the MFJ supported the ruling:

The conclusion that the local companies may not engage in exchange telecommunications outside their own areas is also supported by policy underlying the decree. In order to maintain a stable and effective national telecommunications network, the local companies must work cooperatively in many areas. Together they play an important role in the support of national security and emergency preparedness functions, and they participate in the establishment of national network standards. Competition among these companies with respect to exchange service could, and no doubt in short order would, reduce their incentive to cooperate in these vital areas and thus jeopardize both the quality of the services provided by the national telecommunications network as well as the national defense and emergency requirements of that network.

This ruling reflects Judge Greene's difficulty in accepting that the MFJ was not designed to cement into place the original paradigm of regulated industries law where one local telecommunications carrier had a monopoly right to provide service in each area. As the D.C. Circuit properly found in reversing, the United States' case (and the MFJ) took no position on whether local service would always be a natural monopoly. The MFJ was addressed to a world in which local service was provided on a monopoly basis, but even Judge Greene's section VIII(C) had explicitly contemplated that this premise might not remain true forever.

In all events, it was clear by the end of 1986 from the foregoing decisions that the RBOCs were making substantial headway toward removal of the catch-all restriction but virtually no progress toward removal of the other line-of-business restrictions. And as happy as the RBOCs were to be free to engage in real-estate financing, to provide office equipment, to provide consulting services to foreign

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127. For an expansion of this point, see infra text accompanying notes 251-56.
telecommunications systems, or to do any number of things for which they had received waivers of the catch-all restriction, none of these was their main desire. They wanted the core long-distance, manufacturing, and information-services restrictions removed, and they were poised to launch an all-out assault on those bans in the "triennial review" that had just gotten underway. The RBOCs were about to obtain a surprising new ally in their struggle: the plaintiff in the action, the United States Department of Justice.

III. The Triennial Review

At the time that the district court considered whether to enter the MFJ in 1982, all principals recognized that the line-of-business restrictions at some point might cease to be guarantors of competition and instead become anticompetitive. This would happen, of course, if the RBOCs ceased to possess monopoly control over local bottlenecks to which companies such as long-distance carriers needed access.128 In that event, the line-of-business restrictions should be removed. *Cessante ratione legis*—the theory went—*cessat et ipsa lex*.

The Department of Justice therefore announced during the Tunney Act proceedings that it would "undertak[e] to report to the Court every three years concerning the continuing need for the restrictions imposed by the decree."129 To conduct this "triennial review," as the process would come to be called, the Department of Justice planned to submit the contemplated report to the court in January 1987, which was three years after the divestiture occurred and the line-of-business restrictions took effect. Although the Department essentially met this goal it had set for itself (filing the report on February 2, 1987), it is not likely that the Department or anyone else in the process anticipated that judicial proceedings involving the triennial review would not be completed for another seven years.

A. The Role and Report of the Department of Justice

The triennial review was a substantial undertaking. Throughout 1986, the Department of Justice utilized its authority under the visitatorial provisions of section VI of the MFJ to obtain information

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128. Such loss of monopoly control over local bottlenecks could happen in one of two ways: the RBOCs' local exchanges could altogether cease to be monopolies for local calls as a result of technological developments, or they could remain monopolies for local calls but bypass or other developments could mean that they were no longer bottlenecks through which long-distance calls needed to pass. *See United States v. AT&T*, 552 F. Supp. 131, 194 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

129. *Id.* at 195.
from the RBOCs and AT&T concerning the state of competition in both the local telephone markets and the markets from which the RBOCs were excluded. The Justice Department also permitted interested non-parties such as MCI and Sprint to submit their views on the line-of-business restrictions. In addition, the Department hired Peter W. Huber to serve as a consultant. Huber, who holds a Ph.D. in mechanical engineering as well as a law degree, was detailed to submit to the Department a report that addressed the state of competition in the local telephone industry. All of this was in anticipation of the Department's 1987 report to the court, the purpose of which presumably was to assess whether in fact circumstances had changed along the lines discussed in 1982.

The Department filed its report with the court on February 2, 1987.¹³⁰ This document was submitted under the leadership of Charles F. Rule, who had been appointed to head the Department of Justice's antitrust division in late 1986. The lengthy report recommended substantial changes in the MFJ's line-of-business restrictions. Although some of the Department's recommendations pointed in the same direction as Judge Greene's administration of the MFJ had been heading for the previous three years, others were decided departures from that direction.

Least controversial was the Department's recommendation that the catch-all restriction be removed from the MFJ. This prohibition, which kept the RBOCs out of non-telecommunications activities by restricting them to the provision of tariffed local exchange services, had been the subject of repeated waiver requests since the RBOCs had been divested on January 1, 1984.¹³¹ The Department contended that there was a minimal risk of RBOC anticompetitive conduct (e.g., cross-subsidization and discrimination) in connection with non-telecommunications activities.

The Department further recommended that the MFJ's restrictions on RBOC involvement in information services and in manufacturing be eliminated. The government took the position that regulation could control the RBOCs' ability to use their local exchange facilities to disadvantage competitors in these competitive markets. In these circumstances, the Department suggested, the categorical prohibitions contained in the MFJ were inappropriate.

As for the MFJ's most economically significant line-of-business restriction, the Department took an only slightly more cautious approach. It recommended that the interexchange restriction be

immediately lifted insofar as it prohibited the RBOCs from providing so-called "extra-regional" long-distance service—i.e., interLATA calls originating outside of their home regions—132—or from offering long-distance service to cellular or other mobile customers. Each of these interexchange proposals constituted a reversal of the Department's previous stance. Further, and more extraordinarily, the Justice Department recommended removing the interexchange restriction altogether as soon as various state public utility commissions eliminated state-imposed restrictions on entry into local telephony.133 In other words, the Department suggested that the restrictions could and should be removed even if the RBOCs continued to possess local exchange facilities that were de facto bottlenecks (but not de jure monopolies) for long-distance calls.

More than 170 entities filed papers in the district court in the briefing process that followed the government's report and recommendations. The other parties to the MFJ, of course, lined up in accordance with their economic interests. AT&T opposed removal of the restrictions on manufacturing and interexchange service (AT&T's core businesses) and took no position on the information-services and catch-all restrictions. The RBOCs supported the Justice Department's recommendation, except where the Department did not go far enough for their liking: some RBOCs thus filed their own motions for complete and immediate removal of the interexchange restriction.134 Interested non-parties were allowed to submit comments as well; these entities ranged from companies with which the RBOCs would compete if permitted to enter the closed-off lines of business (such as information service providers and long-distance companies along the lines of MCI and Sprint), to government entities such as the states and the FCC, to consumer organizations such as the Consumer Federation of America. These entities, too, lined up in accordance with their economic or political interests, although it may

132. Cf. supra text accompanying notes 114, 117, 126 (discussing extra-regional intraLATA services).


134. There was some variation among the RBOCs' positions. Compare, e.g., Motion of Bell Atlantic to Remove Portions of the Line of Business Restrictions Contained in the AT&T Consent Decree (Apr. 27, 1987) (seeking partial interexchange relief) and BellSouth Corporation's Motion for Relief Under Section II(D) of the Modification of Final Judgment (Apr. 27, 1987) (same) with, e.g., Motion of NYNEX Corporation to Remove Restrictions Imposed by Section II(D) of the Modification of Final Judgment (Apr. 27, 1987) (seeking unconditional removal of interexchange restriction and all other restrictions) and Motion of Pacific Telesis Group for Waiver of the Line of Business Restrictions (Apr. 27, 1987) (seeking complete though not unconditional removal of restrictions).
be said that the more aggressive motions to remove the line-of-business restrictions found little support.  

The Department's interexchange proposal came in for particular criticism, and the Department substantially modified the proposal in the triennial review briefing process in the Spring of 1987. As finally submitted to the court for decision, the Department dropped the proposal that the RBOCs be permitted immediately to provide extraregional long-distance services and, under certain conditions, to provide such services within their respective regions. In its place, the Department requested that the district court permit the RBOCs to provide long-distance services on cellular calls and that the court consider extraregional and in-region proposals on a case-by-case waiver basis and not in the "general" proceeding of the triennial review. The Department stood by its proposals to remove the catch-all, manufacturing, and information-services restrictions.

As a purely economic or public policy matter, the Department's proposals were rational. Vertical integration in the telecommunications industry had been lawful until the MFJ, and American telecommunications services had become the most advanced and widely available in the world. While the Department of Justice had litigated against the Bell System to end the most substantial vertical integration in the industry, and the results seemed to many (perhaps most) to be favorable, it could not be suggested that the now-prevailing view at the Justice Department—viz., that the benefits of vertical integration outweighed the costs—was simply untenable.  

135. For example, as Judge Greene stated, the request by some RBOCs for removal in toto of the interexchange restriction was "supported by almost none of the other over one hundred seventy entities that have filed papers in this proceeding except the Federal Communications Commission." United States v. Western Elec. Co., 673 F. Supp. 525, 546 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C. Cir. 1990). The FCC's position merits further note, for its stance, though unusual as among the entities participating in the triennial review, was representative of the FCC's consistent position. As Judge Greene stated, "[t]he Commission simply never liked the decree with its restrictions to begin with, and it still does not." Id. n.89. Having argued in 1982 that the line-of-business restrictions were "unnecessary and unwise," the FCC maintained that position in 1987. Id. This consistent hostility to the line-of-business restrictions helps to explain why the RBOCs fought so hard to have Congress designate the FCC as the sole final arbiter (subject to judicial review) of whether the line-of-business restrictions as carried forward into the Telecommunications Act of 1996 should be lifted. See infra notes 228, 237 and accompanying text.

138. In contrast to the triennial review, where the Department of Justice set forth and defended its views concerning the proper approach to the MFJ, the government took a
The difficulty with the Department’s proposals, however, was that the proposals were not entitled to be evaluated simply (or even primarily) as a public policy matter, as might occur in Congress. They arose as proposals to modify a consent decree. This particular consent decree, moreover, rested on a central premise that the Department’s proposals did not accept. The premise of the MFJ, simply stated, was that the combination of monopoly and competitive businesses in telecommunications presented unacceptable risks under the antitrust laws—or, in the Department’s own words, that “regulatory mechanisms . . . are not sufficient to control the long term incentives and abilities the BOCs would have to disadvantage competitors in related markets.” The MFJ thus embodied an understanding that a structural antitrust resolution of the Department’s long-running disputes with the Bell System could do what regulation could not: “achiev[e] conditions that would assure full competition in the telecommunications industry.” And it was the MFJ that was before Judge Greene.

B. The District Court’s Rulings

Judge Greene moved with dispatch to resolve the issues pending in the triennial review. Following extended oral argument, he issued a lengthy opinion in September of 1987 disposing of the different tack on another controversy that came to a head at the same time. AT&T and various non-parties had requested in 1985 that the Department enforce the MFJ’s prohibition on RBOC manufacturing of telecommunications equipment and customer premises equipment, but the Department gave no response for more than two years. When Judge Greene, who was informed in the triennial review briefing process of the Department’s apparent inaction in enforcing the MFJ, requested that the Department explain itself, the Department took the position that only fabrication—and not design or development of equipment—was subject to the manufacturing restriction. See United States v. Western Elec. Co., 675 F. Supp. 655, 656-62 (D.D.C. 1987). AT&T subsequently moved for a declaratory ruling that the manufacturing restriction prohibited RBOC design and development of telecommunications equipment, and the Department then generally acknowledged that such activities fell within the definition of manufacturing as used in the MFJ. See id. at 664-65. Judge Greene, who criticized the Department for its failure to report to AT&T and others that it would not enforce the MFJ as requested (or why it would not do so) or to request a judicial interpretation of the MFJ to the extent it was uncertain of the decree's meaning, granted AT&T’s motion. See id. at 658-68. In a significant opinion, the D.C. Circuit affirmed. See United States v. Western Elec. Co., 894 F.2d 1394 (D.C. Cir. 1990).


