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Natural Monopoly, Consumers, and Government

Harold H. Greene

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NATURAL MONOPOLY, CONSUMERS, AND GOVERNMENT*

*HON. HAROLD H. GREENE***

I. INTRODUCTION

I would like to discuss the problems engendered by the direct or indirect regulation of monopolies and the effect of this regulation on consumers. More specifically, I expect to talk about the tension that exists, almost of necessity, between direct regulation of corporations by an administrative agency and the indirect impact that may be had on such entities by the antitrust laws and their enforcement by the Department of Justice and the courts. The subject is complex; it has considerable historical antecedents, yet it is plainly still topical today.

Quite naturally, I approach this matter from the perspective of the government's antitrust case against the American Telephone & Telegraph Company ("AT&T"), in which I conducted a lengthy trial and which ultimately ended in a negotiated consent decree.[1]

Because of my involvement with that case for some ten years now,[2] I can truthfully claim to be somewhat familiar both with the policy reasons that underlie court involvement with monopolies and with the practical difficulties this involvement entails. Additionally, albeit unfortunately, I have become familiar with the criticisms this kind of judicial activity almost inevitably provokes.[3] These criticisms range from

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* Lecture delivered on March 15, 1989, at Communications Media Center of New York Law School.

** Judge, United States District Court for the District of Columbia.

1. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

2. Judge Greene was assigned to the case on June 22, 1978 because of the illness of Judge Joseph C. Waddy, to whom the case originally had been assigned. *See* United States v. AT&T, 461 F. Supp. 1314, 1320 & n.16 (1978).

3. Dennis Patrick, former chairman of the Federal Communications Commission, was one of the most vocal critics of the judiciary's role in telecommunications. He recently said:

the crass objections raised by those who would rather be free to pursue their monopolistic practices regardless of the social and economic consequences to the more legitimate concerns based on philosophical, structural, or practical grounds.

Criticism of antitrust enforcement is popular these days partly as a consequence of the permissive climate of the last decade or so. As a result, there has been a union of some truly strange bedfellows. During the AT&T trial, former Senator George McGovern testified as a witness for the defendant that he did not believe in antitrust enforcement against the nationwide telephone company or similar entities. In his opinion, if action against improper practices were called for, it should be reserved entirely to administrative regulation. A similar point was made by conservatives in the last administration and elsewhere. These officials argued, for example, that the courts should be relieved of the responsibility for dealing with problems stemming from monopolistic control in the telecommunications markets. According to that view, the means to resolve these problems should be entrusted exclusively to the relevant administrative agency, namely, the Federal Communications Commission ("FCC").[4] This assertion is, of course, merely a subset of a more general argument occasionally made these days that agencies and boards controlled by the executive are preferred for purposes of law definition and enforcement to the judiciary.

The mere fact that there was an identity of views between Senator McGovern and former Attorney General Meese's Assistant for Antitrust obviously does not prove that they were both wrong. It could be, with this kind of agreement across the political and ideological divide, that both were right, and furthermore, that their position could and should properly be applied to markets beyond telecommunications. However, based on historical experience, it is my firm conviction that this approach is mistaken. Santayana's dictum still holds—those who do not remember the past are condemned to relive it.

AT&T, like other corporations in such fields as banking, the sale

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> My counterparts around the world are virtually dumbfounded by our regulatory situation, in which one unelected United States judge essentially shares jurisdiction with the agency created by Congress to regulate this industry. We should not have two authorities in charge of this process, especially two authorities applying two different standards.

Sims, *Patrick Leaves Legacy of a Free-Market F.C.C.*, N.Y. Times, Aug. 11, 1989, at D3, col. 1.

4. *See* Federal Telecommunications Policy Act of 1986, S. 2565, 99th Cong., 2d Sess., 132 CONG. REC. 14,312 (1986); 132 CONG. REC. 14,311, 99th Cong., 2d Sess. (1986).

