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Congress and the Bell System divestiture, 1981–1982

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Northwestern University, 1991

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Congress and the Bell System Divestiture, 1981-1982

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ABSTRACT

"Congress and the Bell System Divestiture, 1981-1982"

Donald L. Goff

The decision to divest the Bell System was a major event. The large and growing literature analyzing this event focuses on four essential factors: the Bell System's corporate culture, incipient competition triggered by a series of ad hoc regulatory decisions, new technologies, and a complex political environment. None of these studies has fully analyzed the role of Congress.

Interviews with senior Bell executives and Members of Congress indicate that congressional action was a significant factor in the decision by the Bell System to accept the Justice Department's proposed settlement in the pending antitrust case. The solution represented a shift in the Bell legislative strategy as well. To succeed, the agreement needed at least the tacit acceptance of the Congress.

The scholarly literature on legislative choice posits that Members of Congress may affect regulatory decision making without necessarily passing legislation. When a majority of the members of a congressional oversight committee perceives that the benefits of regulation are being distributed within the range that they deem to be acceptable, an equilibrium is said to be achieved and no legislation will result.

The divestiture created such an equilibrium. It was the preferred solution over the alternative legislative solution, Congressman Tim Wirth's H.R. 5158, both by members of congress and the public. An examination of two contemporary documents, a March 1981 Harris Poll commissioned by the Bell System, and an analysis of members' responses to constituent mail performed by Bell's public affairs staff at the same time demonstrates that both the Congress and public preferred the divestiture. The distribution of votes within the House and Senate committees confirms that the former supported legislation while the latter preferred the divestiture. The House and Senate positions differed. The argument that the "median member's position" predicts the outcome proves fallacious.

The divestiture literature is refined by this study of congressional influence on the decision to divest.

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CHAPTER I: INTRODUCTION

On January 8, 1982, the Bell System and the Department of Justice announced that consensus had been reached on a solution to the antitrust lawsuit pending in federal district court. The agreement satisfied the concerns of the government by structurally dividing the Bell System into eight separate holding companies. This restructuring, which separated the local exchange companies from the manufacturing, research and development, and long distance companies, was based upon a model developed by the Assistant Attorney General for Antitrust Affairs, William Baxter. It represented a dramatic change for the U.S. telecommunications industry.

The executive and judicial branches of the federal government participated fully in the restructuring. Baxter prosecuted the Department of Justice's case; Judge Harold Greene presided. Various administration officials, including cabinet officers and the President, Ronald Reagan, had been involved in one way or another.

Congress, despite years of debate, dozens of bills and amendments, and hundreds of hearings, passed no laws. Yet Congress may have been the most significant player in the complex activities which led to the decision to divest. The Bell System itself had sought legislation for a half dozen years to address the various concerns alive in the

telecommunications industry: market entry by new companies such as MCI; a large, embedded, obsolescent infrastructure; and the lawsuit itself.

There is a large and growing literature on the divestiture. Various works have analyzed factors contributing to this outcome including the corporate culture of the Bell System, incipient competition created by ad hoc and incremental regulatory decisions, new technologies, and a complex political environment. Few of these works address the role of the Congress in the process of stimulating the decision the Bell System made, nor explains why, after years of hearings and debates, Congress chose not to legislate on telecommunications policy.

A review of Bell documents and interviews with Bell executives and Members of Congress shows that Congress was a key factor in influencing the Chairman of the Board, Charles L. Brown, to accept the divestiture agreement offered by the Justice Department. Congress still attempted to intervene in the months following the announcement by Bell and the Justice Department. Congressman Tim Wirth (D, CO-2), chairman of the House subcommittee with telecommunications jurisdiction, tried to move his bill, H.R. 5158, which would have substantially altered the terms of the agreement. Prior to passage of the bill, his support eroded and, in a bitter announcement, he withdrew it, ending the legislative threat to overturn the agreement.

The scholarly literature on legislative choice argues that Congress may influence the regulatory decisions of other bodies, including both the regulatory agencies and the courts, without necessarily passing new legislation. In this literature, Congress is the arbiter for deciding

which interest groups will receive which benefits from regulation. So long as the Congress perceives that benefits are being distributed within the range that an oversight committee deems acceptable, the agency-congress relationship is in equilibrium and no new legislation will be adopted.

The divestiture agreement seemed to be preferable to the available legislative alternative, Wirth's bill, in addressing the concerns of members and their constituents. The "special interest" of greatest concern to the members -- their own reelection -- seemed not to be jeopardized by allowing the divestiture to proceed. There was, therefore, no reason to create additional risk for themselves by adopting Wirth's bill. His entreaties fell upon increasingly deaf ears until, when his own political position was threatened, he opted to withdraw the bill rather than lose it.

The legislative choice models developed by political scientists and economists offer a way to account for the impact of the Congress which the current divestiture literature lacks. At the same time, a detailed analysis of the divestiture offers an opportunity to refine legislative choice analysis. Using artifacts unique to the divestiture, a Harris Poll commissioned by AT&T to gauge public reaction and an analysis of congressional positions performed by AT&T staff, it is possible to show that the divestiture was preferred by both members of congress and their constituents over the Wirth bill.

This dissertation does four things. First, it explores the influence of the Congress on the decision to divest. Second, it reviews

relationships between the Bell System and the Government before 1980. Third, it explores the Bell System's perspective on the events and circumstances of 1981 and 1982 and the limitations on its available choices as it attempted to find a public policy solution to the problems of market entry, competition, and new technologies. Fourth, it analyzes the behavior of the congress and individual members with respect to issues associated with the divestiture from the perspective of the legislative choice literature.

These analyses suggest refinements to both the divestiture literature and the theory of legislative choice and explain why the specific decision to divest was made how and when it was.

CHAPTER II: THE LITERATURE ON DIVESTITURE

There is a large and growing secondary literature on the divestiture. At the present time, the various works can be separated roughly into three thematic groupings.

The first focuses upon the self-identity and public perception of the Bell System. At its most positive, this group espouses the tradition of the "philosopher kings" led by Theodore Vail who chaired AT&T during its critical formative years. He first served in the middle 1880's, but during his major tenure from 1907 to 1919, he oversaw the formation of both the primary structures that characterized the Bell System until divestiture and the main tenets of its corporate culture. The company's self-identity embodied a strong public service ethos that, in turn, made it difficult to adapt to changing times and circumstances. Change was forced from outside by those who failed to understand the value of the contribution the Bell System made to society. This attitude did not always engender good will on the part of the public. Bell's arrogance and imperiousness were seen as factors contributing to changes wrought by regulation and judicial and legislative review.