141. Judge Greene was generally criticized by the RBOCs for taking what they regarded as an excessive amount of time to rule on waiver requests. See infra notes 259-61 and accompanying text (discussing this criticism).
various motions of the Department of Justice and other parties. In this initial proceeding before the district court, the RBOCs and the Department would get some but not most of the relief that had been requested for the RBOCs.

Judge Greene began the opinion by recounting the history of the government's litigation against the Bell System and the evidence that the Department of Justice had introduced in United States v. AT&T. This recitation emphasized the Department’s evidence that the FCC and other regulators had proved incapable of preventing the Bell System from using its BOCs to facilitate cross-subsidization and discrimination in order to undermine competition or discourage potential competition in the long-distance and manufacturing industries. The opinion discussed at length section VIII(C), the MFJ's provision governing removal of the line-of-business restrictions, which provided that an RBOC could receive relief "'upon a showing... that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.'" Judge Greene rejected what he termed the "curious observation [of one of the RBOCs] that since the actual parties to the decree have agreed to the elimination of the information services restriction, the Court should implement that agreement... without regard to the section VIII(C) requirements." The main point in Judge Greene's discussion of section VIII(C), however, was his rejection of RBOC claims—not made by the Department of Justice—that "they do not retain their monopoly power over the local bottlenecks." Toward the end of the discussion, Judge Greene stated as follows:

The complete lack of merit of [the RBOCs'] arguments that economic, technological, or legal changes have substantially eroded or impaired the Regional Company bottleneck monopoly power is demonstrated by the fact that only one-tenth of one percent of inter-LATA traffic volume, generated by one customer out of one million, is carried through non-Regional Company facilities to reach an interexchange carrier. To put it another way, 99.9 percent of all interexchange traffic, generated by 99,9999 percent of the nation's telephone customers, is today carried entirely or in some part by the Regional Companies (or their equivalents in the territories served by the independents). The Department of Justice found only twenty-four customers in the entire United States who managed to

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143. Id. at 532 (quoting MFJ § VIII(C)).
144. Id. at 534 & n.33.
145. Id. at 537.
deliver their interexchange traffic directly to their interexchange carriers, bypassing the Regional Companies.\textsuperscript{146} Judge Greene concluded that "[i]t is clear, therefore, and the Court finds, that no substantial competition exists at the present time in the local exchange service, and that the Regional Companies have retained control of the local bottlenecks."\textsuperscript{147}

This conclusion drove Judge Greene's disposition of the pending motions. The court denied all the motions for alteration of the interexchange restriction. These included several different proposals: the request by several of the RBOCs that the restriction be lifted altogether; the Justice Department's original proposal (withdrawn by the Department but still asserted by some RBOCs) that would have permitted the RBOCs to provide extraregional interexchange services; the request that cellular and other wireless services be exempted from the interexchange restriction; and the Department's proposal that the restriction be retained but waivers granted "as soon as state and local regulation is lifted with respect to a particular area or locality."\textsuperscript{148}

Regarding the last proposal, Judge Greene stated, "[t]he Court would be constantly reviewing requests for removal of interexchange and information services restrictions on a state-by-state, possibly county-by-county, basis, in order to determine whether local regulation had changed sufficiently to allow such removals in the particular area."\textsuperscript{149} This would be "detailed regulation of the Regional Companies with a vengeance" and would be incompatible with the court's goal of "phasing out or reducing its 'oversight' responsibilities consistently with its responsibilities under the decree."\textsuperscript{150} In short, the long-distance restriction stood unmodified.

The court also denied the requests to remove the MFJ's manufacturing restriction.\textsuperscript{151} Judge Greene concluded that, in the terms of section VIII(C), there was a "substantial possibility" that the RBOCs would engage in anticompetitive activity if they were permitted to enter the manufacturing market. He particularly noted that "[t]he Department of Justice concedes that if the restriction were lifted, each of the Regional Companies would satisfy all or nearly all of its equipment needs from its own manufacturing affiliate."\textsuperscript{152} But Judge Greene also ranged beyond a strict antitrust analysis to discuss

\textsuperscript{146} Id. at 540 (citations and footnotes omitted).
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 544 (citing Response of the United States to Comments on Its Report and Recommendations Concerning the Line-of-Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment, at 9, 28, 48 (Apr. 27, 1987)).
\textsuperscript{149} Id. at 545.
\textsuperscript{150} Id.
\textsuperscript{151} See id. at 552-62.
\textsuperscript{152} Id. at 556 (emphasis removed).
such matters as the effect of RBOC entry on innovation in the manufacturing market, and he later engaged in a wide-ranging discussion concerning the effect of any RBOC relief from the line-of-business restrictions on various "public policies," among which he numbered the protection of local telephone customers from high rates, the goal of universal telephone service, and, with specific regard to the manufacturing restriction, the United States' balance of trade.\(^{153}\)

Judge Greene also essentially retained the restriction on RBOC provision of information services.\(^{154}\) This ruling, which the D.C. Circuit would later require him to reconsider, flowed from Judge Greene's conclusion that the RBOCs had not demonstrated any "'significant technological or structural changes' that would substantially reduce the dependence of information service providers on the local exchange networks."\(^{155}\)

Finally, Judge Greene removed one line-of-business restriction: the so-called catch-all restriction, which limited the RBOCs to providing local exchange service and access service for connecting providers.\(^{156}\) Judge Greene observed that, unlike the "core restrictions" discussed above, the catch-all restriction had been imposed without any evidence of Bell System misconduct, for the 1956 Final Judgment had similarly restricted the Bell System and this restriction merely had been carried over into the MFJ. He further noted that his expectation in 1982 that the "Regional Companies would not have any substantial interest in entering unrelated businesses, and that the line-of-business waiver requests to enter non-telecommunications markets would therefore be rare," turned out to be erroneous.\(^{157}\) Rather, "dozens upon dozens of far-reaching requests were filed almost immediately after divestiture," and the court had granted every one of the 160 requests on which the Justice Department had conducted a review and submitted a favorable recommendation.\(^{158}\) Judge Greene concluded that it was proper to

\(^{153}\) See id. at 583-87.

\(^{154}\) The restriction was lifted only insofar as was necessary "to enable the Regional Companies to acquire and operate the infrastructure necessary for the transmission of information services generated by others." Id. at 587; see also United States v. Western Elec. Co., 714 F. Supp. 1 (D.D.C. 1988) (subsequent opinion implementing ruling on information transmission services by adding a section VIII(K) to the MFJ); United States v. Western Elec. Co., 690 F. Supp. 22 (D.D.C. 1988) (denying motions to amend the 714 F. Supp. 1 decision).


\(^{156}\) See id. at 597-99.

\(^{157}\) Id. at 598.

\(^{158}\) Id.
remove the catch-all restriction altogether, electing not even to retain the four conditions upon which he had previously granted waivers of the restriction.159

C. The Court of Appeals' Decision and Partial Remand

Before offering any assessment of Judge Greene's triennial review ruling, it is appropriate to describe the D.C. Circuit's more authoritative legal assessment. After all, most of Judge Greene's critics have contended that he was a one-man regulatory agency who seized upon powers outside of the judicial role—"Judge Greene Versus the World" is how one editorialist of the day memorably termed it.160 The court of appeals' decision, though providing evidence on both sides of that contention, largely reveals the criticism's inaccuracy.

The D.C. Circuit did not decide the triennial review appeal until some two and one-half years after Judge Greene's initial ruling.161 When it did, it upheld the bulk of the judgment below—the retention of the interexchange and manufacturing restrictions and the removal of the catch-all restriction—and it vacated and remanded the retention of the information-services restriction. The court of appeals' decision is noteworthy not only for its judgment but also for some of its comments.

First, the court of appeals addressed the section VIII(C) standard for removal of the line-of-business restrictions. The court emphasized a number of points: that section VIII(C) required a "substantial possibility, [not] a mere theoretical possibility," that the RBOCs would impede competition in the market they sought to enter; that the RBOCs could not "impede competition" within the meaning of

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159. See id. at 598-99; supra note 108 and accompanying text (summarizing these conditions).

160. Bruce W. Radford, Judge Greene Versus the World, PUB. UTIL. FORT., Apr. 26, 1990, at 4. Judge Greene's critics felt so strongly that some strayed beyond the bounds of good taste. See, e.g., Heymann, supra note 10, at 12 (recounting that in November 1987 "an executive of a top U.S. publishing company, when asked what could be done to convince Greene to free the regionals from the constraints of the AT&T agreement, told a large audience, 'Well, they don't allow lynching'").

section VIII(C) "unless the entering BOC will have the ability to raise prices or restrict output" in that market; and that it was the market that the RBOCs sought to enter, not the local exchange market, that mattered. 162 While these points—or at least the first and third—may seem rather self-evident explications of the section VIII(C) text, they certainly were clarifications or even corrections of the standard. For example, under this interpretation, the district court erred in focusing on cross-subsidization to the extent that the court was concerned that the RBOCs would overcharge local ratepayers (as opposed to being concerned that they would use monopoly revenues to price below cost in competitive markets).

Second, the reviewing court rejected claims that Judge Greene should have deferred to the Department of Justice's and FCC's views in conducting the section VIII(C) analysis, but the court nevertheless suggested that in the future the judge should pay closer attention to the Department's views. 163 The court of appeals acknowledged having some sympathy for Judge Greene's attitude toward the Justice Department's change of position on the line-of-business restrictions—given that "[w]ith little warning or explanation, the DOJ completely altered its stance [since divestiture] and is now generally hostile toward the restrictions"—and it had no doubt that the government's position would "undo much of the decree after only three years' time." 164 The reviewing court wrote, however, that the district court should take into account the Justice Department's "comparative advantage" in "economic analysis and predictions of market behavior" and, in particular, in evaluating the effectiveness of the FCC's regulations in controlling RBOC conduct. 165

In the context of the triennial review, the foregoing discussion by the court of appeals tracked the RBOCs' positions. But not all of the court of appeals' exegesis of section VIII(C) was helpful for the RBOCs. The court endorsed Judge Greene's fundamental position—expressed early after divestiture when the waiver requests were flooding in 166 and reiterated in the triennial review proceeding 167—that the RBOCs ordinarily had to show a change in circumstances to obtain relief from the MFJ's restrictions:

Under section VIII(C) . . ., the BOCs must establish that something is different now from the time when the decree was entered so that they can no longer use their monopoly power to impede competition. Obviously, if all conditions and assumptions

163. See id. at 297.
164. Id. at 298.
165. Id. at 297-98.
166. See supra notes 99-106, 122 and accompanying text.
167. See supra notes 145-47 and accompanying text.
remain the same now as when the decree was entered, no relief can be due under section VIII(C).168 These changed circumstances need not be unforeseen changes, the court emphasized, but the burden was on the RBOCs to prove the change.169

Finally, the court of appeals criticized the district court for "stray[ing] beyond the competitive analysis mandated by section VIII(C) when it considered the impact of removing the restrictions on various public policies, including the welfare of local ratepayers, innovation in the manufacturing market, the goal of universal telephone service, first amendment values, and the United States' position in international trade."170 Although the D.C. Circuit took Judge Greene at his "somewhat unusual" word that, notwithstanding his discussion of these issues, they "did not have an actual impact on the Court's decisions,"171 the court of appeals felt it important to make clear that, however relevant to the "public interest" standard under which Judge Greene had been required to evaluate the MFJ in 1982,172 these public policies were irrelevant to the section VIII(C) analysis.