Another bill, introduced in the House of Representatives, was designed to permit the regional companies to provide information services and to manufacture telecommunications equipment, subject to regulation by the FCC. Mason, *MFJ Bill Would Allow RHCs into Manufacturing, Info Services*, in TELEPHONY, Apr. 24, 1989, at 8.

of electricity and gas, nuclear power, and the like has long been supervised by various regulatory bodies. At least in telecommunications, experience demonstrated quite conclusively some years ago that this scheme of regulation could neither prevent substantial abuses of power nor curb entrenched anticompetitive activities. If any proof of that assertion was required, it was supplied by several of the chiefs of the FCC's Common Carrier Bureau, the agency having day-to-day responsibility for telephone regulation. These officials testified without hesitation or ambiguity that, because of the size and power of the Bell System, and the necessarily weak regulatory and budgetary structure of the FCC, oversight of the telephone company was more theoretical than real.

II. THE AT&T LITIGATION

In 1974, the Ford Administration arrived at the same conclusion; therefore, it authorized the filing of the government's antitrust suit against AT&T. Furthermore, it was based on this same conviction that the Carter and Reagan Administrations refused to dismiss that action during the many years of its pendency.

Decisional law as laid down by the Supreme Court has long been to the effect that only where an industry is pervasively or specifically regulated should an exemption from the antitrust laws be implied.[5] My court, and a number of other tribunals having responsibility for private lawsuits against the telephone company, held, in response to lengthy and impassioned AT&T filings, that FCC regulation was neither broad nor specific enough to sustain an antitrust exemption.

For context, let me describe briefly the history of the AT&T litigation. The suit was filed late in 1974; between 1978, when I assumed control of the case, and 1981 when the trial itself began, the parties exchanged millions of documents and several thousand stipulations on facts which could not be reasonably disputed. This was followed by an eleven-month trial at which hundreds of witnesses testified and many file drawers full of documents were introduced as exhibits.[6] While all this was going on, AT&T continued to assert, unsuccessfully, that be-

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5. *See, e.g.*, United States v. Radio Corp. of Am., 358 U.S. 334 (1959) (FCC's activities in licensing television broadcasters did not constitute "pervasive regulatory scheme"); Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) (Commodity Exchange Commission had true primary jurisdiction to review Mercantile Exchange's transfer of a membership without a hearing). *But see* Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (Exchange ruling against member firm not immunized from antitrust laws despite role of SEC). *See also* Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867 (1976).

6. A comprehensive history of the litigation is set out in United States v. AT&T, 552 F. Supp. 131, 135-47 (D.D.C. 1982).

cause of FCC regulation, it was immune from the antitrust laws. On another front, strenuous efforts were made to secure the enactment of congressional legislation that would have aborted the lawsuit, and the Departments of Defense and Commerce, among others, lobbied furiously to have the suit dismissed. These efforts culminated in a meeting, chaired by former President Reagan, at which the various arguments were made and debated. Nothing came of all these efforts because the Department of Justice successfully maintained that, absent extraordinary AT&T concessions, the case had to be tried "to the eyeballs."[7] Congress also failed to enact any of the legislation urged upon it by the interested parties, some resembling AT&T's wishes, some comparable to the relief sought in the lawsuit by the Department of Justice.

Ultimately, when the trial was within a few weeks of completion, the parties arrived at a settlement in the form of a proposed consent decree.[8] Their proposal was submitted to my court for approval under the Tunney Act[9] which, for reasons related to the financial clout of typical antitrust defendants, does not permit the Department of Justice alone to settle such suits, but requires a court finding that the particular settlement is in the public interest.

I approved the parties' proposal with some modifications, after conducting a so-called Tunney Act public interest proceeding in which more than 120 parties participated, including about thirty states, many of AT&T's competitors in various fields, and a number of consumer groups. It is interesting to recall in light of subsequent statements and events, that not one of these intervenors objected to the basic structure of the decree.

The point of all this is that the decree which still governs this industry was not invented by the court, as some seem to believe, but was the product of negotiations between the Department of Justice and the

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7. Asked about the AT&T case at a news conference on April 9, 1981, Assistant Attorney General William F. Baxter announced, "I intend to litigate it to the eyeballs." *See* J. TUNSTALL, COMMUNICATIONS DEREGULATION: THE UNLEASHING OF AMERICA'S COMMUNICATIONS INDUSTRY 104 (1986).