The second group focuses upon forces of change. The broad evolution of technology and competition are generally seen as factors that required

the reevaluation of the relationship between the government and the nation's telecommunications industry.

The third group focuses upon policy making by default. This group tends to view the divestiture as a function of systemic or institutional failure. In this view, the failure of the courts, Congress, and the Administration to deal with the complexities of technology, competition and monopoly required the creation of new regulatory mechanisms. In the absence of consensus about what those new forms should be, the Bell System was "forced" to accept a policy position it could tolerate rather than one it had sought.

These groups broadly overlap. No single author's work ignores the elements emphasized by the others, but the relative emphasis helps to delineate both the strengths and the weaknesses of the arguments. In this chapter, studies of the Bell System's corporate culture, attitudes, service ethos will be grouped under the first section, headed "The Corporate Culture." The second grouping will deal with broad trends under the heading "Competition and Technology." The third will appear under "Politics and Political Processes."

The Corporate Culture

Alvin von Auw was vice president of AT&T and assistant to the chairman at the time of the divestiture. His Heritage and Destiny: Reflections on the Bell System¹ describes the divestiture as an outgrowth

¹Alvin von Auw, Heritage and Destiny: Reflections on the Bell System in Transition (New York: Praeger, 1983).

of struggle within the company to create a clear self-image and identity in the face of competition and government assault. He places a high value on the corporate culture. The "heritage" in the title -- the belief in providing universal service -- is what he sees as the real risk in the breakup. The Bell System understood its responsibility under the monopoly -- perhaps better than regulators, congressmen and judges. But the government had created, willy-nilly, a world that threatened the Bell System by admitting competition and not allowing Bell to compete.

The divestiture occurred only after much internal soul searching and "never was a coup more reluctantly accomplished."² It came as a result of the government's failure to comprehend the unique qualifications of the Bell System and of public indifference to the Bell System's fate. The supreme irony, to von Auw, is that the public lack of understanding and indifference both may have stemmed from the System's success in providing ubiquitous, reliable, and technologically superior telephone service.

An earlier "independent history" of the Bell System, Telephone, The First Hundred Years by journalist John Brooks, had raised many of the same themes about the operation of the company.³ The tradition of the "philosopher king" as chairman went back to Vail. His successors had shown a substantial resilience in maintaining the organizational integrity of the Bell System during its early conflicts with the government. The

²Ibid., 388-389.

³John Brooks, Telephone, The First Hundred Years (New York: Harper and Row, 1975).

work is a reasonable popular history more valuable for its narrative of major events than its analysis. But it does suggest some of the imperiousness and arrogance that Bell's opponents found so repugnant about its dealings with the public and public officials.

In contrast to these positive portrayals of the Bell System's culture is the MCI view expressed by Howard Crane.⁴ Crane attacks AT&T for "willingly, repeatedly, and consistently violat[ing] the antitrust laws of the U.S."⁵ Such violation constituted a business risk the Bell System took to stop competition. To Bell, the most important "cross subsidy" was the lobbying expense paid for by the ratepayers. Crane offers the explosion of new products and services in the immediate post-divestiture environment as evidence that the monopoly had been an impediment to technological advancement.

In an important early assessment, Judge Greene echoed the last point.⁶ Calling the breakup "inevitable," Greene contended that the System had been destined for breakup from the time of the first coast-to-coast microwave transmissions. He further argued that there were three alternatives to divestiture. First, Congress could have restricted market entry. Second, AT&T could "crush" newcomers. Third, all constraints

⁴Howard C. Crane, "The Bell System's Breakup: MCI's View," Public Relations Journal 40, no. 5 (May 1984): 34-35.

⁵Ibid., 34.

⁶David Myers, "Greene Has No Apologies on 'Inevitable' Bell Breakup," Computer World 18, no. 27 (2 July 1984): 3-12.

could have been removed from AT&T. He pointed to the emergence of new products and services after 1984 as evidence of the benefits of competition between AT&T and its rivals.

The "inevitability" argument is elusive. Greene sees, through hindsight, how things had evolved in the telecommunications industry. Less clear are the reasons why the specific structural and regulatory changes were made, especially in the light of both the FCC's and the Congress's advocacy of separate subsidiaries under regulatory control, rather than structural separation.

Steve Coll attempts to reconcile the problems of attitude and technology. He fully develops the themes of imperiousness and arrogance in his description of Chairman John DeButts in The Deal of the Century, The Breakup of AT&T.⁷ The book is one of the important analyses of the divestiture.

Coll, a business reporter for the Washington Post, is "very, very close," in the words of AT&T general counsel, John Zeglis, in his narrative of the detailed events leading up to the decision to divest.⁸ But Zeglis would disagree with Coll's primary thesis -- that AT&T was not a "victim" of bureaucrats and legislators. Its arrogance betrayed it. By demanding too much, it made itself vulnerable to attack. The breakup,

⁷John Coll, The Deal of the Century: The Breakup of AT&T (New York: Atheneum, 1986).

⁸John Zeglis, "Remarks," AT&T Public Affairs Conference, Washington, D.C., November 11, 1987. Zeglis was a member of the trial team at Sidley and Austin working on the antitrust case. In 1991, he is General Counsel of AT&T.

Coll concludes, will be a failure doomed to hurt consumers, investors, and employees, because the substantive arguments about economies of scale, synergies, and "universal service" which Bell presented to the court and congress are essentially correct.

Coll's sources are limited, and there is no evidence he ever talked directly to any of the Members of Congress. He does not reconcile the arrogance-induced "failure" with the poise, intellect, and forward-thinking he describes Chairman C. L. Brown as displaying.

In addition to limited treatment of the congressional aspects of the debate, Coll says little about public involvement or reaction to the events leading up to the decision. His reviewer, Janet Guyon of the Wall Street Journal, chides him for this, since "most didn't comprehend its magnitude until Ma Bell lay dismembered."⁹

Another reviewer was too close to the case. George Saunders, who was trial advocate for AT&T, sees no virtue in avoiding the legal aspects. Viewing the breakup as a "colossal blunder," Saunders chastises Coll for not understanding the flaws in the government's case.¹⁰

Technology and Competition

The first truly scholarly analysis is that of Peter Temin and Louis

⁹Janet Guyon, "Assessing the Dismemberment of Ma Bell," Wall Street Journal, (January 23, 1987): 15.

¹⁰George L. Saunders, "AT&T: Breaking Up Is Hard to Do," Antitrust (Winter 1988): 38-40.

