The AT&T Divestiture and The Judge as the Great Compromiser

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The growing role of the "Imperial Judiciary" in public policy-making is often accepted, with varying degrees of reluctance, in the belief that only the judiciary can fashion the controversial but necessary decisions that the other branches of government are incapable of delivering. It is therefore interesting to observe the reverse in the last skirmishes of the government's huge antitrust lawsuit against AT&T. In that case, one may recall, the Justice Department reached a settlement agreement with the communications giant. After much public clamor and comment, however, the agreement was modified by the judge in several ways, most importantly by permitting the newly formed "Bell Operating Companies" to market telephone equipment to customers. In the resolution of the case it has been the "political" Justice Department that has fought for and won a neat and clear solution; the Judge, on the other hand, was the one to pull back and fashion a somewhat muddled compromise, arbitrating in Solomonic--and political--fashion the conflicting economic claims of competitors, consumer, states, and the Federal Government.

Despite the initial reaction to the settlement that AT&T had somehow gotten off the hook, antitrust chief Baxter had scored an extraordinary coup. When else has a company agreed to give up 80 billion dollars of its assets, half a million of its employees, and a position as monopoly supplier of an essential service to up to 80% of the population? The proposed settlement had a remarkable purity. It identified the main source of AT&T's power as its control over local telephone distribution--a natural monopoly by most counts--which then provided it leverage in the potentially competitive markets for equipment and long distance telephone services. Hence, the proposed settlement isolated the local natural monopolies and split them

off, forming neat packages of regional companies that were not permitted to stray beyond the tight boundaries of their monopoly.

This immediately raised a hue and cry. Two major arguments were made. The first was that the Baxter approach was overly "structural." Many observers felt that it would create a category of musclebound and atrophying utilities excluded from hi-tech applications. A second line of attack came from state regulators and consumer groups. These feared that the prposed divestiture would let AT&T abscond with the long distance profits that previously subsidized basic local service. Although much of the increase in basic service charges would be offset by a reduction in long distance rates, many customers clearly would lose out. The regulators, mindful of the public interest and of their own popularity, did not relish the prospect of presiding over these increases. To them, a mini-AT&T--that is, a vertically integrated company which now happened to be geographically restricted--was both familiar and expedient. Hence (except for long distance service), they in effect wanted to transform the vertical dismemberment of AT&T into a horizontal and geographic one.

Caught in the crossfire, Judge Greene equivocated. In the technologically important area of customer equipment, he attempted to resolve these conflicting claims by dividing the pie. The manufacturing of such equipment would give the new regional comapnies an unfair competitive advantage. But to leave them entirely out of the equipment field would reduce their ability to support low rates. Hence, Judge Greene's solution was to permit them to market rather than manufacture equipment. This distinction evades the hard choice necessary. If unfair competition is feared, the required solution will have no effect, since the companies could simply subcontract

the physical manufacture of "their" equipment to some eager producer, and sell or rent it to customers as an integral part of their regular telephone service. Therefore, the marketing permission will lead to results similar to those occurring if manufacturing were opened to the regional companies. Why then not permit it openly, instead of indirectly, if a prohibition is deemed unacceptable?

Judge Greene's modifications to the settlement between AT&T and the Justice Department have surely made important groups happier than before. But future regulatory tangle will be born out of the Judge's unwillingness to make a clear-cut choice on the role of the regional companies--utility or competitor--where one is necessary. That it had been the Judge and not the Attorney General that forged a compromise among interest groups is an irony of this gigantic restructuring.