8. On January 8, 1982, the government and defendants filed, with the District of New Jersey, a stipulation consenting to the entry by the court of the "Modification of Final Judgment" of the 1956 decree (which had settled the government's original action filed in 1949 against AT&T and Western Electric, Civil Action No. 17-49). As I pointed out, "since the agreement encompasses far more than a modification of the 1956 judgment—and, indeed . . . deals primarily with the AT&T lawsuit—it would be misleading to refer to the agreement as a modification of the 1956 decree." *AT&T*, 552 F. Supp at 141 n.31. While the agreement is generally referred to as the MFJ, I always have less bureaucratically called it "the decree." *See* Botein & Pearce, *The Competitiveness of the U.S. Telecommunications Industry: A New York Case Study*, 6 CARDOZO ARTS & ENT. L.J. 233, 241 (1988).

9. Antitrust Procedure and Penalties Act, 15 U.S.C. § 16(b)-(h) (1982).

Bell System, and was agreed to in principle by all interested parties and organizations.

III. The Decree

There are three main provisions to the decree. First, AT&T was required to give up all of its local subsidiaries, the so-called Bell operating companies or regional companies,[10] for the following reasons. From the time when it was discovered that microwaves could be used to transmit telephone sounds over long distances, AT&T lost its monopoly in the long distance field as others began to compete in that market. Local communications, on the other hand, has remained a natural monopoly. Microwave transmission is not practical in urban areas, and for obvious reasons, it is likewise not practical to run two, three, or more telephone wires from many different telephone companies into each home or office. The consequence of these technological facts is that anyone wishing to operate in either the long distance or the telephone manufacturing market must use the switches and wires of a local operating company for the last leg of his transmission; he cannot reach any of his customers without the cooperation of these local companies.

As you can imagine, given these facts, the local companies and their wires and switches were the principal means by which the Bell System discriminated against independent providers. Because of their tight control of these local companies and thus, of local "bottlenecks," the Bell System was able to prevent or significantly delay competitive services and equipment from reaching residential or business subscribers. Hence, if the anticompetitive practices actually were to be halted, the structural solution of separating the local companies from AT&T was a far surer means to accomplish this than repeated regulatory commands. That, accordingly, was done.

The second major provision of the decree prohibits the newly independent local telephone companies—which inherited from AT&T the switches and wires that had been the instruments of anticompetitive activity—from entering those lines of business, principally long distance and telecommunications manufacturing, in which they could repeat AT&T's performance.[11] Their control of the local means of transmission obviously gave them the same ability as the Bell System to discriminate against competitors, and it was and is assumed that they also have the same incentive to act as did the Bell System.

The decree also prohibits the local companies from providing information services—that is, the distribution of information they them-

10. *AT&T*, 552 F. Supp. at 141.
11. *Id.* at 143.

selves had generated—because the same incentives and abilities for unlawful conduct exist with respect to this market. A company that has a monopoly on transmission of information, it was reasoned, could not be trusted with also generating information for sale to the public because its transmission monopoly gives it the capacity to delay or otherwise disadvantage the data generated by others.

A number of the regional companies later made the claim that they would be satisfied if they were permitted merely to enter the business of transmitting information. "That's really what we want," they claimed. "We are not interested in generating information the way the *New York Times* or CBS does. We are interested in transmitting information and having all the sophisticated technological apparatus that goes with it."

The decision I rendered in September 1987[12] said, "Yes, that's fine." That decision is not at all inconsistent with the decree because the theory of that document was that if the telephone companies had both a monopoly on transmission and the ability to generate information, they would tend to disadvantage others. The transmission of information alone, however, is not problematic.

Since then, I have received requests from regional companies almost every week, claiming, "We really need to go into the rest of the field, otherwise we'll fall behind."[13] I believe the regional companies have accomplished some things in response to the September 1987 and March 1988 decisions. Gateways are being established for the transmission of information in various places, and some fairly ambitious programs have been formulated. It is too early to tell whether the companies will be able to furnish information service transmission on the model of the French, for example, but I think some efforts along that line are being made.

A third principal provision of the decree requires the local operating companies to provide the same access to their networks to the smaller long distance carriers, such as MCI and Sprint, as they were

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12. United States v. Western Electric Co., 673 F. Supp. 525 (D.D.C. 1987); *see also* United States v. Western Electric, 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. July 28, 1989) (court approved AT&T's entry into electronic publishing, which will enable AT&T to enter information services).

13. In an opinion denying such a request by three regional companies for line of business restriction waivers, the court observed:

> The [r]egional [c]ompanies obviously have sufficient funds, in part extracted from the ratepayers, with which to pay lawyers to repeat the same arguments again and again. But these arguments do not become more convincing by dint of repetition, nor do they obligate the Court to repeat its reasoning again and again.