After this extended analysis of section VIII(C), the court of appeals turned to reviewing the district court's judgments in the triennial review. It affirmed the lower court's refusal to eliminate the MFJ's interexchange and manufacturing restrictions. As to the former, it was more sympathetic than Judge Greene to the argument that FCC regulations promulgated since the MFJ had been entered would reduce the RBOCs' ability to discriminate against competing long-distance carriers and cross-subsidize long-distance service from local operations. But it noted that those regulations operated on the premise that the RBOCs would not be involved in the long-distance market and, in particular, were not designed to account for any RBOC "violations of the equal access policy [which] are extremely difficult to detect and remedy."173 And as to the latter, it noted that neither the RBOCs nor the Department of Justice had segmented the manufacturing market into different markets for telecommunications equipment (where the argument that the RBOCs would foreclose competition was strong) and customer premises equipment (where the foreclosure argument was weaker), so the RBOCs could not be

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169. See id. at 299.
170. Id.
171. Id. at 300 n.15 (quoting Western Elec. Co., 673 F. Supp. at 580).
172. See supra note 91.
173. Western Elec. Co., 900 F.2d at 301 (citing United States v. Western Elec. Co., 846 F.2d 1422, 1424-25 (D.C. Cir. 1988)).
said to have met their burden under section VIII(C).\textsuperscript{174}

The court of appeals' most interesting ruling was its vacatur and remand of Judge Greene's retention of the information-services restriction.\textsuperscript{175} To reach this result, the D.C. Circuit held that the section VIII(C) test did not apply. The court of appeals noted that AT&T and the United States—the other parties to the MFJ besides the RBOCs—had not opposed removal of the information-services restriction.\textsuperscript{176} The court concluded that, in those circumstances, the motions to remove the information-services restriction were uncontested by any party and should have been considered under section VII of the MFJ, which provided no standard itself but was governed by the common law of consent decree modifications. That common law permits uncontested modification "even without a showing of a 'change' of any kind so long as the resulting array of rights and obligations is 'within the reaches of the public interest' today."\textsuperscript{177} "Because the 'public interest' test must take its meaning from the nation's antitrust laws," the D.C. Circuit finally stated, "the appropriate question under section VII is whether the proposed modification would be certain to lessen competition in the relevant market."\textsuperscript{178}

This ruling had two consequences. The immediate one was that the court of appeals remanded the question of the continuing propriety of the information-services restriction to the district court for consideration under the new standard. The requirement that the district court remove the restriction unless it could be "certain" that doing so would lessen competition in the information-services market set a dramatically lower bar than section VIII(C)'s antitrust standard. On remand, Judge Greene removed the restriction in accordance with the lower standard.\textsuperscript{179}

\textsuperscript{174} See id. at 301-05.

\textsuperscript{175} Although the D.C. Circuit styled this as a reversal, see id. at 289, 309, 311, its effect was that of a vacatur. While distinctions between the two types of orders may blur together in some instances, the salient point is that the district court was required to reconsider its ruling under a different legal standard.

\textsuperscript{176} It was not clear that AT&T had agreed to the removal, but the D.C. Circuit thought it dispositive that AT&T (and the Department of Justice) had not opposed such action. See id. at 305 & n.27.

\textsuperscript{177} Id. at 306 (quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)) (internal quotation omitted).

\textsuperscript{178} Id. at 308.

\textsuperscript{179} The information-services remand proceeding in the triennial review was a massive undertaking itself. Not only did the RBOCs file new supporting papers and affidavits in support of their removal request, but interested entities (such as newspapers and other information-service providers) submitted what Judge Greene termed "voluminous evidence in the form of affidavits and exhibits." United States v. Western Elec. Co., 767 F. Supp. 308, 311 (D.D.C. 1991), aff'd, 993 F.2d 1572 (D.C. Cir. 1993). (Having been
It was clear that Judge Greene would have greatly preferred to maintain the information-services restriction. He detailed at length the antitrust-related reasons that the restriction should be retained and summed up this discussion by stating that “were the Court free to exercise its own judgment, it would conclude without hesitation that removal of the information services restriction is incompatible with the decree and the public interest.” His opinion lifting the restriction sought to place the entire onus for the removal on the D.C. Circuit. It appears further to have been written in such a way that the D.C. Circuit on appeal from the remand would have been required to reverse Judge Greene’s second decision—and reinstate the restriction—if it concluded that to retain the restriction a court did not have to be absolutely “certain” that the RBOCs would impede competition in the information-services market. The ruling thus might be termed “Judge Greene’s remand to the D.C. Circuit,” but the court of appeals was unmoved. It affirmed the removal of the restriction.

admonished by the D.C. Circuit in its triennial review opinion to consider carefully the Department of Justice’s predictive economic analysis, Judge Greene could not resist noting that the Justice Department had submitted no additional affidavits or other evidence. See id. at 313 (noting that “[i]t may be regarded as odd that, on a remand for the specific purpose of the compilation of an evidentiary record, the Department produced no evidence whatsoever”). Notwithstanding the substantial amount of disputed evidence in this proceeding, Judge Greene ruled reasonably expeditiously, resolving the matter 16 months after the D.C. Circuit’s triennial review decision and only six months after briefing was completed in the remand proceeding. Compare id. (decided July 25, 1991) with, e.g., Reply of the United States in Support of Motions for Removal of the Information Services Restriction (Jan. 18, 1991).


182. See United States v. Western Elec. Co., 993 F.2d 1572 (D.C. Cir. 1993). The D.C. Circuit’s opinion was written by Judge Stephen Williams, who consistently voted for the RBOCs in MFJ appeals. See United States v. Western Elec. Co., 969 F.2d 1231, 1243-48 (D.C. Cir. 1992) (Williams, J., dissenting) (disagreeing with ruling that held that AT&T’s opposition to RBOC waiver request triggered the section VIII(C) standard); United States v. Western Elec. Co., 12 F.3d 225, 237-44 (D.C. Cir. 1993) (Williams, J., dissenting) (disagreeing with ruling that the MFJ prohibited an arrangement whereby an RBOC would fund a separate company involved in a prohibited line of business and take back a
The other consequence of the court of appeals’ triennial review ruling that the public interest standard applied to uncontested motions to modify the MFJ—i.e., motions not opposed by a party—was to dangle in front of the RBOCs the tantalizing possibility that section VIII(C)’s high standard would apply only if the Justice Department opposed a modification request. In discussing section VIII(C) in its triennial review opinion, the court of appeals had dropped a footnote suggesting that a request by the Justice Department to modify the MFJ might be evaluated under the low public interest standard—regardless of the opposition of AT&T, the other party to the MFJ. 183 The court was equivocal on the matter, but the hint was sufficient to ensure that the RBOCs would pursue the point. By this time, AT&T had become the main opponent of RBOC requests under section VIII(C) that involved the interexchange and manufacturing markets, and mooting AT&T’s opposition would be a huge coup for the RBOCs with enormous practical implications. This possibility would be played out after the triennial review, and there should therefore be no misconception that the triennial review was the last word even on section VIII(C).

IV. Beyond the Triennial Review

The triennial review, begun in 1987 and primarily resolved on appeal in 1990, was the only full-scale assault by the RBOCs on the MFJ for almost its entire duration, and the only one to be litigated to a final ruling. 184 Yet the RBOCs did not merely acquiesce in the continuation of the manufacturing and interexchange line-of-business restrictions. Rather, in the years following 1990, the RBOCs

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183. See United States v. Western Elec. Co., 993 F.2d at 1580-81. It is thus possible that, if the MFJ had not been terminated after passage of the Telecommunications Act, these regulatory concepts would have found application to any RBOC attempt at removal of the manufacturing and long-distance restrictions. On the other hand, these analyses were all set forth in the context of an uncontested motion to modify the MFJ (which the D.C. Circuit had held in the triennial review appeal was subject only to the low “public interest” standard), and it is therefore not clear that these concepts would have been deemed relevant to a section VIII(C) analysis. But it is not too much speculation to say that the concepts would have been largely rejected as inapposite by Judge Greene or that they would have been deemed dispositive by Judge Williams if he had sat on any appeal, and the matter would then have come down to views of the other D.C. Circuit judges who heard such an appeal.

184. In 1994, four of the RBOCs moved to vacate the MFJ. See infra text accompanying notes 205-08. The Telecommunications Act of 1996 intervened before the district court ruled on this motion. See infra text accompanying notes 230-39.
mounted two types of efforts directed against these restrictions. First, the RBOCs repeatedly sought entry into "limited" portions of the interexchange business, although several of these attempts would have provided legal precedents supporting elimination of even larger chunks of the remaining restrictions. Second, the RBOCs increasingly petitioned Congress for relief from the MFJ's restrictions.

A. Litigation in the 1990's

Although its name suggests otherwise and the Department of Justice had originally intended differently, the triennial review was—if a lengthy process may be so-called—a one-time event. There was no second triennial review. In 1989, the Department of Justice informed Judge Greene that it intended to postpone the next filing of a triennial review report until the appeals in the first triennial review were concluded—for the D.C. Circuit's eventual ruling would "influence, if not control, the factual and legal issues that should be considered by the Department" in the next comprehensive review.\(^{185}\)

In response, Judge Greene made clear that the Department had "complete discretion" with regard to whether and when to conduct such a review.\(^{186}\) He noted that "[t]he triennial review was the Department's own idea, and it was not required as such by the Court."\(^{187}\) But that was not all that Judge Greene had to say:

Beyond that, the need for such a review may not be as great now as it appeared to be when the Department's suggestion was first made, for two reasons. [¶] First, at the time, the Court and the Department envisioned a comprehensive review every three years, interspersed with an occasional waiver request. What has occurred however, is a process of almost continuous review generated by an incessant stream of regional company motions and requests dealing with all aspects of the line of business restrictions.... No doubt, in view of these motions and decisions, the need for an in-depth examination every three years is far less than it would have been had the parties and the Court left these matters essentially unreviewed for that period of time. [¶] Second, on the significant issues implicated in the triennial review proceedings, the Department has been simply and predictably supporting regional company positions, advancing by and large the same arguments they do, with the same underlying reasoning and assumptions. To that extent, too, the intended value of the Department's triennial review reports—as being those of a detached, unaligned observer

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186. Id. at *5.
187. Id. at *1-*2 (citation omitted).
providing assistance to the Court of a kind that the directly interested parties do not—has been diminished.\footnote{188}{Id. at *2-*4 (footnote omitted).}