Galombos.¹¹ The former, an economics professor at MIT, and the latter, a business historian at Johns Hopkins, have reviewed the record kept by AT&T and see the divestiture primarily as a result of disparities created by technological change and ad hoc policy decisions.

Historically, residential telephone service was priced lower than cost -- a "loss leader" -- to promote universal service availability. Long distance services, used primarily by businesses, were priced above cost and subsidized the shortfall from residential services. Revenues from manufacturing equipment, leasing, and special services were calculated and included with local and long distance revenues to determine rates. The ensuing allocation of costs and revenues was accomplished through a complex process known as "separations and settlements." The Federal Communications Commission largely exercised its regulatory responsibilities by demanding justifications for rates based on this process.¹²

Technological advances in the '50s, notably microwave communications, made it possible to provide much cheaper long distance services. As the differences between price and cost grew, and as the courts and the FCC admitted competitors such as MCI into the national network, an anomaly developed. Bell could provide, at least theoretically, long distance as cheaply as anyone, were it not for the

¹¹Peter Temin with Louis Galombos, The Fall of the Bell System: A Study of Prices and Politics (Cambridge: Cambridge University Press, 1987).

¹²Ibid.

requirements of separations and settlements.¹³

But the Bell System also had to make itself competitive. It loaded redundancies and expenses into its costs, as a result of its service-oriented corporate culture, that were unwarranted by competitive demands. The "Vail Plan" which had been the organizational scheme for so long, lacked the focus and flexibility to meet the competitive needs of the business. The divestiture, Temin argues, was created by uneconomic cost allocations and a need to compete.

William Baldwin reviews Temin.¹⁴ While critical of the fact that he had "chosen not to formulate any specific standards of economic performance by which he can evaluate the performance of the Bell System," Baldwin thinks it's good history, "admirably thorough and lucid." Baldwin's most important contribution to the discussion, however, is the statement that "Temin is unduly kind in his discussion of the irresponsible and opportunistic behavior of leading Members of Congress in this affair."

Temin's sources are apparently reviews of secondary articles, such as in Telecommunications Reports. He fails to provide this scholarly work with a bibliography and is too dependent upon too few sources to warrant the generalizations he makes. Al Partoll, frequently cited as an AT&T source, is an officer of the corporation. But Partoll was in charge of regulatory matters and was not intimately involved in the activities for

¹³Ibid.

¹⁴William L. Baldwin, "The Restructuring in Telecommunications," Science 239 (12 February 1988): 800-801.

which his words and notes are given as authority in the court and congress. The entire body of congressional testimony is omitted; there is but one paragraph on Wirth's Telecommunications Subcommittee hearings.

It may be that Brown came to the conclusion that Temin suggests - - that a horizontal organization was more viable than a vertical one, but there is no discussion of why such an elaborate restructuring occurred. Surely it had to do with more than Brown's admiration for Baxter's model.

Temin's "undue kindness" more nearly reflects a failure to understand the complex political iterations and machinations that occurred. Baxter was on the scene less than ten months when the decision was made; Wirth had been active for five years. Judge Greene had been hearing testimony for more than a year; competition had been emerging for nearly twenty years.

Further, there were strong countervailing arguments to divestiture within the Bell System and the notion expressed by Saunders of the "flaws" in the government's case. In Disconnecting Parties. Managing the Bell System Breakup: An Inside View, W. Brooke Tunstall describes the difficulties of divestiture in terms of engineering problems, asset transfers, and personnel.¹⁵ As corporate vice president for organization and management systems, his job was to implement the consent decree. He views the decision as one engendered by public indifference and pressures induced by technology, competition, and politics.

The seriousness of the interactions of these three factors was

¹⁵W. Brooke Tunstall, Disconnecting Parties. Managing the Bell System Breakup: An Inside View (New York: McGraw-Hill, 1985).

explored in a special edition of the British magazine, The Economist. The nameless author describes U.S. telecommunications as "more regulated than before."¹⁶ It admires such technological innovations as ISDN, VAN, digital networks and the "feat[s] of integration matched by neither the computer nor the television."¹⁷ But it also adds that, "while monopoly-breaking is one thing, proper competition [is] quite another," and "Potomac fever is what less liberal countries want to avoid."¹⁸ The divestiture, driven by technology, was strongly influenced by politics.

Politics and Political Processes

Identifying politics as a factor and analyzing its influence requires a more sophisticated approach than the writers above have attempted. The political process is more than debate, hearings, and reelection. It presupposes the identification of valid public policy goals and some notion of differing perspectives, priorities or options for achieving them.

Among the first scholarly attempts to sort out the public policy debate on telecommunications is the work of Carol Weinhaus and Anthony

¹⁶N.A., "A Survey of Telecommunications; New Lives for Old," The Economist, October 17, 1987 (Special Issue): 8.

¹⁷Ibid., 25.

¹⁸Ibid., 25; 8.

Oettinger.¹⁹ Their effort is directed toward defining the parameters of debate both before and after divestiture. They identify five major subject areas which have consistently been debated with regard to telecommunications. Revenue and the allocation of cost is foremost. (This is also the sole factor discussed by Temin in detail.) The boundaries of the industry and related questions raised by the FCC in its computer inquiries are the second area. The issues of monopoly and competition are the third and are interrelated with the question of universal service. Interconnection and ownership, the fourth area, is also interrelated to universal service. The fifth, physical plant (or infrastructure) is the physical reality that underlies all policy debate on the other issues.

This is a solid work. In addition to basic factual discussions of the issues, the work provides excellent appendices, an apparently adequate index, and is footnoted on primary sources. Its publication offers a useful first step into the technical aspects of the debates. However, there is very little analysis or study of the political processes that led to the actual decision.

Similarly, "Chip" Shooshan writes about the various "issues" without talking about the debate or the political processes.²⁰ Having been staff counsel to Lionel van Deerlin, chairman of the House communications

¹⁹Carol L. Weinhaus and Anthony G. Oettinger, Behind the Telephone Debates (Norwood, NJ: Ablex Publishing Corp., 1988).

²⁰Harry Shooshan III, ed., Disconnecting Bell: The Impact of the AT&T Divestiture (New York: Pergamon Press, 1984).

subcommittee, Shooshan was an extremely active player when telecommunications issues were considered by the subcommittee through 1980. Some would say that, as a staff person, he was too active, having even participated in interrogating congressional witnesses. Given that Shooshan had both access and experience in this complicated policy making arena, it is surprising that he gives virtually no attention to the congressional influences other than to acknowledge their existence.