United States v. Western Electric, 1989-1 Trade Cas. (CCH) ¶ 68,619 (D.D.C. June 13, 1989).

providing to AT&T itself.[14] The equal access requirement does not operate independently of the second provision of the decree I mentioned earlier, the line of business restrictions. The third provision simply means that various interexchange or long distance carriers—MCI, Sprint, AT&T, and smaller ones—will have equal access to the local network. To some extent, that equality already exists. But equal access does not bear a direct relationship to the question of whether the local companies controlling the local switches can still engage in anticompetitive practices. If the local companies were in the long distance business, whether it is called interexchange or interLATA,[15] the incentive to try to further their own long distance business at the expense of their competitors would be precisely the same as AT&T had when it owned those local switches and wires. The decree is based on the assumption that people will do what is in their best interest; clearly, their best interest would be to advantage their own operations at the expense of others. Therefore, the decree does not permit the regional companies to go into that business until they have lost their capacity to discriminate.

This rationale applies to aspects other than price. For thirty years, AT&T had, in various subtle and not so subtle ways, given an advantage to its Long Lines (now AT&T Communications) department over competitors, particularly MCI. I listened to four or five months of testimony on those issues, some related to price and some related to types of interconnection. I believe that, despite equal access, this discrimination would be duplicated by the regional companies to the extent that it could be duplicated.

Two more or less procedural aspects of the decree are worthy of brief mention. The decree specifies, at my court's insistence, that when the technological and economic situation has changed sufficiently to make it unlikely that the local operating companies will engage in anticompetitive activity, they must be relieved by the court of the line of business restrictions.[16]

The second procedural aspect of note, this one authored by the parties, imposes on my court the obligation to decide any and all disputes regarding the interpretation of the decree; and it requires the court to enforce the decree in case of violation.[17] Since the AT&T divesture in 1984, requests for interpretation or enforcement have come to my court at a steady pace and, unfortunately, no end is in sight.

Most of these requests, as I mentioned, have concerned the line of

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14. *AT&T*, 552 F. Supp. at 142.

15. LATAs (local access and transport areas) are geographically defined territories that usually do not cross state borders.

16. *AT&T*, 552 F. Supp. at 142.

17. *Id.*

business restrictions. Naturally, I have insisted on enforcing these restrictions just as they are embodied in the decree, and I have made it clear that I will continue to carry out the decree's mandate. The not unexpected consequence of that decision has been that those who do not like it have turned elsewhere. The local telephone companies—now massed in seven regional giants—are arguing in Congress and in other places that the restrictions should be eliminated or, more plausibly, that their enforcement should be transferred from the courts to the FCC.

IV. Dissatisfaction with the Decree

We have thus come full circle. The antitrust suit and the decree came about because regulation and regulators proved to be ineffective in preventing widespread anticompetitive practices in the telecommunications industry. Yet, proposals are now being made in all seriousness to transfer jurisdiction over that decree to the same regulatory agency.[18] These proposals are asserted vigorously in many fora, and they have found acceptance in some, even though there is not the slightest evidence that anything of significance has changed since the decree was entered.

In fact, insofar as the efficacy of FCC regulation is concerned, the situation has, if anything, deteriorated. In the '60s and '70s, at least the Commission was intent on regulating, while the agency now prides itself on its deregulatory philosophy. It passes understanding on what reasonable basis one could conclude, in view of that circumstance, that regulation would be more effective now than it was then. This may be precisely the point—no regulation and, therefore, a return to the grand old days of monopoly control.

Perhaps the most interesting development from a public policy point of view is that the Department of Justice, the "tiger" who was most adamant in litigating the antitrust suit to the end and in including the line of business restrictions in the decree, is now supporting the companies' requests for removal of these restrictions. Changes in policy are of course not unusual; they occur with some frequency in government, especially when a new administration takes office or there is a fundamental change in political outlook. But what is remarkable here is that, although the consent decree was negotiated and agreed to by the Reagan Administration, that same administration suggested its demise within less than three years of its entry.