Judge Greene's dissatisfaction with the way the waiver process had evolved since the MFJ had been entered was clear. Whether or not Judge Greene was correct in criticizing the Justice Department for its alignment with the RBOCs, this statement does reflect the essential characteristics of litigation under the MFJ after the D.C. Circuit's 1990 triennial review decision. First, the RBOCs continued to file a substantial number of requests for waivers of the remaining line-of-business restrictions. To give just a few examples, these included requests for waivers of the interexchange restriction to deploy common channel signalling without regard to LATA boundaries,\footnote{189}{See United States v. Western Elec. Co., 131 F.R.D. 647, 650-52 (D.D.C. 1990) (denying blanket waiver request), \textit{reconsid. denied}, 1990 U.S. Dist. LEXIS 12153 (D.D.C. Sept. 6, 1990), \textit{aff'd}, 969 F.2d 1231 (D.C. Cir. 1992). A subsequent request, seeking not a blanket waiver but a waiver for certain specified LATAs, was approved. See United States v. Western Elec. Co., Civ. No. 82-0192 (D.D.C. Nov. 10, 1992).} to provide ordinary 800 and other interexchange services that would be used to access one-way paging systems and to transmit messages to and from associated voice storage and retrieval systems,\footnote{190}{See \textit{Motion of Pacific Telesis Group for a Waiver to Provide InterLATA Paging Origination and Access to Voice Storage and Retrieval Services Provided in Connection with Paging Services} (Dec. 31, 1992).} and to provide, through foreign telecommunications entities, service between foreign countries and the United States.\footnote{191}{See, e.g., United States v. Western Elec. Co., 1991-2 Trade Cas. (CCH) ¶ 69,604 (D.D.C. Oct. 9, 1991) (waivers to permit RBOCs to provide Australian "half" of international telecommunications services between the United States and Australia); United States v. Western Elec. Co., 1991-2 Trade Cas. (CCH) ¶ 69,605 (D.D.C. Oct. 9, 1991) (similar waiver with regard to Venezuela). The RBOCs subsequently moved for and were granted a "generic" international waiver. See United States v. Western Elec. Co., Civ. No. 82-0192 (D.D.C. Feb. 4, 1993).} Second, as Judge Greene observed, these waiver requests were generally supported by the Department of Justice. While neither the RBOCs nor the Department of Justice could essay any broadbased assault on the long-distance and manufacturing restrictions unless they could demonstrate that "something [was] different... from the time when the decree was entered,"\footnote{192}{United States v. Western Elec. Co., 900 F.2d 283, 298-99 (D.C. Cir. 1990); \textit{see supra} text accompanying note 168.} the Department was supportive of what RBOC opponents—using terms that Judge Greene and the D.C. Circuit had earlier invoked—called "piecemeal waivers" or "partial repeals" of the MFJ.\footnote{193}{See, e.g., United States v. Western Elec. Co., 673 F. Supp. 525, 545 (D.D.C. 1987), \textit{aff'd in part, rev'd in part}, 900 F.2d 283 (D.C. Cir. 1990); \textit{Western Elec. Co.}, 900 F.2d at 309 n.29. The Justice Department, too, had long argued against partial repeals of the MFJ,}
In this regard, the D.C. Circuit’s clarification of the section VIII(C) standard in the triennial review provided guiding principles for consideration of such waiver requests. Specifically, the RBOCs had to demonstrate that each waiver request involved a separate antitrust “submarket” of the interexchange or manufacturing markets, for the RBOCs could not assert that they lacked the power to impede competition in those general markets. There thus was a settled legal standard under which to evaluate the RBOC requests.

Notably, there would have been no need for application of the section VIII(C) standard to many of these waiver requests if AT&T had not adamantly opposed RBOC entry into long distance and manufacturing. The question of the legal significance of AT&T’s position on a waiver request provided the most important challenge to the line-of-business restrictions following the triennial review. The RBOCs attempted to persuade the D.C. Circuit that only the RBOCs’ and the Department of Justice’s positions should be pertinent to the question of whether the demanding section VIII(C) standard or, instead, the very lenient section VII “public interest” standard applied to RBOC waiver requests. Specifically, the RBOCs argued that a waiver request should be deemed “uncontested”—and thus subject to the “public interest” standard—so long as the RBOCs and the Department of Justice supported or did not oppose the waiver. The Department joined in this argument.

In a significant opinion, a divided panel of the D.C. Circuit rejected the RBOCs’ and the government’s argument and held that AT&T’s opposition to a waiver request was enough to trigger the section VIII(C) standard.194 The RBOCs had picked up on the footnote in the triennial review opinion suggesting that the Justice Department’s support perhaps should cause a waiver request to be considered under the low public interest standard,195 but the court of appeals now rejected the implication of its earlier statement. Noting that the parties had never previously proposed such a restrictive view of AT&T’s rights under the MFJ and in fact had taken positions inconsistent with such a view, the D.C. Circuit concluded that the MFJ “gives AT&T the right, as a party to the decree, to assert its warning that such waivers required drawing artificial “lines [that] have no basis in logic, economics, or technology” and that will be “very difficult to maintain over time, and will be subject to enormous erosive pressures.” Response of the United States to Ameritech’s Motion for Clarification and Waiver of the Decree Regarding the Provision of Shared Telecommunications and Other Services, at 30 (June 29, 1984).

194. See United States v. Western Elec. Co., 969 F.2d 1231, 1240 (D.C. Cir. 1992). This case occasioned a rare division between Judge Laurence H. Silberman, who wrote the majority opinion, and Judge Stephen F. Williams, who dissented. Cf. supra note 182 (discussing Judge Williams’s attitude toward the MFJ).

195. See supra note 183 and accompanying text.
objection to the BOCs’ proposal and thus to invoke section VIII(C).”\textsuperscript{196} The 2-1 majority stated that “[i]t should be remembered that section VIII(C) does not give AT&T the power to veto truly pro-competitive line-of-business modifications, only to block those changes that are quite possibly, though not certainly, anti-competitive.”\textsuperscript{197} But no one doubted that the RBOCs’ last major hope for judicial removal of the line-of-business restrictions was now gone.\textsuperscript{198}

The pattern of relatively small-scale RBOC waiver requests (judged against the size of the waivers or, more accurately, the modifications that had been sought in the triennial review) predominated for some time. An example of such a waiver request may be instructive. In 1992, the RBOCs moved for a waiver of the MFJ to provide long-distance services in connection with the cellular and other wireless services that the companies offered. In other words, the RBOCs wanted the authority to provide to end-users not only the local component of a cellular long-distance call, but also the long-distance component. As with many things in telecommunications, this request was small-scale only in relation to other aspects of the telecommunications business. The long-distance component of the wireless business itself amounted at least to hundreds of millions of dollars, but was dwarfed by the billions of dollars at stake in the larger long-distance industry.

The other parties to the MFJ divided along lines that by then had become predictable. AT&T opposed the request, contending that the RBOCs had failed to demonstrate that there was a discrete market for interexchange wireless calls and that a waiver thus would permit the RBOCs in fact to enter the general interexchange market. In AT&T’s judgment, the RBOCs had therefore failed to demonstrate that there was no substantial possibility that they could impede competition in the market they sought to enter, as section VIII(C) required. AT&T also argued that the RBOCs had bottleneck control over the facilities necessary to transport calls from cellular systems to long-distance carriers (more specifically from so-called “mobile telephone switching offices”—the heart of a cellular system—to the long-distance companies’ points-of-presence). The RBOCs could use

\textsuperscript{196} Western Elec. Co., 969 F.2d at 1240.
\textsuperscript{197} Id.
\textsuperscript{198} The significance of the RBOCs’ and the Department of Justice’s argument was sufficiently clear that near the beginning of the oral argument in the D.C. Circuit, Judge Silberman noted that “[t]he argument is really a big enchilada, indeed,” because it would permit RBOC entry into the long-distance market without any showing that the RBOCs were unlikely to impede competition in that market: “That’s a big, big, big, big case.” United States v. Western Elec. Co., No. 90-5333 et al. (D.C. Cir.), Transcript of Proceedings, at 6-7 (Jan. 21, 1992).
this bottleneck control, AT&T suggested, to impede competition in cellular services in the same ways they could impede any long-distance service.

The Department of Justice, after a lengthy investigation, supported the RBOCs' request for authority to provide long-distance cellular services. As had now become typical of its approach, the Department insisted that a series of conditions be attached to the proposed waiver. The Department’s conditions included the following: an injunction against discrimination; a requirement that the RBOCs employ a separate subsidiary to provide the long-distance services; the development of an equal access plan; a requirement that the RBOCs sell only long-distance service purchased from other providers (and purchase no more than 45 percent from any one source); and an obligation on the RBOCs to unbundle their local and long-distance cellular services and market them separately. Conversely, its rejection of Quagmires I and II in the early 1980's, the Department of Justice generally responded to post-triennial-review waiver motions by attempting to design a regulatory scheme to support at least a major portion of the RBOC waiver request.

Although Judge Greene granted the RBOCs’ motion, he attached not only most of the conditions requested by the United States but also an additional condition. Specifically, he permitted the RBOCs to provide long-distance cellular services only in areas where the RBOCs' cellular competitor had an alternative to RBOC transport for carriage of a call from the competitor’s mobile telephone switching office to the long-distance companies’ points-of-presence in the area. This was vintage Judge Greene. On the one hand, he appeared to be giving the RBOCs some of the relief that they sought. On the other hand, this additional condition was so significant that it likely would have amounted to a denial of relief in most instances.


200. Judge Greene handed down his decision a little more than 10 months after the RBOCs' motion had been presented to the court. Compare id. (decided April 28, 1995) with Motion of the Bell Companies for a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Services Across LATA Boundaries (June 20, 1994). As set forth in the text, the motion had been pending in the Justice Department for a substantial period of time beforehand.


202. It is thus not surprising that the RBOCs appealed Judge Greene's order. The appeal was dismissed and the order vacated when passage of the Telecommunications Act of 1996 rendered the dispute moot. See United States v. Western Elec. Co., 1996 U.S. App. LEXIS 7285, at *3 (D.C. Cir. Feb. 16, 1996); see also infra note 231 and accompanying text (noting Act's issuance to RBOCs of immediate authority to provide cellular long-distance services).
This is not a criticism of Judge Greene. Judge Greene appeared receptive to the Justice Department's suggestion that in certain instances regulation could tamp down the RBOCs' ability to cross-subsidize their competitive businesses out of local exchange revenues. He remained concerned, however, with the central issue of the RBOCs' bottleneck which, as he recalled in his opinion, was the premise upon which the interexchange restriction of the MFJ had been imposed. Although the particular bottleneck to which Judge Greene pointed was, he acknowledged, somewhat different from the bottleneck that had prompted the MFJ,203 his reasoning was entirely consistent with the MFJ's premises. After all, the Department of Justice had argued in 1982 that, even quite apart from the substantial costs that it would impose on all involved, a regulatory alternative could not "approach even remotely the effectiveness of the proposed modification [of final judgment] in achieving conditions that would assure full competition in the telecommunications industry."204

The RBOCs ultimately presented one last courtroom assault on the entirety of the remaining line-of-business restrictions.205 On July 6, 1994, four RBOCs filed a motion to vacate the MFJ.206 They argued that the premises on which the MFJ had been entered were no longer valid. Specifically, they contended that a combination of regulatory developments and technological changes in local exchange markets since divestiture meant that the RBOCs no longer could leverage into the competitive interexchange and manufacturing markets. Judge Greene referred the motion to vacate to the Department of Justice so that it might investigate and prepare a recommendation.

205. In addition to the requests described above, there were, of course, numerous other motions filed with Judge Greene after the triennial review (as well as before). These included, for example, run-of-the-mill requests for slight changes in LATA boundaries. Cf. Huber, supra note 8, at 99. The RBOCs and the Department of Justice also continued from time to time to file requests for declaratory rulings that the MFJ did not prohibit some activity. One of the more potentially far-reaching of these was the request for a ruling that the MFJ did not bar an arrangement in which an RBOC would fund the research-and-development activity of a separate corporation in exchange for a royalty on any sales to third parties of products that the corporation developed on the basis of the RBOC funding. The D.C. Circuit agreed with Judge Greene that this arrangement would involve the RBOCs in prohibited lines of business via an "affiliated enterprise" in violation of section II(D) of the MFJ. See United States v. Western Elec. Co., 12 F.3d 225 (D.C. Cir. 1993). The court concluded that the MFJ "cover[ed] all arrangements in which the BOCs share directly in the revenues of entities engaged in prohibited businesses." Id. at 227.
206. Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and Southwestern Bell Corporation to Vacate the Decree (July 6, 1994).
The motion to vacate was a substantial undertaking. The RBOCs, consistent with the parties’ post-triennial-review sophistication on these matters, had retained numerous experts and filed many affidavits in support of the motion. AT&T and various non-parties would do the same in opposing the motion before the Justice Department. The Department commenced an extensive investigation of its own. But neither the Department, nor Judge Greene, nor even the D.C. Circuit was the RBOCs’ primary intended audience. There was virtually no chance that Judge Greene would grant the motion, and although the D.C. Circuit might present a more favorable reception, the RBOCs had lost almost every assault in that court on the interexchange and manufacturing restrictions. The motion was likely intended primarily to keep attention on the RBOCs’ arguments against the line-of-business restrictions while the RBOCs focused their efforts on the one branch of the federal government that had had little to do with the MFJ—or, for some time, with telecommunications policy at all. The RBOCs turned to Congress.