Shooshan's personal role is analyzed by Jeri Olejniczak Cabot in a doctoral dissertation entitled "Congress and Communications Policy: Rewriting the Communications Act of 1934."²¹ Her study argues that the entry of new interest groups created conflict for Members of Congress who found themselves in a situation in which any clear decision would create offense to someone. Their usual response would be deference and inaction. But from 1976 to 1980, changes occurred that contributed to a significant effort to legislate. These included Shooshan's "entrepreneurial" attitude as staff director, as well as organization by and resources from telecommunications users and Bell competitors. But this rewrite effort dissipated as a consequence of inadequate congressional leadership, competition from the FCC and opposition from the Bell System. Her study fully elucidates Shooshan's role, but stops short of the critical events of the following year, 1981, when the decision to divest was made. By then, Shooshan had left as staff director and was no longer a participant.

Alfred Kahn saw the divestiture as a function of the economics of

²¹Jeri Olejniczak Cabot, "Congress and Communications Policy: Rewriting the Communications Act of 1934," doctoral dissertation, Duke University, 1986.

regulation. Since there is, in his opinion, no "natural monopoly," it was only a matter of time before unsatisfied demand created enough pressure to alter the means of supply. That is, customers would create the impetus for new goods and services faster than regulators could accommodate their demands within the existing institutions. Deregulation and competition would provide a better, more flexible, more economically rational response to this demand.²²

Peter Drucker argues that the antitrust suit raised serious questions about antitrust policy in general. The suit and the regulatory framework constrained AT&T management from making the decisions it needed to make to take advantage of its own economies of scale and to drive technology forward. With the convergence of telecommunications and computing, AT&T sought to prepare for an information age future based upon a significantly different technological base. It could not because of regulatory constraints.²³

Peter Huber similarly focuses on the impact of convergent technologies and the choices of technology strategies upon policy decision making in the post-divestiture environment. But his futurist approach, while suggestive about the decision to divest, is focused on the technologies and the regulatory and structural issues of the post

²²Alfred E. Kahn, The Economics of Regulation 2 vols. (Cambridge, MA: The MIT Press, 1988).

²³Peter F. Drucker, "Beyond the Bell Breakup," Public Interest 77 (Fall 1984): 3-27.

divestiture environment rather than the issues and events of 1981.²⁴

A British scholar, John T. Wenders, argues the contrary. While the standard economic theory of regulation suggests that the processes will be dominated by those with the most to gain, the U.S. telecommunications industry was something different. It became, in effect, a regulated cartel that could balance the interests of its myriad users. But divestiture resulted from a failure to understand this balance. Since residential users enjoy the benefits of cross subsidy, competition is risky if it produces a bifurcated telecommunications network. The net effect could be the "usual" result of regulation: a few who have much to gain will do so at the expense of the many who have much to lose.²⁵

The divestiture produced risk to the quality of service, according to Alfred W. Duerig, and engineering and installation difficulties for users according to Ronald Frank.²⁶ These problems, raised after

²⁴Peter W. Huber, The Geodesic Network: 1987 Report on Competition in the Telephone Industry (Washington, D.C.: U.S. Department of Justice, Antitrust Division, 1987).

²⁵John T. Wenders, "The Economic Theory of Regulation and the U.S. Telcoms Industry," Telecommunications Policy 12, no. 1 (March 1988): 16-26.

²⁶Alfred W. Duerig, "The Demise of the Telephone Network," Public Utilities Fortnightly 117, no. 2 (23 January 1986): 30-38, and Ronald A. Frank, "Coping with Divestiture," Business Communications Review 14, no. 3 (May/June 1984): 2-3. See also Richard Stannard and Donald F. Danker, "Is it Time for an Independent Regulatory Strategy," Telephony 207, no. 11 (3 September 1984), on the difficulty of allocating "access" -- the residential cross-subsidy issue between the post-divestiture, competitive long-distance costs attributed to the non-usage sensitive portion of the local loop.

divestiture, reflected arguments the Bell System had made during the debate about the "synergies" inherent in the vertically integrated Bell System. H.W. Bode's Synergy describes the "uniqueness" of the Bell System as a vertically integrated company and offers an internal assessment of its ability to provide services.²⁷

Duerig also argues that the desire of policy makers to introduce competition blinded them to the benefits of the pre-divestiture system. In his view, divestiture produced benefits for the carriers, the manufacturers, and the large users. The small users -- residential and small business customers -- would pay more for less reliable service in the post divestiture world. Breaking up the Bell System ended the benefits of synergy and efficiency which its organization had provided.

Roger Noll echoes this viewpoint. He argues the impetus for change came not only from the abstract "forces" of competition and technological change, but also from the policy makers who sought to impose their vision of a generally deregulated and competitive telecommunications industry.²⁸ He sees a flaw in attempting to differentiate between regulated monopoly and unregulated competition and becomes a proponent of total deregulation himself.

Noll's beliefs were shared by two key policy makers. William F. Baxter, who became the Assistant Attorney General for Antitrust Affairs

²⁷H.W. Bode, Synergy: Technical Integration and Technological Innovation in the Bell System (Murray Hill, NJ: Bell Labs, 1972).

²⁸Roger G. Noll, "The Twisted Pair: Regulation and Competition in Telecommunications," Regulation 11, no. 3/4 (1987): 15-22.

in the Reagan Administration and whose ideas became the basis for divestiture published his views in 1974.²⁹ Mark Fowler, Chairman of the FCC in 1981, wrote later, but emphatically, that economic regulation of telecommunications under the Communications Act of 1934 had "failed" by 1984. In his view, the "trusteeship" model needed to be replaced by a "marketplace" model and the "public's interest" and neither a regulatory agency nor Congress should determine "the public interest."³⁰

Jeremy Tunstall describes deregulation as a movement from bureaucracy into the "political marketplace."³¹ Modifying the rules creates a greater demand for protecting the rules remaining in place. The result is more political activity as groups strive to maintain the benefits they have against the encroachments they perceive from their competitors, potential or actual.

Gerald Faulhaber's excellent study, Telecommunications in Turmoil: Technology and Public Policy, argues that Brown's "mistake" was in failing to get reassurances that deregulation would follow divestiture.³² In his

²⁹William F. Baxter, "How Government Cases Get Selected -- Comments from Academe" Antitrust Law Journal. 46 (Spring, 1977): 586-601.

³⁰Mark S. Fowler and Henry Geller, "50th Anniversary of the Communications Act: Special Supplement/ Communications Law -- A Half Century Later," Federal Communications Law Journal 37, no. 1 (January 1985): 71-83.

³¹Jeremy Tunstall, "Deregulation is Politicization," Telecommunications Policy 9, no. 3 (September 1985).