To be sure, a new Attorney General, Edwin Meese, had taken over in the interim. However, in matters of public administration this kind of personnel change does not normally lead to a change in policy, par-

18. *See supra* note 4.

ticularly where the policy is embodied in a judicial judgment. While it is true that administrative regulations are altered from time to time, although normally even they are not changed without good reason, court judgments based on solemn undertakings by responsible government officials normally lead a less hazardous life. Therefore, it is odd that the Department of Justice should today fight to emasculate a court judgment which it had secured just a short while ago.

This consideration is particularly potent because the judgment at issue is an antitrust decree. Judgments in major antitrust cases are normally not changed every few months or years to reflect a new zig or zag in governmental policy. Traditionally they have endured—the judgment breaking up the Standard Oil Trust has lasted for seventy-five years,[19] and the decree separating motion picture distribution from theater operation has lasted for forty years.[20]

The reason for such longevity is simple. Antitrust law has a special, almost quasi-constitutional standing in our legal system. The Sherman Antitrust Act,[21] it has often been said, is to American economic life what the Bill of Rights is to the nation's political life. Like the Constitution, the antitrust laws are relatively ancient and they speak through a few broad principles, but they are nevertheless basic to our system and are not easily amended. Just as the Bill of Rights provides a framework for diversity and for the competition of ideas in the political realm, the antitrust laws provide a platform for fair competition in the marketplace.

Decrees entered into pursuant to this kind of basic text are not meant to be valid only at the whim of every new Attorney General or Assistant Attorney General who may be appointed from time to time. They are solemn judgments enshrined in court decrees upon which hundreds or thousands of corporate entities and their officials and employees rely in making important business decisions.

Enforcement of the antitrust laws in the last hundred years has been uneven, and the vigor of that enforcement has not been uniform, nor has it followed party lines. Presidents Theodore Roosevelt, Taft, and Franklin Roosevelt believed in these laws and enforced them with enthusiasm, while Presidents Cleveland, Harding, and Nixon were rather lackadaisical in this respect. Indeed, Cleveland, a Democrat, actually used antitrust against labor unions more frequently than against corporate interests.

The past eight years have witnessed diminished antitrust enforcement, with fewer cases brought in that eight-year period than the preceding four. That relative lethargy in enforcement can hardly be at-

19. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).
20. United States v. Paramount, 334 U.S. 131 (1948).
21. 15 U.S.C. § 1 (1982 & Supp. V 1987).

tributed to a paucity of possible targets. Giant acquisitions and mergers, many financed with junk bonds, have occurred on an unprecedented scale. I do not mean to say that all, or even most, of these necessarily involved violations of the law. However, I believe that one could reasonably argue that a transaction such as the RJR-Nabisco merger warranted scrutiny, at least to determine whether this massive reorganization would reduce supermarket choices for consumers or inflate the prices they must pay at the store. In fact, many of the transactions that have occurred in recent years appear to have served primarily to enhance the financial interests of the speculators, as distinguished from generating increases in efficiency, productivity, or the American balance of trade.

We often hear it said that big is not necessarily bad, and that is certainly true. But it is also true that big is not necessarily good. If, for example, a huge conglomerate achieved a monopoly or close to it in certain food or household items, it could, with relative ease, crowd out competitors from the more popular and accessible store shelves and begin to raise prices or decrease quality and choice.

However, there are other dangers beside the impact of monopoly control on the consuming public. There is the danger of a concentration of political power that frequently accompanies economic power. The prevention of the accumulation of political power traditionally has not been regarded as one of the purposes of the antitrust laws, although two recent developments may constitute a valid basis for rethinking that theory. First, political campaigns today require enormous financial contributions, which large corporate interests are particularly capable of providing. Second, the news media, from the networks to newspapers and magazines, are now more and more often controlled by huge conglomerates, and the threat of distortion in favor of their agenda is always present.

I am somewhat worried when information companies grow so large that the financial and corporate structure overwhelms everything else. We have been lucky so far. General Electric apparently has not dictated the content of news to the network it owns, for example. But I am not sure this will always be true. Particularly in regard to information providers, it is dangerous when these powers become highly concentrated.