B. Legislation

Congress had long been unable to form a consensus concerning what, if any, legislation it should adopt in the area of telecommunications regulation. This state of affairs antedated even the MFJ itself. In the late 1970’s and early 1980’s, Congress stalemated over whether legislatively to address the “AT&T problem” which was then in litigation between AT&T and the Department of Justice. When that problem was solved in 1982—not by Congress, but by the MFJ—the new problem became whether to enact legislation overruling the MFJ’s line-of-business restrictions. This “RBOC problem,” as it might be termed, resulted in an even longer congressional stalemate.

207. Indeed, one of the four movants (Bell Atlantic) subsequently withdrew from the motion, complaining that this was necessary “to avoid further punitive discovery by the Department.” Notice of Withdrawal, at 1 (May 2, 1995).

208. See infra notes 244-48 (citing cases).


210. See Kearney & Merrill, supra note 13, at 1381 (“[t]he most that can be said of Congress in this regard is that it resisted—or at least did not act upon—the Bell System’s pleas that it be given protection from the Department of Justice’s antitrust suit that led to divestiture (or the RBOCs’ subsequent pleas that the MFJ’s line-of-business restrictions be lifted”). Although the proposal did not focus on the line-of-business restrictions, it is an interesting footnote that the ink was barely dry on the MFJ when influential members of Congress began calling for legislation to change it. See, e.g., TEMIN, supra note 5, at 283-87; Caroline E. Mayer, AT&T Pact Changes Offered; Wirth Calls for Changes in U.S.
Congress's failure to act was not from want of RBOC lobbying efforts or from an absence of sympathetic ears in Congress. As early as 1986, the RBOCs had persuaded some of Congress's most influential members that the FCC, and not the district court, should have authority over the RBOCs' entry into long distance, manufacturing, and other businesses. In particular, Bob Dole, then the majority leader of the United States Senate, introduced legislation in 1986 to accomplish precisely such a transfer of jurisdiction. This would have been far more than a procedural victory for the RBOCs, for the FCC opposed the line-of-business restrictions from the beginning.

Although the Reagan Administration supported the Dole bill, the bill died in committee.

These early efforts marked the beginning of a decade-long effort to free the RBOCs from the MFJ's line-of-business restrictions. Other proposals were made in the late 1980's and early 1990's that would variously have removed jurisdiction from Judge Greene or granted at least service-specific relief to the RBOCs.

Substantial efforts in Congress picked up steam once the D.C. Pact with AT&T, WASH. POST, Mar. 23, 1982, at C7; Merrill Brown, Spotlight Glows on Wirth As Leader in the Bell Debate, WASH. POST, Jan. 31, 1982, at Fl. The entire story of Congress's attempts for more than a decade to address the "RBOC problem" would appear to call out for full-blown treatment by a political scientist. Some of the better popular pieces that tell part of the story have appeared in unlikely places. See, e.g., David J. Lynch, Lobbyists' Tug of War; Strategic Errors Offset Contributions, USA TODAY, Oct. 16, 1995, at 1B; Mike Mills, The New Kings of Capitol Hill; Regional Bells Use Lobbying Clout to Push for New Markets, WASH. POST, Apr. 23, 1995, at H1; Stuart Taylor, Jr., Fight for the Future; Part I: Getting the Ball to Congress, THE AMERICAN LAWYER, April 1992, at 50; Stuart Taylor, Jr., Fight for the Future; Part II: Invading the Capitol, THE AMERICAN LAWYER, May 1992, at 56.

To be sure, other entities lobbied, too, as the discussion below makes clear. See infra text accompanying notes 227-29. The initial focus must be on the RBOCs because it was they who sought a change in the status quo.

211. To be sure, other entities lobbied, too, as the discussion below makes clear. See infra text accompanying notes 227-29. The initial focus must be on the RBOCs because it was they who sought a change in the status quo.

212. See supra note 135.

213. The next Congress also failed to act on a proposal that would have allowed the RBOCs to enter the information services and telecommunications equipment manufacturing businesses, subject to FCC regulations. See H.R. 2140, 101st Cong., 135 Cong. Rec. H1434 (daily ed. Apr. 27, 1989) (introduction of so-called "Swift-Tauke" bill, some version of which was regularly introduced in the late 1980's); see also Richard A. Hindman, Comment, The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies, 38 CATH. U. L. REV. 471, 504 n.236 (1989) (describing MFJ-related legislative efforts in late 1980's).


Circuit's decisions in the 1990 triennial review appeal and the 1992 common channel signaling appeal dashed any hope for prompt judicial action in the RBOCs' favor. Legislation that would have granted the RBOCs freedom to manufacture telecommunications equipment passed the Senate by a large margin in 1991. A more comprehensive effort was underway in the House. After they resolved their own jurisdictional dispute which had bogged down efforts in 1992, the powerful Chairmen of the House Judiciary Committee and its Commerce Committee (Jack Brooks and John Dingell, respectively) made common cause on behalf of legislation that essentially would have lifted the manufacturing restriction and given the Department of Justice and the FCC the authority to permit RBOC entry into long distance. Although this coalition enabled legislation overwhelmingly to pass the House in the summer of 1994, the effort died in the Senate when the RBOCs concluded that it overly favored the existing long-distance companies and did not go far enough in removing the MFJ's restrictions.

The RBOCs had many weapons available for an extended legislative fight. The RBOCs were, after all, seven of America's largest corporations—a status that in itself commands influence in Washington, D.C. Moreover, their regional organization meant that they would have special claim on particular members of Congress. The RBOCs, having taken well more than half a million Bell System workers with them upon divestiture, were among the handful of

216. See supra text accompanying notes 161-83.
217. See supra text accompanying notes 194-98.
221. See Jon Healey, Stumped by Bells' Objections, Hollings Kills Overhaul, 52 CONG. Q. WEEKLY REP. 2669 (Sept. 24, 1994).
222. Cf. Mills, supra note 210, at H1 (suggesting that "[p]erhaps the biggest source of the Bells' power . . . is simple geography").
largest employers in every one of their seven regions. The companies further demonstrated that they understood that delving into the political process required a willingness to dig into their pockets.

By 1994, the RBOCs’ eight years of legislative efforts had taken root. Each session of Congress was virtually assured of at least one serious effort to enact legislation superseding the MFJ. At the same time, larger political forces became more hospitable to such legislation. First, the Republican capture of both houses of Congress in the 1994 elections ensured that the RBOCs’ natural allies—deregulation-minded politicians—would be setting the congressional agenda. Second, the Democratic Clinton Administration had come to view RBOC entry into the prohibited lines of business not so much as an antitrust problem as a potential source of job growth.

In these circumstances, the long-distance companies and other political opponents of the RBOCs, which had been vigorously resisting the RBOCs’ efforts for almost a decade, realized that a change in tactics was necessary. The debate accordingly shifted in the mid-1990's, in practical terms, from the question whether the RBOCs would get legislative MFJ relief to the question what that legislation would consist of. The waters of the legislative debate ebbed and flowed, sometimes (given their multiple currents) at the same time. The RBOCs sought legislation granting them unconditional entry into the long-distance and manufacturing markets. By contrast, the long-distance companies supported efforts that focused on increasing competition in local telephony. Although they were primarily in a defensive posture, the long-distance companies essentially argued

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223. See Vietor, supra note 19, at 82 (Table 2-6 listing assets, revenues, and number of employees of each RBOC after divestiture).

224. See Mills, supra note 210, at H1 (noting that, according to the FCC, the RBOCs spent $41 million on state and federal lobbying in 1992 and $64 million in 1993, recounting that “[RBOC] lobbyists themselves say their annual budget for influencing Congress has been $20 million a year in recent years,” and explaining why “those figures may only scratch the surface”).

225. See, e.g., Jube Shiver Jr., Telecommunications Bill Faces Extinction in Senate, L.A. TIMES, Aug. 5, 1994, at D1 (noting Clinton Administration estimates that pending telecommunications bill “would boost America’s global competitiveness and produce 1.4 million jobs by 2003”); Tom Steinert-Threlkeld, White House to Seek New Cable, Phone Laws, DALLAS MORNING-NEWS, Dec. 22, 1993, at 1A (“The administration hopes that breaking down restrictions on what companies can compete in the different arenas of communications will spur growth and create jobs in industries that now account for 12 percent of the nation’s $6.3 trillion economy.”).

226. See Mills, supra note 210, at H1.

that the RBOCs should not be permitted into the markets restricted by the MFJ unless and until the RBOCs' monopoly control over local telecommunications was eroded.

By 1995, it was clear that Congress was likely to pass a telecommunications bill before the 1996 election. The House of Representatives passed a bill on August 4, 1995, without AT&T's support. The long-distance companies, which had supported that bill before it was amended in ways favorable to the RBOCs,\footnote{228} got back on board late in the year when conference negotiations between key House and Senate figures resulted in several changes that these companies favored. In particular, the legislation formalized the role that the Department of Justice would play in any removal of the line-of-business restrictions.\footnote{229} This change and other compromises removed the last substantial opposition to congressional action.

On February 1, 1996, just three days short of the 109th anniversary of the Interstate Commerce Act, Congress passed the Telecommunications Act of 1996 by overwhelming margins.\footnote{230} The bill contained numerous provisions that granted the RBOCs immediate partial relief from the MFJ's remaining restrictions, modelling the substance of several of the RBOCs' piecemeal waiver requests. For example, Congress specified that the RBOCs could provide long-distance telecommunications service in connection with their cellular and other wireless services and on any "extraregional" calls (i.e., calls originating outside of the region where the RBOCs controlled landline monopolies).\footnote{231} Congress also permitted the RBOCs to enter into arrangements with manufacturers under which the RBOCs could fund manufacturing research and then earn a royalty on sales to third parties of any products developed with that

\footnote{228} In particular, the long-distance companies were dissatisfied that the proposed law did not give the Department of Justice a say in determining whether the RBOCs had opened their local exchanges to competition sufficiently to justify their entry into long distance and manufacturing. See Ralph Vartabedian, \textit{Landmark Reform of Communications Law OKd in House}, L.A. TIMES, Aug. 5, 1995, at A1.

\footnote{229} See infra note 237 (describing requirement that FCC consult with Department of Justice). The long-distance companies would have preferred an even more substantial role for the Department of Justice, such as its having dual jurisdiction with the FCC over RBOC entry into long distance and manufacturing.