³²Gerald R. Faulhaber, Telecommunications in Turmoil: Technology and Public Policy (Cambridge, MA: Ballinger Pub. Co., 1987).

view, the decision to divest failed to achieve the aims it was devised for -- allow the restructured components of the Bell System to compete openly. But while Faulhaber's book remains one of the key theoretical works on the divestiture and the broader issue of telecommunications policy, it provides no analysis or insight into the limitations that policy makers may impose upon corporate decision making. Such an analysis is necessary, as will be shown below, to fully understand the decision to divest.

Others have expanded the notion of political conflict to describe the failure of political institutions to deal with the problems at hand. Richard Wiley, former chairman of the FCC, argues that regulatory agencies simply lacked the wherewithal to deal with the complexity of technology, competition, and monopoly.³³ Chronically understaffed and poorly funded, both state and federal regulators were merely making the most of a bad situation. Unable to successfully cope with the large volume of information, the arcane technical arguments, and the complexities of separations and settlements, they struggled to deal with the dramatic changes wrought by technology but could not do so effectively.

Ithiel de Sola Pool more fully develops the idea that divestiture was a function of the lack of technical understanding and breadth by legislators and regulators. Tracing communications regulation to its 19th century roots, he sees most policies evolving from early understandings of the technical limitations of each of the various media. The regulation

³³Richard E. Wiley, "U.S. Regulation -- The Shape of Things to Come," Telecommunications 21, no. 10 (October 1987): 181-182.

of the major telecommunications technologies, including telephone, telegraph, and broadcasting (with cable television partially included) evolved along several distinct tracts. Regulation of the press, or print media, focused upon the First Amendment; the free market has been the instrument of regulation. The postal service was a "pure" monopoly, operated by the government until quite recently. Broadcasting became a regulated commercial activity. Telephones and telegraphs were regulated as common carriers. The fifth model, nationalization, was largely rejected in the U.S., though quite common in the rest of the world.

Telecommunications regulation developed along lines similar to roads and railroads. As common carriers, telephone and telegraph providers were obligated to provide service to all who sought it. Further, they could not require customers to assign their rights, they could be required to be licensed, and their rates could be regulated. In exchange for accepting these obligations, the carriers would be granted an exclusive franchise to provide telephone or telegraph service in a given geographical area.

Other technologies evolved along different paths. The challenge, according to Pool, comes with the convergence of technology. Privacy, freedom of speech, and intellectual property rights, for example, require safeguards that simple competition may not compel. One common thread among the various regulations has been to define the boundaries of the various media. In the AT&T case, the boundary between computing and telecommunications eroded over time. Despite review of that boundary by the FCC in 1966 and 1980 in its computer inquiries and the 1956 Consent

Decree, policy makers sought to review the technologies and institute new policies. The divestiture followed from this public policy review.³⁴

John Gantz develops this theme relative to the Third Computer Inquiry (CI-III). CI-III, he predicted, would be radically different than the first two Computer Inquiry decisions because of emerging technologies and new policy parameters. New technologies that are network driven make it virtually impossible to determine boundaries between media. While his study does not focus upon the divestiture decision, he does offer a revealing insight into the perceptions of policy makers and engineers on the difficulties the new technologies were creating for policy formulation.³⁵

Others focusing upon the failures of political institutions have been more parochial. Saunders called the DOJ case "flawed."³⁶ He was personally involved in the lawsuit as a member of the Bell trial team. He argued strenuously that the Justice Department's arguments about leveraging market power in regulated adjacent competitive markets were invalid and that the public interest was well served by the vertically integrated Bell System. The synergies of the integrated system produced a greater social benefit than divestiture could.

³⁴Ithiel de Sola Pool, Technologies of Freedom (Cambridge, MA: Ballinger Pub. Co., 1983).

³⁵John Gantz, "Computer Inquiry III: Punishment of the Gods," Telecommunications Products and Technology 3, no. 9 (September 1985): 49-52.

³⁶Saunders.

Kraus and Duerig are more polemical. The title of their book clearly states their position: The Rape of Ma Bell: The Criminal Wrecking of the Best Telephone System in the World.³⁷ This work reflects a widely held view that the divestiture was unnecessary and improper because of the quality of the U.S. telecommunications system which Bell had provided. The intervention of "politicians" represented an untoward involvement by government, and the specific decisions were the result of flawed government actions.

Alan Stone dismisses the decision as "politics."³⁸ Stone's study offers useful information about the background of events leading up to the decision, but offers very little insight into the political process. It is clear from the tone of the work that the author perceives "politics" to be an evil, irrational process.

Henck and Strassburg describe policy as "cyclical" and the decision to divest as a function of a downturn in the regulatory "cycle."³⁹ Rather than an extraordinary event or aberration, the divestiture was a natural function of the need to make adjustments or corrections along the way.

³⁷Constantine Raymond Kraus and Alfred W. Duerig, The Rape of Ma Bell: The Criminal Wrecking of the Best Telephone System in the World (Secaucus, NJ: Lyle Stuart, 1988).

³⁸Alan Stone, Wrong Number: The Breakup of AT&T (New York: Basic Books, 1989).

³⁹Fred W. Henck with Bernard Strassburg, A Slippery Slope: the Long Road to the Breakup of AT&T (New York: Greenwood Press, 1988). Strassburg was Chief of the Common Carrier Bureau. The work is solid and offers perhaps more insight than described here. But most of it repeats the long evolution from Carterfone to divestiture that has been covered in various ways by Coll, Temin, von Auw, and the others.

Finally, Gerald Brock offers insights into the continuing strategy of AT&T to limit market entry by competitors through a variety of weapons, ranging from patents to acquisitions to mergers. The acceptance of regulation was an early strategy by Vail to protect the company from competitors. The divestiture, by inference, could be a strategy to protect the core business from the uncertainty and frustration that chaotic regulatory policies had produced. While arguing "competition," AT&T may have in fact been trying to avoid it.⁴⁰

The works just reviewed suggest, collectively, that four things affected the decision to divest. These factors are Bell's corporate culture (whether viewed positively or negatively), incipient competition (whether driven by technology or ideological zeal), new technology (which consumers wanted faster than the Bell System, for reasons of management, engineering, or regulatory limitations, could provide), and a complex political environment. But while the complex political environment is acknowledged, it has generally not been analyzed. The role of Congress, in particular, has not received the attention it should.