In any event, Senator Sherman himself said that "[i]f we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[22] Justice William O. Douglas likewise agreed, in a dissent to be sure, that industrial power "should be scattered into many hands so that the for-

22. 21 CONG. REC. 2457 (1890), *reprinted in* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 117 (1978).

tunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men."[23]

Since the Civil War, or perhaps before, the United States has succeeded fairly well in making consumer welfare and purchasing power the centerpiece of public policy. The corporate structure in Japan, it has been suggested, exploits that economic philosophy and our regulatory process. While some say that this model is the wave of the future, I do not believe that we should be prepared to give up an economic system that has served us well simply because Japan is making more and better VCRs than we make. If the Japanese wave is the wave of the future, I would want to see more evidence than the mere fact that Japanese citizens are saving more than we save and perhaps securing a greater share of international trade.

America needs large corporations for a number of reasons—the accumulation of the necessary capital, economies of scale, and last but not least in this shrinking world, the ability to compete against foreign economic giants. However, more balance would appear to be called for than we have witnessed in the recent past.

The failure to bring antitrust suits when warranted, and the proposals to vest enforcement authority over an important existing antitrust decree in an unenthusiastic agency, are not only interrelated, they are tied to a broader and perhaps more ominous trend.

The Executive Branch avoids litigation involving substantive issues with increasing frequency. Rather than litigating, the desired result is achieved by technical strategies not easily understood by the press and the public. When an antitrust suit is not filed, it is difficult for the citizenry to learn about the outrages that would have come to light had there been a suit, a trial, and a placing of the evidence on the record.

Likewise, one can plausibly argue that no one would bear responsibility for destruction of the AT&T decree and the independents it encouraged when all that was being advocated was a simple transfer of enforcement authority from a court to a regulatory agency. That kind of decision can easily be rationalized as an avoidance of unnecessary duplication, a transfer of the problems from an uninformed court to an expert agency, and so on, without any mention of the expectation that the agency will turn the clock back. If the result is the industry's return to the conditions of monopoly control and the suffocation of the independents that presumably could be, at a later time, attributed to the law of unanticipated consequences.

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23. United States v. Columbia Steel, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

V. The Courts in the American System

This kind of attitude—of bypassing substance and concentrating instead on technical process—also exists on a broader basis. In recent years, by constant pressure, and some judicial acquiescence, the Executive Branch has succeeded in removing ever widening aspects of administrative decision making from judicial review. From my small perch as a district court judge in the nation's capital, I have what might be called a bird's-eye view of that kind of practice. On the basis of that vantage point, let me relate what I have observed.

It happens occasionally, or perhaps more than occasionally, that government officials will overreach in their relations with the citizenry or even engage in affirmative misconduct. This is not an indictment of public servants, but simply a statement of obvious fact. In an establishment as large as the federal government, it would be surprising if mistakes of various magnitudes were not made from time to time.

Not infrequently, the victims of such activities come to the federal court in Washington, D.C. to seek redress. The litigants may be low bidders on government contracts who were shut out; they may be government employees who were unfairly treated by their superiors; they may be whistleblowers; or they may simply be citizens complaining about denials of their rights in such fields as immigration, free speech, pollution, discrimination on account of race, sex, or national origin, or a myriad of other matters. Some of these complaints are valid; many, perhaps most, are not.

The complaining parties have usually completed an obstacle course through the various administrative channels, in which the higher echelons often will have routinely upheld the decisions made below, if only because the rubber-stamping of a policy that has long been pursued is intellectually less demanding than a reexamination of the wisdom of that policy. Finally, at the end of that long process, the hapless citizen arrives at the courthouse, full of hope, before an impartial judge without any vested interest in the defense of what conceivably may be a mistaken view of the contested issue.

Just as the citizen is full of hope, we, as judges, are anxious to rectify the inequity, or at a minimum, to grant a fair hearing on the substance of the complaints. To be sure, the courts are constrained and cannot simply substitute their judgment for that of the administrative chiefs or subchiefs. But often the evidence of law violations or the commission of injustices is such that it cries out for action under any reasonable standard, such as that which forbids arbitrary or capricious conduct. Yet what happens? The merits—the substance of the complaints—often are never heard for reasons that are truly ironic.

Few administrations in American history have talked as much about protecting the citizen from government as that of former Presi-

dent Ronald Reagan, and, to be fair, that of his predecessor, Jimmy Carter. The juxtaposition of the "good citizen" with the "bad government" was made in countless speeches and statements in the past dozen years. Typically, President Reagan would assail the government as the problem rather than the solution, and President Carter talked repeatedly about a government as good as the people. Yet the lawyers of few other past administrations have so tenaciously advocated legal principles so at odds with these lofty pronouncements.