\footnote{230} See Edmund L. Andrews, \textit{Congress Votes to Reshape Communications Industry, Ending a 4-Year Struggle}, N.Y. TIMES, Feb. 2, 1996, at A1 (reporting on vote and proceedings). The historic Interstate Commerce Act—which had formed the basis for the Communications Act of 1934 to which the new Telecommunications Act was an amendment, but which had been whittled down during the two decades leading up to the Telecommunications Act—had been repealed by Congress only weeks before. See Kearney & Merrill, supra note 13, at 1336 & n.51.

funding.\textsuperscript{232}

The Telecommunications Act nonetheless was far from a complete victory for the RBOCs. The core long-distance restriction, though no longer within Judge Greene's power to enforce, was not abolished. Congress simply codified it in section 271.\textsuperscript{233} Moreover, Congress changed the standard for removal of the restriction, but it is not clear that the new standard is more favorable to the RBOCs than the section VIII(C) standard that it replaced. Specifically, Congress required that in order to enter into the long-distance business, an RBOC must (a) demonstrate that it has complied with a 14-point competitive checklist, which essentially requires the RBOCs to open up their local exchanges to competition and to unbundle enough network elements that competitors can develop alternatives to the RBOCs' local exchanges; (b) comply with a separate-subsidiary requirement; and (c) persuade the FCC that the RBOC's entry into long distance is "consistent with the public interest, convenience, and necessity."\textsuperscript{234} While it is doubtful that these second and third requirements will provide much independent basis for denying RBOC entry into long distance,\textsuperscript{235} the competitive checklist for local telephony is a substantial requirement and one that no RBOC has been found to satisfy in the more than three years since the passage of the Act.\textsuperscript{236}

One of the Telecommunications Act's primary purposes is reduction of the RBOC bottleneck monopoly to its technologically irreducible minimum. Section 271's competitive checklist incorporates by reference various provisions in sections 251 and 252 of the Act, which are attempts by regulatory means (e.g.,

\textsuperscript{232} See id. § 273(b)(2); cf. supra note 205 (discussing MFJ proceeding concluding that such an arrangement was prohibited).


\textsuperscript{234} See id. § 271(b)(1), (d)(3).


\textsuperscript{236} See, e.g., id.; Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 539 (1997); Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd 539 (1998); Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma, 12 FCC Rcd 8685 (1997). Congress also codified the bulk of the MFJ's manufacturing ban, which was the other remaining line-of-business restriction, and made removal of this ban turn on whether the RBOC in question had received long-distance relief. See 47 U.S.C.A. § 273(a) (West Supp. 1999).
interconnection, unbundling, and resale mandates) directed to the RBOCs (and other local exchange carriers) to foster the development of local competition.\textsuperscript{237} Thus, the opening up of the RBOCs' local exchange monopolies to competition to the extent possible—a prospect that the MFJ perhaps contemplated in section VIII(C) but never made a goal—has become a goal of telecommunications law.

The Telecommunications Act spelled the end of the MFJ. Specifically, it eliminated the MFJ's prospective effect by providing that "[a]ny conduct or activity [heretofore] subject to any restriction or obligation imposed by the [MFJ] shall [hereafter] be subject to the restrictions and obligations imposed by [this Act] and shall not be subject to the restrictions and the obligations imposed by the [MFJ]."\textsuperscript{238} Accordingly, on April 11, 1996, Judge Greene terminated the MFJ, \textit{nunc pro tunc}, as of February 8, 1996, the date the Telecommunications Act had been signed into law.\textsuperscript{239} All of the parties to the case and all other interested entities that filed comments on the issue had agreed that this was the appropriate course of action. Jurisdiction over RBOC entry into the long-distance and manufacturing industries now rested with the FCC, not with Judge Greene. An era was over, not merely in telecommunications regulation, but in American law.

\section*{V. An Assessment}

Now that Judge Greene no longer presides over the MFJ, it is appropriate to judge him. What are we to make of this chapter in our legal history? Although the foregoing chronology should provide the initial basis for others to come to their own conclusions, regardless of whether they lived through a portion of this history, one set of answers follows.

As an initial matter, there is some argument—though ultimately not a persuasive one—that Congress has already answered the question just posed. On the one hand, the statements of some members of Congress influential in the passage of the Telecommunications Act, made both contemporaneously with the passage of the Act and for many years previous, conveyed a deep

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\textsuperscript{237} The Telecommunications Act's adoption of a regulatory model can also be seen in less direct ways as well, particularly in the explicit provision in section 271 that, while the FCC must consult with and give "substantial weight" to the Department of Justice's view in determining whether to permit the RBOCs into long distance, the Department's view does not bind the FCC. 47 U.S.C.A. § 271(d)(2)(A) (West Supp. 1999).


unhappiness with Judge Greene's actions and a sense that he had become a one-man regulatory commission. Of course, these politicians' statements do not themselves amount to a congressional judgment.

Once the rhetoric is left aside, the Telecommunications Act itself could permit a number of different inferences concerning Congress's view of Judge Greene's job performance. Consider first that Congress ratified a number of the MFJ's restrictions as they had been

240. See Taylor, supra note 210, THE AMERICAN LAWYER, April 1992, at 53 (describing in detail one legislative battle over the MFJ and noting that Judge Greene's "domineering role as telecommunications czar has infuriated many in Congress, the FCC, and the administration"). As set forth above, this view of Judge Greene's tenure has also been espoused by numerous non-politicians, including various academics. See, e.g., PAUL W. MACAVOY, THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES 37-42 (1996); supra note 9 (citing sources, including some by academics). It bears mention that, on this question (and increasingly on other issues in regulated industries law), it can be difficult to separate out those writers who are disinterested and those who are not—i.e., those who have some economic or other non-academic stake in the questions they are addressing and those who do not. For example, consider the multiple articles in the July-August 1995 issue of Managerial and Decision Economics: The International Journal of Research and Progress in Management Economics. That iteration of the scholarly journal is billed as a "Special Issue" addressed to "The AT&T Antitrust Settlement: Costs and Benefits." Notwithstanding its academic nature and its seeming promise of evenhandedness, one is rather hard pressed to find throughout its eleven articles—whose authors include faculty members at the Massachusetts Institute of Technology, University of Chicago, and Stanford University—any discussion of the MFJ's benefits. This is unsurprising if one realizes that these articles are simply repackaged versions of affidavits that the RBOCs filed in support of a 1994 motion to vacate the MFJ and for which these authors (or, equally accurately and more revealingly, these affiants) were undoubtedly compensated. But the articles generally do not even refer to this fact, see, e.g., David E.M. Sappington, Revisiting the Line-of-Business Restrictions, 16 MANAGERIAL & DECISION ECON. 291 (1995); Jerry A. Hausman, Competition in Long-Distance and Telecommunications Markets: Effects of the MFJ, 16 MANAGERIAL & DECISION ECON. 365 (1995); but see Kenneth J. Arrow et al., The Competitive Effects of Line-of-Business Restrictions in Telecommunications, 16 MANAGERIAL & DECISION ECON. 301, 320 (1995) (acknowledging that "[t]his paper is based on an affidavit submitted by [two of the authors] on behalf of the Regional Bell Operating Companies in February 1994"); and one unsuspecting of this fact would learn it only by reading an introductory article (which is not billed as a foreword), see Richard S. Higgins, The Costs and Benefits of the AT&T Antitrust Settlement: An Overview, 16 MANAGERIAL & DECISION ECON. 275, 275-76 (1995). It is not clear why some of the affidavits submitted in opposition to the RBOCs' motion to vacate could not also have been included in the issue (as opposed to merely one such affidavit's being summarized in two paragraphs, see id. at 280-81). Perhaps the answer may be found in the fact that the editor of the issue and the editor-in-chief of the journal were themselves RBOC affiants. It would seem that, at least for the academics writing in the area, disclosure of interests would be appropriate, and some writers follow this practice. See, e.g., Baumol & Merrill, Deregulatory Takings, supra note 3, at 1037 n.**; Sidak & Spulber, Tragedy of the Telecommons, supra note 3, at 1081 n.**; Sullivan, supra note 6, at 495 n.19, 522 n.97.
retained and interpreted by Judge Greene, even where the RBOCs or the Department of Justice had maintained that Judge Greene's actions were unlawful. The most noteworthy example is the retention of the core restriction on RBOC provision of in-region long-distance service. This can be taken as a congressional judgment that Judge Greene had acted correctly in rebuffing the RBOCs' efforts in the triennial review to remove the long-distance restriction altogether. A similar argument could be made based on Congress's not having adopted in the Telecommunications Act the Department's position in the triennial review that such RBOC relief would be justified by the mere removal of entry restrictions into local telephony. Yet all such congressional retentions or incorporations of Judge Greene's actions could be taken instead to imply at least something of a negative judgment concerning Judge Greene. For if Congress approved, why would it take away jurisdiction?

The various congressional alterations (as opposed to preservations) of the landscape as it had existed under the MFJ can also support inconsistent inferences. For example, Judge Greene's opinions reflect an almost exclusively structural approach to controlling the RBOCs' incentive to use their local monopolies to engage in anticompetitive conduct. Although he granted several waivers or modifications of the MFJ premised on certain regulatory requirements (e.g., separate subsidiaries), even in these contexts (and certainly in others) Judge Greene generally decided motions based on a view that the very existence of the RBOCs' local monopolies required their exclusion from the long-distance and manufacturing markets. The cellular long-distance order entered shortly before the MFJ's demise is an example of this view, for Judge Greene's modification of the MFJ was accompanied not only by regulatory requirements of separate subsidiaries and other conditions but also by the structural requirement that there be no RBOC bottleneck for transporting a cellular competitor's calls from the competitor's network to the long-distance companies' points-of-presence.241 Congress's diminished emphasis on a structural approach to telecommunications law and its specific grant of relief to the RBOCs to provide cellular long-distance service could be seen in different ways. While these actions could be taken as reflecting disapproval of Judge Greene's approach, they could equally reflect Congress's opinion that these actions were good ideas but were not possibilities open to Judge Greene in interpreting a consent decree that incorporated the Department of Justice's litigation theories from some time ago.

241. See supra notes 200-02 and accompanying text.
Most fundamentally, the Telecommunications Act can be said to reflect a mixed view, or even no view, of Judge Greene's administration of the MFJ. For example, the legislation may simply reflect Congress's collective judgment that, whatever the advisability of the MFJ at the time that it was entered and even subsequently, circumstances at the time of the Act's passage made the MFJ qua MFJ no longer advisable. These circumstances might particularly include Congress's sense that it was time to promote the introduction of competition into local telephony—a point on which the MFJ had no position. *Tempora mutantur, et nos mutamur in illis*, this theory would go, and the law designed for today and tomorrow, though different, would not be intended to reflect any judgment concerning that applied yesterday. This possibility, along with the fact that Congress's view concerning the wisdom of a particular policy is entitled in an academic context to persuasive force only, means that we must look elsewhere in assessing Judge Greene.

If we cannot conclusively applaud or condemn Judge Greene's administration of the MFJ by considering Congress's action to replace the decree, we can look to the opinions of the United States Court of Appeals for the D.C. Circuit. The D.C. Circuit is the only court that reviewed any of Judge Greene's actions in any detail and the only one to have expressed its opinion in at least some contexts.\(^{242}\)

The D.C. Circuit's opinions reflect a substantially positive reaction to Judge Greene's administration of the MFJ. The court of appeals published twelve separate opinions reviewing challenges to Judge Greene's decisions interpreting, modifying, or refusing to modify the MFJ.\(^{243}\) In nine of these opinions, it found no error.