As the next chapter will clearly show, the Bell System chose the option it did at the time it did from among limited public policy choices. Secondary sources make clear that many issues had been debated in the public policy arena for years. To argue that "forces" were at work as

⁴⁰Gerald W. Brock, The Telecommunications Industry: the Dynamics of Market Structure (Cambridge, MA: Harvard University Press, 1981). Published the year the decision was made, Brock could not comment upon it. But his longitudinal study of the industry is lucid and insightful and is one of the major works on telecommunications issues.

most writers on the divestiture do is appropriate. But such analysis is simply not precise and detailed enough to explain why this event of such significance to a major industry occurred how and when it did. In the next chapter, a careful examination of the history of the Bell System's relationship to government and of the specific events in the Congress leading up to the divestiture decision will identify the available options. This study will show that conflict between the government and the Bell System frequently had been resolved by negotiated settlements and that divestiture had been employed before to satisfy government concerns. It will also show a direct relationship between Congressman Tim Wirth's introduction of a highly regulatory bill in December, 1981 and the decision to divest.

CHAPTER III:
CONGRESS AND THE BELL SYSTEM

This chapter will examine the events leading up to the divestiture decision. It will show that the Bell System had limited options in its public policy choices and that the decision to divest reflected those limitations. The specific decision flowed from the dim prospect for obtaining a legislative solution to its regulatory and legal problems within the time available and as a direct result of its perception of the consequences of H.R. 5158 introduced by Congressman Tim Wirth.

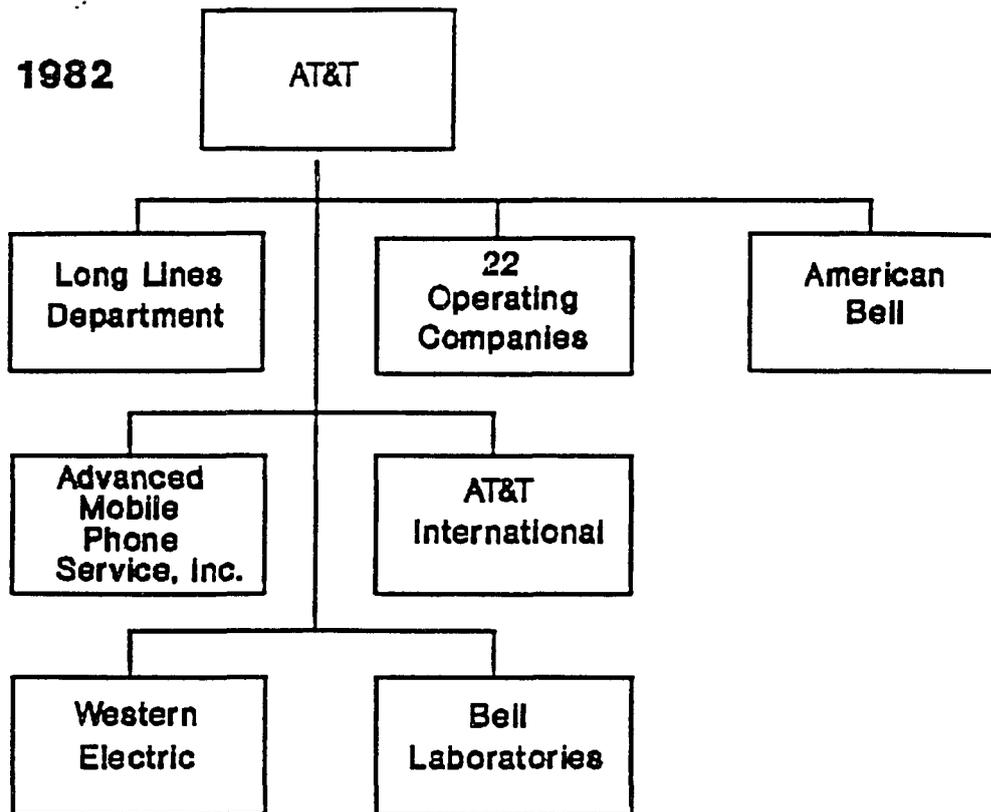
The Bell System and Congress Until 1980

The predivestiture Bell System was the nation's largest corporation. With approximately a million employees, it had assets of nearly \$160 billion and almost three million shareowners. It employed more people than the entire civilian side of the federal government. After divestiture, the eight newly created companies were all among the top 25 companies on the Fortune 500 list.⁴¹

The Bell System was organized along lines developed in 1907 by Theodore Vail. (See Figure 3.1) His system was based upon vertical

⁴¹Howard Trienens, "Remarks," J.L. Kellogg Graduate School of Management, Northwestern University, November 21, 1988. Trienens was the Senior Vice President and General Counsel of AT&T.

Figure 3.1. Predivestiture Organization of the Bell System



Source: AT&T Annual Report, 1982

integration of manufacturing, research and development, and services (both local and long-distance), under one holding company, the American Telephone & Telegraph Company (AT&T). There were 22 operating companies, divided largely by state boundaries and population into roughly comparable entities. The operating companies were confederated with a relatively large degree of self-control and direction within the demands and limitations of system engineering and broad corporate policy goals. The operating company presidents had substantial autonomy. But they organized their companies in a similar, essentially flat manner: organizational emphasis was on plant, traffic and engineering; marketing and sales, new product development, and customer services were detached and subordinate to the needs of the operating network.⁴²

Within the company, a strong corporate culture emerged. Aggressive salesmanship was not praised; the environment rewarded consensus-building and was layered with redundancies to prevent individuals from exceeding their authority. This corporate culture lasted for over seventy years without serious jeopardy against a backdrop of near-monopoly operation of the system. The culture gave expression to the mission-oriented goal of providing "universal service," a phrase coined by Vail to describe his turn-of-the-century plan to put a telephone into every home and office.⁴³

Universal service effectively became a public policy goal with the

⁴²Temin, 9-19; Stone, 39-54. See also Temin, 87-91 for organizational charts.

⁴³Brooks, 170; Stone, 24-33; and von Auw, 44-52 discuss the corporate culture and "universal service" ethic.

passage of the Communications Act of 1934. Ubiquity of service was largely achieved in the 1950s when 70% of homes had phones and 96% had access to them.⁴⁴

But Congress and certain office holders, both elected and appointed, had never been particularly comfortable with the relationship between a private company and the provision of a service so important to the public interest. The Kingsbury Commitment of 1912 was the first agreement between the Bell System and the government to maintain the private company as the primary service provider.⁴⁵ But there were a substantial number of critics who sought to nationalize the system under direct government ownership.