Day after day, in case after case, the Department of Justice's attorneys seek to avoid any discussion of the substance, the merits of a controversy, between citizen and government. Instead they argue, often successfully, that the court lacks jurisdiction; that the citizen has no standing to sue; that the controversy is not yet ripe; that the controversy is overripe and therefore moot; that the issues are not significant enough and are therefore *de minimis*; that the issues are beyond the reach of the courts because they involve a political question; that all possible administrative remedies have not yet been exhausted; or that if the remedies have been exhausted, the administrative conclusion must be given controlling weight; and so on. During World War II, a popular song by a young woman complained that the men who were at home, rather than away fighting, were either too young or too old. One could easily adapt that ditty here by having the Department's lawyers characterize the lawsuits against the government as being either too early or too late, too important or not quite important enough.

The consequence of the incessant battles over these technical defenses is that the litigation between citizens and their government is carried on almost exclusively on the terrain of collateral or technical issues; the citizen's real complaint is not heard in court any more than it was within the bowels of the bureaucracy. Certainly, the doctrines I have discussed have their place: no one advocates that courts should decide matters that are none of their legitimate business or that they should intervene while an administrative process is still going on. But in my view, the trend of excluding judicial review or consideration has gone so far as to swallow up and deter litigation that is entirely appropriate.

There are a couple of reasons that underlie the extraordinary effort of the last decade or two to limit judicial decision making, one that is rarely discussed, and a second that is more legitimate.

The courts and the media are two influential forces which are not under the control of those who run the government, whether executive or legislative. Because of that independence, their actions are neither predictable nor controllable; they are loose cannons, so to speak. Naturally, from the point of view of those who run things—whether as part of the government or by way of influence from the outside—it is desirable to keep the courts and the media from scrutinizing or reviewing

actual, important decisions. To apply this principle to the somewhat parochial AT&T issue, those with power of one kind or another are better off with a regulatory commission that is subject to the usual process than with life-tenured federal judges beholden to no one. Let me hasten to add that there is substantial, valid concern among thoughtful observers about government by an "imperial judiciary" of unelected judges making decisions that should be left to those who must face the electorate every two, four, or six years. The concept is surely well taken; judges should not decide issues that are political in the best sense of that term. In a democratic nation, the decisions on such issues should clearly be reserved to the political branches elected by and responsible to the people. However, the premise broadcast by former Attorney General Meese and others, and by now more or less accepted as conventional wisdom, that the courts are deciding too many important matters in too many important areas of national governance is, I respectfully submit, quite mistaken.

In actuality, the courts are significantly involved in only a few important public issues. They are not involved in appropriations, in budget making, in the setting of interest rates or the money supply; they do not participate in the fight on inflation or that on unemployment; they have little or no role in foreign policy, foreign trade, national defense, highways, city planning, farm policy—the list could easily be extended.

The courts are, to be sure, involved in the protection of constitutional rights, and it follows that they also meddle in such subjects as abortion, school prayer, affirmative action, and the protection of small, unpopular groups from majority repression. But that is as it should be.

It is the central duty of the federal courts to protect constitutional and other legal rights, if necessary, from the will of the majority. The elected branches are by definition responsible and responsive to the majority. How many members of these branches would protect the right of the Ku Klux Klan or the Communist Party to march, and how many would see to it that the neighborhood cocaine dealer receive the same protection against prosecutorial overreaching as Oliver North? The answer is obvious. Not a great many could afford to do so, whatever their private inclinations, because they must, naturally, consider the sentiments of their constituents.

Not long ago former President Reagan said that the crucial difference between our Constitution and that of other nations is that ours begins with the words "We the People." With all due respect to our former President, this statement bears no relation to the realities of popular governance. Every one of the world's dictatorships can and does claim to be acting in the name of the people. Such nations as the People's Republic of Kampuchea, the People's Democratic Republic of South Yemen, both barbaric dictatorships, are proof of that. In fact,

the most widely extremist and antidemocratic organizations almost invariably identify themselves by such high flown labels as the Democratic Center for the Constitutional Rights of the People or the Organization for Peace and Justice. If further proof were needed, let us recall that Stalin's dictatorship operated in the name of democratic centralism, and that the full name of the Nazi Party was the National Socialist German Workers Party—quite an appealing label for so murderous an outfit.