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\(^{243}\) The number of appeals, of course, was larger than this for two reasons. First, many cases involved multiple appellants, as in the triennial review, for example, where all the RBOCs and numerous intervenors filed appeals. *See* United States v. Western Elec. Co., 900 F.2d 283, 286-88 (D.C. Cir. 1990) (listing counsel for, among others, party appellants and non-party intervenor appellants). Second, the D.C. Circuit in some cases acted without published disposition, in circumstances ranging from dismissals of appeals for procedural reasons, \(^{242}\) see, e.g., United States v. Western Elec. Co., Nos. 88-5183, 88-5186 (D.C. Cir. July 1, 1988) (dismissal of appeals that were premature under former version of
These included numerous outright affirmances reflecting agreement on such important determinations as that the MFJ prohibited the RBOCs from offering access services to end users at rates below those charged interexchange carriers,244 that the manufacturing restriction banned RBOC design and development of equipment and not just its fabrication,245 and that AT&T's opposition to a waiver triggered the section VIII(C) standard.246 In two of the other three opinions, the D.C. Circuit affirmed in part and reversed in part. One of these was the opinion in which the D.C. Circuit reversed Judge Greene's holding that the MFJ required waivers for RBOC entry into local telephony outside the RBOCs' home regions; at the same time, the court affirmed Judge Greene's ruling that the MFJ bound the holding companies such as Ameritech and Bell Atlantic as well as their BOC subsidiaries.247 The other partial reversal was in the court of appeals' opinion requiring Judge Greene in the triennial review to reassess whether to retain the information-services restriction under a standard that was not set forth on the face of the MFJ; the court there


246. See United States v. Western Elec. Co., 969 F.2d 1231 (D.C. Cir. 1992). The D.C. Circuit also affirmed Judge Greene's decisions that the MFJ prohibited the manner in which Bell Atlantic proposed to structure a "gateway" service introducing consumers to information-service providers, see United States v. Western Elec. Co., 907 F.2d 160 (D.C. Cir. 1990), that the information-services restriction had to be removed in the triennial review remand, see United States v. Western Elec. Co., 993 F.2d 1572 (1993); supra text accompanying notes 179-82, and that AT&T was entitled to a waiver of section I(D) of the MFJ insofar as the provision would have prohibited AT&T's acquisition of McCaw Cellular Communications, Inc., see United States v. Western Elec. Co., 46 F.3d 1198 (D.C. Cir. 1995); supra note 51. The court of appeals dismissed a challenge to Judge Greene's referral of certain waiver requests to the Department of Justice under procedures that he had instituted. See United States v. Western Elec. Co., 777 F.2d 23 (D.C. Cir. 1985). The D.C. Circuit also remanded without finding error in two instances. In one case, the remand was because there was confusion in the court of appeals over whether the waiver request had been contested or uncontested (and hence over whether section VII's "public interest" test or, rather, section VIII(C)'s test applied). See United States v. Western Elec. Co., 907 F.2d 1205 (D.C. Cir. 1990); cf. supra notes 175-78, 183, 194-98 and accompanying text. In the other, the court affirmed Judge Greene's denial of a declaratory ruling concerning a "funding/royalty" arrangement that the RBOCs and the United States proposed, but remanded for "further exploration of the [fallback] waiver request." United States v. Western Elec. Co., 12 F.3d 225, 237 (D.C. Cir. 1993).

247. See United States v. Western Elec. Co., 797 F.2d 1082 (D.C. Cir. 1986); see supra text accompanying notes 112-27.
affirmed the district court’s rejection of the RBOCs’ and the Department of Justice’s requests to modify or remove the long-distance and manufacturing restrictions.\textsuperscript{248} The D.C. Circuit outright reversed Judge Greene in only one published opinion under the MFJ.\textsuperscript{249}

Any assessment based on the bottom lines of affirmances and reversals, it must be acknowledged, is somewhat crude.\textsuperscript{250} Nonetheless, these rulings are the intended results of appellate review, and here they reflect favorably on Judge Greene. Most fundamentally, the D.C. Circuit never reversed Judge Greene on any bottom-line ruling concerning the manufacturing and long-distance restrictions. In short, the overall impression one gets from the court of appeals concerning the administration of the MFJ is favorable.

This favorable impression of Judge Greene remains when one looks beyond the assessments of Congress and the D.C. Circuit. Perhaps it should be said, at the outset and with the benefit of hindsight, that Judge Greene was not aware that he was in the midst of an extraordinary transformation of the nation’s conception of the proper role of a public utility company.\textsuperscript{251} Beginning approximately the time that the government filed its lawsuit in 1974, a variety of federally regulated industries—including most dramatically airlines, railroads, and trucks, but also long-distance telecommunications—shifted from a model where monopoly or oligopoly service was thought the appropriate means for advancing the public interest, to a

\textsuperscript{248} See United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir. 1990); see supra text accompanying notes 141-78.

\textsuperscript{249} See United States v. Western Elec. Co., 894 F.2d 430 (D.C. Cir. 1990) (reversing district court order that had required the RBOCs to obtain Department of Justice approval before acquiring a conditional interest in any entity engaged in activities prohibited by the MFJ). The court of appeals also reversed Judge Greene’s conviction of one of the RBOCs for criminal contempt. See United States v. NYNEX Corp., 8 F.3d 52 (D.C. Cir. 1993). The government had prosecuted NYNEX for violating the MFJ by allegedly providing information services through a subsidiary, Telco Research Group, to MCI. Although NYNEX’s assignment of errors included what the D.C. Circuit termed “a significant objection” to Judge Greene’s denial of NYNEX’s request for a jury trial, the court of appeals did not reach that issue. Id. at 53. It rather reversed because it concluded that NYNEX’s computer-based offering was not clearly an information service (which the MFJ then prohibited the RBOCs from offering), as opposed to customer premises equipment (which the MFJ permitted them to provide). See id. at 54-57.

\textsuperscript{250} For example, although the D.C. Circuit affirmed Judge Greene’s decision in the triennial review to retain the MFJ’s manufacturing and long-distance restrictions, it also criticized some aspects of his conception of the section VIII(C) standard for evaluating the continuing propriety of those restrictions. See Western Elec. Co., 900 F.2d at 295-300; supra text accompanying notes 162-72.

\textsuperscript{251} To be sure, this lack of awareness distinguishes Judge Greene not at all from virtually all others involved in regulated industries law during this time period. Cf. Kearney & Merrill, supra note 13, at 1407 & n.383.
reliance on competition. This is not to suggest that the MFJ’s line-of-business restrictions were part of the old regime. To the contrary, they were an essential step in ensuring the paradigm shift in telecommunications. But to the extent that Judge Greene thought it desirable to keep the RBOCs not only out of markets such as interexchange, manufacturing, and information services (which were closely related to the local exchange services in which the RBOCs possessed a monopoly), but also out of fairly unrelated businesses, he was swimming against what we now know was a historic current that was washing away the distinction between public utility companies and common carriers, on the one hand, and “unregulated” industries, on the other.

It must also be said, however, that this mindset (as opposed to the actual requirements of the MFJ) does not appear to have disadvantaged the RBOCs much in practice. For example, as noted previously, Judge Greene approved each of the 160 requests for waivers of the catch-all restriction that had gone through the procedure that he devised and had received the Justice Department’s support. Further, the question in the decision that earlier afforded the basis for characterizing Judge Greene’s conception of the RBOCs as one of traditional public utilities and not diversified enterprises was whether the MFJ barred extraregional exchange activities, not whether the MFJ should be waived if it did (and recall that the D.C. Circuit reversed Judge Greene on this interpretive point). Indeed, Judge Greene indicated that under some circumstances he would be receptive to a waiver request in this instance as well.

The inquiry thus must rather focus on Judge Greene’s actions in administering the MFJ, and here Judge Greene earns high marks. As an initial matter, considerable credit must be given to the individuals who drafted and proposed the MFJ. It should not be forgotten that the parties had eschewed various proposals for decrees that would have required detailed superintendence by the district court over an extraordinary array of RBOC activities. By rejecting various regulatory decrees (such as Quagmire I and Quagmire II) in favor of a structural decree, the parties enabled the district court to limit its continuing jurisdiction largely to matters at the margin of the RBOCs’ operations that were permitted under the MFJ or to RBOC

252. See generally id. at 1329-64 (detailing this great transformation).
253. See id. at 1351-52.
254. See supra text accompanying notes 105-11 and 158.
255. See supra text accompanying notes 123-27.
257. See supra text accompanying notes 41-48.
efforts simply to go beyond those operations. 258

While the RBOCs and those sympathetic to them have contended that Judge Greene was all too involved in the RBOCs’ business affairs, his involvement was neither inherent in the MFJ’s scheme nor (with perhaps very limited exceptions) a result of independent initiative by Judge Greene. His activities—the various orders that he issued or requirements that he imposed—came about because of the actions of the parties to the MFJ. It was thus the Justice Department’s triennial review, for example, or AT&T’s request for a declaratory ruling concerning the scope of the manufacturing restriction, or, most frequently by far, the RBOCs’ own numerous motions for waivers or modifications of the MFJ’s line-of-business restrictions that usually prompted Judge Greene’s rulings.

As for the RBOCs’ claims that the costs of the waiver process were too great in the aggregate to justify the process, this would not alone justify eliminating the line-of-business restrictions. The logical alternative instead would have been a decree that permitted no contested waivers unless the background standard for modifying consent decrees—the demanding “changed circumstances” test—was

258. Although the point is almost never made in discussions of RBOC exclusion from long-distance service and other businesses, it bears mention that the concept of line-of-business restrictions is not one that the MFJ invented. First, Congress from time to time has imposed line-of-business restrictions in several industries. See, e.g., Investment Co. Inst. v. Camp, 401 U.S. 617, 629, 634 (1971) (describing prohibition in Glass-Steagall Act, 12 U.S.C. § 24, on involvement by commercial banks in the investment banking business); cf. Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79i, 79j(b)(1) (1994) (prohibiting companies subject to Act from making corporate acquisitions unless the Securities and Exchange Commission gives approval based on certain competition and public-interest factors). Indeed, Congress has used line-of-business restrictions in the telecommunications industry, for it formerly prohibited telephone companies from providing video programming in their local telephone territories, see Cable Communications Policy Act of 1984, § 613, Pub. L. No. 98-549, 98 Stat. 2779, 2785 (1984), codified before repeal at 47 U.S.C. § 533(b) (1994), as did the FCC before it, see Winston P. Lloyd, Comment, What’s the Frequency Uncle Sam? Will the Government Hold Up the Information Superhighway in the Name of Competition?, 30 WAKE FOREST L. REV. 233, 242-44 (1995) (tracing history of this restriction from regulation to legislation). Second, and in some respects more directly analogously to the MFJ, line-of-business restrictions have been deployed in other antitrust litigation, both in consent decrees affecting a wide variety of industries, see, e.g., TALBOT S. LINDSTROM & KENNETH P. TIGHE, ANTITRUST CONSENT DECREES 551, 1188, 1370-71 (1974) (consent decrees involving MCA, Inc., American Optical Co., and Bausch & Lomb); United States v. National Broadcasting Co., Inc., 1978-1 Trade Cas. (CCH) ¶ 61,855 (C.D. Cal. 1977); United States v. National Broadcasting Co., 449 F. Supp. 1127, 1130-31 (C.D. Cal. 1978) (Tunney Act decision on NBC decree); infra note 259 (discussing meatpacking decree whose line-of-business restrictions as revised lasted more than 60 years), and as a contested remedy after adjudicated findings of liability, see, e.g., Ford Motor Co. v. United States, 405 U.S. 562, 563, 572 (1971).
This undoubtedly would have been the less preferable alternative from the RBOCs' side (even though, notwithstanding his having drafted section VIII(C), Judge Greene might have come to prefer that approach). Finally, while there is some truth to claims that Judge Greene took longer than desirable to resolve some of the RBOCs' waiver motions, most of these were in the later years of the MFJ's tenure when some of the RBOCs' motions were flying in the face of much settled law under the MFJ. Moreover, Judge Greene acted promptly on the "big issues" such as the triennial review in 1987, the triennial review remand on information services in the early 1990's, and the RBOCs' request for cellular long-distance authority in the mid-1990's. The more substantial delays occurred in the