During the First World War, the Bell System resisted the efforts of the Postmaster General to nationalize the company along British lines. While telephones were nationalized briefly for about a year during the war, Bell continued to operate the system largely unchanged, as agent for the federal government. In 1921, Congress granted the Bell System limited immunity from the Sherman Antitrust Act with the Graham-Willis Act.⁴⁶ That legislation formally declared the U.S. telecommunications market to be a "natural monopoly" subject to regulation. It created incentives for acquisitions by Bell.

⁴⁴Temin, 16.

⁴⁵Brooks, 136; Stone, 138.

⁴⁶Brooks, 158-160; Stone, 48; Temin, 11.

Figure 3.2. CHRONOLOGY of MAJOR EVENTS 1912 - 1984

December 19, 1913	"Kingsbury Accord" -- AT&T to provide service as a privately owned "common carrier."
July 16, 1918	Congressional resolution to nationalize for war effort.
Oct. 5, 1918	World War I -- nationalization to be a contract between U.S. and AT&T.
Aug. 1, 1919	Reversion to private ownership.
1921	Graham-Willis Act adopted; gives AT&T partial relief from Sherman Antitrust Act.
1925	AT&T divests international arm; ITT created.
July 1, 1926	AT&T divests radio broadcasting.
Jan. 13, 1927	John Otterson of Western Electric -- "Four Square Memorandum" -- patents are weapons to gain control of non-telephone industries.
Oct. 1927	Chairman Walter S. Gifford's "Dallas Speech" identifying AT&T's public responsibilities: "The best possible service at the lowest cost consistent with financial safety."
1928	AT&T divests Graybar.
November 1934	Commissioner Paul Atlee Walter begins investigation of AT&T business practices.
March 1935	Congressional joint resolution adopted for FCC to investigate AT&T.
April 1, 1938	Walker's "Proposed Report" attacks AT&T vertical integration, urges divestiture of Western Electric.
Jan. 14, 1949	DOJ files suit against AT&T seeking divestiture.

Figure 3.2--Continued

Jan. 12, 1956	Consent Decree filed.
1959	House Judiciary Committee declares consent decree "without merit and ineffective."
June 27, 1968	Carterfone decision opens terminal equipment market to competition.
August 13, 1969	FCC authorizes MCI to serve multiple customers.
March 18, 1971	FCC authorizes non-Bell telephone companies to offer computing services.
November 20, 1974	DOJ files suit seeking divestiture of Western Electric and Long Lines.
April 7, 1980	FCC issues Computer Inquiry II allowing deregulation of customer premises equipment.
January 8, 1982	AT&T and DOJ announce divestiture agreement.
August 11, 1982	Judge Greene approves the settlement.
January 1, 1984	Divestiture implemented.

Graham-Willis contributed directly to the system in place before the 1984 divestiture. There was a dominant carrier, the Bell System, serving the bulk of the nation with a number of smaller carriers such as General Telephone and the rural independents serving certain geographically-based markets. This contrast of companies was designed to allow regulatory authorities to make comparisons. But at no time were there to be multiple companies in a given market or service area. "Competition" occurred among separate, parallel markets, but not within the same market, a system known as "benchmark competition."

As a corporate strategy, the Bell System focused upon the "natural monopoly" in telecommunications identified in Graham-Willis. In the next few years, it divested itself of many of its ventures other than domestic telecommunications. It sold its international arm, International Telephone and Telegraph, in 1925, its radio station, WNBC, in 1926, and its electrical equipment subsidiary, Graybar, in 1928. But it retained its telecommunications manufacturing unit, Western Electric, as well as the Bell Laboratories, and Long Lines, the domestic long-distance network.

Congress renewed its interest during the active legislative period of President Franklin D. Roosevelt's first term. The Communications Act of 1934 removed the Bell System from regulation by the Interstate Commerce Commission and placed it under a new agency, the Federal Communications Commission. Among the first commissioners appointed was Paul A. Walker. Over the next four years, Walker investigated the company and in 1938 issued a "Proposed Report" highly critical of the vertical structure of the company, and particularly of its manufacturing subsidiary, Western

Electric. While neither legislation, regulatory change, nor lawsuit followed immediately because of World War II, an antitrust lawsuit was filed by the Justice Department in 1949.⁴⁷

At issue in this lawsuit was the way the Bell System engaged in competitive businesses dependent in various ways upon the monopoly local exchange. The manufacture of telecommunications equipment for which the local companies were the principal customers and from whom privileged information about the technical characteristics and dynamics of the operating companies could be obtained suggested an arrangement "inherently anticompetitive" under the antitrust laws. The Department of Justice argued that, while Bell did enjoy a lawful monopoly, it had violated the Sherman Act by leveraging that monopoly to impede and foreclose competition in a related market. The Department sought structural relief requiring Bell to divest itself of Western Electric, and a permanent injunction against manufacturing by the Bell System.⁴⁸

The case proceeded slowly. The Administration changed and, in 1956, a negotiated settlement was explored and discussed. The Bell System agreed to accept restrictions on its lines of business, including a ban on its entry into computers, in exchange for a Justice Department commitment to leave it organizationally intact. The 1956 Consent Decree sought to control the Bell monopoly by restricting the system to providing regulated telephone services and to manufacturing equipment of a kind used

⁴⁷Brooks, 170-173; Stone, 11-27, 59-80.

⁴⁸United States v. Western Electric, et al., No. 17-49 (D.N.J., 1949).

only for such regulated services. Regulators were expected to prevent abuse.

The decree generated considerable controversy within the Department of Justice and among the members of the Democrat-controlled House Judiciary Committee. The latter issued a scathing denunciation of the Consent Decree in 1959, judging it to be "without merit and ineffective."⁴⁹

During the following decades, the basic premise under which the 1956 Consent Decree had been entered eroded through a series of seemingly unconnected regulatory and judicial decisions. Within a year of each other, the federal court decisions in "Carterfone" opened the telephone terminal equipment market to competition and the 1969 action of the FCC allowing Microwave Communications, Inc. (soon to be MCI) to offer microwave voice transmission services to multiple business customers had the effect of opening the long-distance market to competition. In 1971, the FCC allowed telecommunications companies other than the Bell System to offer computing services through separate subsidiaries.⁵⁰

The next decades saw a rapid expansion of competition. In three areas -- terminal equipment, long-distance services, and computing services -- Bell's competitors would gain market entry without regulation, but Bell would continue to be regulated. The Bell System considered itself threatened and treated unfairly.⁵¹

⁴⁹Temin, 16.

⁵⁰Henck and Strassburg, 110-125; Stone, 146-156, 167-170.

⁵¹Stone, 119-194; Temin, 28-69; Henck and Strassburg, 110-125.