The real difference between the United States and other nations lies not in the words of the preamble to the Constitution, but in the fact that the substantive clauses of that Constitution are "enforced" by individuals independent of and not beholden to the elected branches. Thus, I am not seeking simply to legitimize judicial activism when I say that the repeated attempts to foreclose the courts' consideration of matters which they have historically considered are ill-advised and dangerous to our way of life.

VI. Conclusion

I have drifted considerably from the AT&T decree and antitrust issues to freedom of speech and civil rights; but I shall now return to the telecommunications issues with which I began. However, the various subjects, as my remarks, I think, have suggested, are actually more closely connected than might seem at first blush.

There is more than one irony in the current efforts to emasculate the divestiture decree that governs the telecommunications markets. Not only has divestiture brought competition as well as substantial consumer benefits to those markets, but the same competitive trend is being widely copied elsewhere in the world.

As a consequence of the emergence of competition, the price of telephone service in this country has declined, its quality has improved, and innovation has made significant headway. Although local telephone rates increased in the two years following divestiture because the telephone companies were able to secure quick rate increases from their local regulators, that rise has since been checked. In the last two years these rates have actually decreased when measured in constant dollars. Furthermore, long distance rates have declined by over forty percent since divestiture, and the overall price of telephone service has accordingly shown a decrease. That decrease, in turn, was accompanied by a substantial reduction in the price of the telephone apparatus.

With the new fiber optics and the digital technology, the quality of telephone transmission is better than ever, contrary to AT&T's dire prediction that if it lost its monopoly, the national network would rapidly break down. As for innovation, we have seen more of it in the last five years than in the preceding forty. For instance, ordinary subscrib-

ers now have access to such features as repeat calling, one-button dialing, mobile and cellular phones, and greater control of incoming calls. Before competition, although telephones were sturdy, their sophistication did not change from one year to the next. Presumably there will be other technological changes similar to the introduction of microwave transmission and satellites that facilitated long distance transmission of telephone communications across the country. It was claimed at the time of the AT&T trial, which is eight years ago now, that bypass of the local switches was not merely a conceivable development but was more or less right around the corner. It has not occurred yet, but I would assume that it will. That kind of technological progress will permit the line of business restrictions to be removed or loosened. Economic conditions could change as well, but the cornerstone of such a change must be competition.

Other nations have learned from this experience. Everywhere in the developed world—from Japan to Britain—entrenched telephone monopolies are being broken up, albeit slowly. These governments have begun to realize that, without the benefits of competition, their telecommunications systems will stagnate and that, as a consequence, they will fall behind as the information age takes center stage in the world economy, as in entertainment, business, defense, and other areas. None of this is particularly surprising, as the parallel phenomenon of competition in political affairs is making its way to such formerly inhospitable soils as the Soviet Union and the People's Republic of China.

Clearly, business and industry have been responsible for most of the material progress this country has enjoyed in the last hundred years. However, this progress has been, and is being, accompanied by the unethical or illegal actions of some; actions that must be curbed and remedied by government if they are not to overwhelm the rest of the economy, in a Gresham's Law-like manner. Antitrust enforcement is one tool for the achievement of this result.

Although antitrust has a somewhat old-fashioned ring to it, and although it is certainly not a panacea for all of the problems which I have mentioned, its basic operative principle—that competition will yield significant benefits and must be protected—is as sound as ever. As it has unfortunately turned out, the protection of competition through antitrust litigation is now often a more reliable path to consumer welfare than an attempt by underbudgeted regulatory forces to control enormously powerful interests. But it may be that a new day is dawning, and that the regulation of dangerous or otherwise improper practices will regain the honored place it once possessed. If that were to happen, all of us would be the winners.

In spite of all the problems I have catalogued, I am optimistic. Ten, fifteen years ago, telephone service conjured up the image of a

sleepy public utility of little interest to anyone other than those directly engaged in that business and their local regulators. Few would have been interested in the telecommunications industry.

Today, telecommunications is a vibrant industry, constantly in ferment, with entrenched and independent players jockeying for position, and therefore, exerting their best efforts to provide the best possible product and service. I believe that it is that kind of ferment that made the American economy progressive and superior to others, and that it will do so again.