259. Indeed, at the time the MFJ was entered, it was assumed that, in the absence of section VIII(C), the line-of-business restrictions could not be altered without the parties' consent unless the demanding standard of United States v. Swift & Co., 286 U.S. 106 (1932), were met. Swift involved a 1920 consent decree under which various members of the meatpacking industry were barred from engaging in the manufacture, sale, or transportation of other foodstuffs. When the defendants moved for elimination of these line-of-business restrictions in 1930, the Supreme Court affirmed the denial of their motion. The Court declared that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead... to [a] change [in] what was decreed after years of litigation with the consent of all concerned." Id. at 119; see United States v. AT&T, 552 F. Supp. 131, 195 n.266 (D.D.C. 1982) (discussing Swift), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see also Robert M. Aduddell & Louis P. Cain, Public Policy Toward "The Greatest Trust in the World," 55 BUS. HIST. REV. 217 (1981) (discussing meatpacking decree and early industry efforts to set it aside); Robert M. Aduddell & Louis P. Cain, The Consent Decree in the Meatpacking Industry, 1920-1956, 55 BUS. HIST. REV. 359 (1981) (describing such efforts through July 1981, with particular emphasis on 1956 decision refusing to terminate decree); United States v. Swift & Co., 1982-1 Trade Cas. (CCH) ¶ 64,464 (N.D. Ill. 1981) (terminating decree). Some years after the MFJ was entered, the Supreme Court ruled that the Swift standard did not govern contested motions to modify consent decrees entered in "institutional reform litigation" (a category whose precise contours the Court did not specify), but that a lower standard of "a significant change in facts or law" would govern such motions. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392-93 (1992). Notwithstanding subsequent attempts by the RBOCs to rely on Rufo, the existence of the explicit standard in section VIII(C) of the MFJ itself meant that the so-called "common law" standard for contested motions to modify a consent decree (whether as set forth in Swift or as set forth in Rufo) was not applied to RBOC motions for waivers or modifications of the line-of-business restrictions that other parties (i.e., the Department of Justice or AT&T) opposed. Cf. United States v. Western Elec. Co., 969 F.2d 1231 (D.C. Cir. 1990) (determining standard for waiver motions opposed by AT&T); supra notes 194-98 and accompanying text (discussing this ruling). Several RBOCs nonetheless relied in part on Rufo in their motion to vacate the MFJ, but that motion, of course, was rendered moot after passage of the Telecommunications Act resulted in the MFJ's termination.

260. See supra notes 141-42, 179, 200 and accompanying text. For a more extended discussion of whether the waiver procedures worked inadequately (the RBOCs' view) or were adequate except for the RBOCs' unexpected use of the procedures to make continual piecemeal assaults on the MFJ and for the Department of Justice's failure properly to apply section VIII(C) (AT&T's view), compare Motion of Bell Atlantic
Department of Justice's waiver-review process. However, such delays were not inherent in that process, which Judge Greene had designed, but rather resulted from the Department's tendency even after the triennial review to attempt to support the types of partial repeals of the MFJ that not only Judge Greene but also the D.C. Circuit had cautioned against because they did not conform to discrete antitrust markets.  

Nor is it fair to label Judge Greene a "mini-FCC" who simply fly-specked the RBOCs' businesses. Judge Greene's lack of desire to be involved in the details of the RBOCs' business affairs is reflected in one of his earliest and most important rulings: *viz.*, his termination of numerous entities' intervenor status after the MFJ had been approved and upheld on appeal.  

As Judge Greene explained at the time and would later consistently require, anyone other than one of the nine parties that sought to have the MFJ enforced would first be required to complain to the Department of Justice and thereafter would not be permitted to seek involvement by the court unless the non-party could demonstrate "bad faith" on the Department's part.  

This strict test for when a non-party could involve the court in an MFJ matter was essential in helping to ensure that the district court did not become a sort of rump administrative agency, to which any party "adversely affected" by an RBOC's acts or failures to act could turn for relief.  

This limitation on access to the district court recognized that something beyond mere standing to sue should be required for a non-party to have the ability to proceed against the RBOCs *under the MFJ*. After all, any entity dissatisfied with the Department of Justice's rejection of a request to seek enforcement of the MFJ against the RBOCs retained the ability to file its own antitrust lawsuit against the RBOCs—just as MCI, Sprint (then known as Southern Pacific Communications), Litton Systems, and others had done against the Bell System in the years leading up to, and culminating in, the MFJ.  

At the same time, Judge Greene properly permitted limited intervention after entry of the MFJ for purposes of appealing from (or defending on appeal) any of his rulings under the MFJ. It is  

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261. See supra note 193 and accompanying text.  
262. See supra notes 97-98 and accompanying text.  
264. See supra note 81 (citing examples of private antitrust actions brought against the Bell System).
apparent that this permission of intervention was even-handed: it was extended to both those who agreed with and those who disagreed with the district court’s rulings. Such limited intervention—particularly when combined with the requirement that any intervenors needed to satisfy background principles of standing in order to prosecute an appeal by themselves—seems a principled way of balancing the interests in a stable decree against the interests in a correctly interpreted decree.

Judge Greene’s handling of the triennial review also reflects well on him. The underlying process was essentially conducted by the Department of Justice, which used the visitatorial powers provided in section VI of the MFJ to obtain information concerning the state of the monopoly and competitive markets implicated by the MFJ. The court, by contrast, played a reactive role, ruling promptly on the various requests for relief that were filed after the Department had submitted its report and recommendations.

As for the substance of these rulings, Judge Greene’s rejection of the proposal that would have required near-constant judicial superintendence—viz., the Department’s suggestion that the RBOCs be permitted entry into long distance on a state-by-state basis when certain conditions were met—belie claims by some of his critics that he was interested in ongoing, detailed oversight of the RBOCs’ activities. The same is true of Judge Greene’s removal in the triennial review of the MFJ’s catch-all restriction. Not only did he recognize that the restriction was no longer appropriate under the MFJ’s standards, but he did not attempt to attach to the removal the various quasi-regulatory conditions on which he had previously granted waivers of that restriction. Here, too, a judge whose desire to shackles the RBOCs exceeded his interests in the antitrust laws and its particular principles reflected in the MFJ would have ruled quite differently.

There remains the question of Judge Greene’s interpretation of

266. See id. at 309-10 (concluding that, notwithstanding its intervenor status, the Public Service Commission of the District of Columbia lacked standing to challenge triennial review ruling because it lacked injury in fact); cf. United States v. Western Elec. Co., 797 F.2d 1082, 1092 (D.C. Cir. 1986) (RBOC lacked standing on appeal to challenge ruling that by its strict terms applied only to other RBOC).
267. See supra notes 130-59 and accompanying text.
268. See supra notes 148-50, 156-59 and accompanying text.
269. See supra note 108.
270. The D.C. Circuit’s affirmance of most of Judge Greene’s triennial review rulings and its reversal of the information-services ruling have already been discussed. See supra notes 173-83 and accompanying text.
section VIII(C). It is true that the D.C. Circuit felt impelled in its triennial review opinion to write at length concerning its view of section VIII(C)'s proper interpretation. Judge Greene of course invited this discussion by his statements during the triennial review reflecting a broader conception of his duties than merely undertaking the section VIII(C) inquiry whether the petitioning RBOC had shown that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." However, the D.C. Circuit did not doubt that these statements had not influenced Judge Greene's legal analysis. Moreover, the court of appeals' discussion was also directed at rejecting various claims concerning section VIII(C) made by the RBOCs and others such as the FCC. While the D.C. Circuit did exhort Judge Greene to pay more heed to the Department of Justice's predictive economic analysis under section VIII(C)—the court of appeals could not bring itself to use the word "defer"—the most fundamental point is that even in that ruling (as elsewhere) the court rejected all challenges to Judge Greene's rulings under section VIII(C).

These statements by Judge Greene concerning the RBOCs' activities, for which he was chided in the triennial review appeal, gave the RBOCs and those sympathetic to them an opportunity to criticize Judge Greene. It is possible that Judge Greene's occasional rhetorical flourishes, including his willingness to respond even in a couched way to one Senator's inquiry concerning possible legislation touching upon the MFJ were ill-advised. Even leaving aside, however, both that Judge Greene may have been correct in statements that the RBOCs seemed more interested in an ascent into the ranks of conglomerate corporate America than in the provision of basic telephone service and that these statements were made in the logical course of deciding various contested matters before the court (as opposed to being made in external attempts to influence public policy), the statements afford little lasting basis on which to criticize

271. See United States v. Western Elec. Co., 900 F.2d 283, 295-300 (D.C. Cir. 1990); supra notes 162-72 and accompanying text.


273. See supra text accompanying notes 163-69.

274. See infra note 275.

275. An apparent exception to this is a letter that Judge Greene sent in response to a letter from Senator Paul Simon that asked for the former's view of proposed legislation that would have removed the manufacturing restriction of the MFJ. See Letter from Harold H. Greene to the Hon. Paul Simon at 1 (May 29, 1991) (filed in the Western Electric case on May 31, 1991); supra note 218 and accompanying text (discussing this legislation). Judge Greene stated that, while it was possible that the canons of judicial
Judge Greene. Such statements were infrequent at most and, in all events, cannot alter the central fact that for twelve years Judge Greene provided precisely what the framers of the MFJ intended: stability and certainty, grounded in defensible antitrust principles written into the MFJ, so that the RBOCs’ local monopolies did not impair competition in closely related markets.

Conclusion

The decision by the Department of Justice and the Bell System in 1982 to end their years of litigation through divestiture and going-forward restrictions on the divested companies was of historic proportions. Whether the MFJ’s line-of-business restrictions on the RBOCs benefited the American economy is a topic on which many words were exchanged, studies commissioned, and reports submitted to the courts, the executive branch, and Congress for more than a decade. That question, at least in the form in which it previously existed, has become moot since Congress altered these restrictions in the Telecommunications Act of 1996.

Less studied, but of broader significance for future policy, has been the question of whether the district court overseeing the MFJ from 1982 until its termination in 1996 was undertaking and properly discharging judicial functions. The conventional wisdom has become that the court was overly involved in the RBOCs’ affairs and evinced constant hostility to the RBOCs’ legitimate business interests. This conventional wisdom has usually not been accompanied by an account of the district court’s actions under the MFJ, and no overall retrospective of this important chapter in public policy has been essayed.

This Article has provided that comprehensive account. While this should permit others to make an informed assessment of the district court’s actions or at least to sort through this extraordinarily complex litigation, which is a prerequisite for formulating one’s views,

ethics permitted him to offer his opinion on the desirability of the bill, it seemed that any such expression would create an appearance of impropriety. He nonetheless stated that there was no reason that he could not “render assistance to the Subcommittee by calling your attention to pertinent parts of published opinions in my court on the subject under the Subcommittee’s consideration.” Letter from Harold H. Greene, supra, at 1. Judge Greene then proceeded at some length to summarize aspects of both his and the D.C. Circuit’s triennial review opinions retaining the manufacturing restriction. He concluded that “I wish to advise you that no evidence has come to my attention in the last three and one-half years that would cast doubt on the findings and conclusions stated in [the triennial review] opinion or call for their repudiation.” Id. at 9. For differing views on the propriety of Judge Greene’s letter, see Building Bridges Instead of Walls: Fostering Communication Between Judges and Legislators, JUDICATURE, Oct./Nov. 1981, at 167, 173-75.
this Article has also provided its own assessment. At the end of the day, Judge Greene should be commended for the way he administered the MFJ. He remained true to its adoption of a structural solution to the problems that had long bedevilled the telecommunications industry because of the Bell System’s vertical integration of monopoly and competitive telecommunications businesses. Unlike the Department of Justice, which had insisted on the MFJ’s structural approach but later advocated before the courts the primarily regulatory approach that it had come to favor instead, Judge Greene recognized that it was not his role to abandon the decree merely because of a shift in the Department’s preferences. The MFJ thus succeeded as a legitimate judicial enterprise because it rested on an articulable economic theory and the court administering it abided by that theory. Absent evidence that “something [was] different [since] the time when the decree was entered,”276 any revision at odds with that theory would have been lawless if undertaken by the district court.