It argued first before the FCC, and then in the courts and Congress, that the integrity of the network was at stake. "Foreign" equipment, i.e., terminal equipment not manufactured by Western Electric, that failed to meet the Bell System's rigorous engineering standards would jeopardize the entire network. Sales and resales of long-distance services to business customers amounted to "cream skimming" which would surely end in higher residential rates. "Unequal regulation" of Bell and the Other Common Carriers (OCCs), the phrase used to describe new entrants like MCI, failed to serve the best interest of the consumer and jeopardized "universal service." The arguments fell on deaf ears.⁵²

In 1974, a second lawsuit exposed the Bell System to the risk of divestiture not only of Western Electric, as both the Walker Proposed Report and the 1949 suit had, but also of Long Lines.

Long-distance, or interexchange, services were dependent upon the local exchange "bottleneck" to originate and terminate calls. The Department of Justice argued that the new long-distance carriers which regulators had admitted into the market needed access to local telephone company facilities and charged that the Bell System had substantially abused its control of the local bottlenecks to impede competition. Such alleged abuses had included activities ranging from denial of access to price discrimination.⁵³

Under the monopoly leveraging theory, the only remedy that could

⁵²Temin.

⁵³Coll, 63-82; Stone, 273-313; Temin, 101.

satisfy the Department's concern was a structural one -- divestiture of the local exchange operations from the competitive businesses, and permanent injunctions that would prevent the local exchange companies from entering competitive businesses as long as the "bottleneck" facility remained.⁵⁴

The Bell System vigorously defended itself against the allegations of abuse, yet the Department of Justice held fast. Through three Administrations and the tenure of five Attorneys General, the Department demanded structural separation.⁵⁵

In its pleadings, the Bell System argued forcefully, if not convincingly, its points. But its advocates, among the world's best lawyers, lobbyists and strategists, sometimes sowed the seeds for their own losses through their strident rhetoric.

Despite the redundancies and blandness built into the organization and, more important, the corporate culture, the Bell System liked tough talk. Back in the '20s, the head of Western Electric had circulated what became known as the "Four Square Memorandum." Patents and technology, he argued, were corporate weapons used to destroy one's business enemies.

⁵⁴Philip L. Verveer, Attorney at Law, Staff briefing, U. S. Senate Judiciary Committee staff, July 9, 1990. Verveer was the initial trial team leader at the Department of Justice and later was Chief of the Common Carrier Bureau at the FCC.

⁵⁵United States v. AT&T, No. 74-1698 (D.D.C., 1974). There is confusion about the two cases because of the way in which they were finally resolved. Technically, the legal solution in 1982 was a Modification of Final Judgment (hence the term "MFJ") to the 1956 Consent Decree in U.S. v. Western Electric, et al., and the 1974 case, U.S. v. AT&T, was dropped.

His strident tone and military imagery might have been inspirational to his subordinates and colleagues, but to persons outside the company, it looked harsh, unyielding, and bellicose.

This tendency toward harsh rhetoric continued. John DeButts, Chairman of the Board from 1972 to 1980 sought to seize the initiative on competitive and regulatory issues which had been lost to him, as he saw it, through the disconnected actions of the regulators and courts.⁵⁶ On September 20, 1973, DeButts addressed the National Association of Regulatory Utility Commissioners (NARUC) in Seattle. His speech, strident and bold, sought the support of the state commissioners to stifle incipient competition and reconfirm the monopoly. But to many, it was regarded as "a clear example of DeButts' overweening arrogance."⁵⁷

In 1975, DeButts caused the introduction in the Congress of the "Consumer Communications Reform Act," known on Capitol Hill as the "Bell Bill," to reestablish and confirm the legal status of the Bell System's monopoly. But while Bell spent millions for lobbying and public relations in support of the bill, the strategy failed. While the House Communications Subcommittee did hold hearings that year, legislative time ran out before legislation moved. The Subcommittee chairman, Lionel Van Deerlin of California, sought to regain control of the process by announcing a plan for a "basement to attic" revamp of the Communications Act in the 1977 session.

⁵⁶Coll, 21.

⁵⁷Ibid., 44.

The Senate preempted the House that year, however, and Sen. Ernest Hollings' Communications Subcommittee began what would evolve into hundreds of days of hearings and dozens of bills and amendments over the next five years. DeButts' initiative was lost. Congressional debates centered not on the retention of monopoly, but on alternate methods of restructuring the Bell System. In most cases, the debate centered on competition and "deregulation" and the potential impact the Bell System would have upon competitors and consumers were it "unleashed." Many of the proposals were hostile to the Bell System, although not necessarily as threatening as the potential actions of the court or the FCC.

In 1980, a young, third-term House member from Colorado, Tim Wirth, offered an amendment which identified him as a major player in telecommunications matters, but in a way clearly hostile to Bell. The "Wirth Substitute" to H.R. 6121, the House subcommittee bill crafted by Van Deerlin and Shooshan, would have made separate subsidiaries of Long Lines and Western Electric, essentially turning AT&T into an even more decentralized holding company. In hindsight, the amendment would have created a perhaps less radical restructuring than what emerged. But in the context of the time, AT&T's emphasis on protecting the monopoly and the vertical integrity of the Bell System, the amendment was perceived by the Bell lawyers and lobbyists as extremely menacing. H.R. 6121 was well on its way through the House in 1980 when the Judiciary Committee asserted its jurisdiction because of antitrust implications of the bill. That committee reported it "adversely without prejudice," a legislative maneuver which nominally voiced no opinion on the merits of the bill, but

Figure 3.3. Major Legislation and Sponsorship on Telecommunications, 1976-1982

1976	H.R. 12323	"Consumer Communications Reform Act"; the "Bell Bill"
1978	H.R. 13015	Committee bill by Van Deerlin and Frey
1979	S.611 S.622 H.R.3333	Cannon and Stevens Goldwater, Stevens, and Pressler Van Deerlin, Collins, and Broyhill
Dec. 1979 1980	H.R. 6121 -Wirth substitute	Subcommittee bill in House -- all 15 members Wirth's comprehensive amendment
	S.2827	Hollings, Goldwater, Cannon, Packwood, Schmitt, and Stevens
1981	S.898 Baxter I, II H.R.5158	Packwood, Goldwater, Schmitt, Stevens (Cannon later added) Floor amendments adopted on S.898 Wirth bill
1982	Substitute H.R.5158	

effectively killed it for that session.

The FCC had, in the meantime, acted on its own. In April 1980 it moved to deregulate telecommunications by administrative rule. In this "Computer Inquiry II" case, the commission completed a four-year study of telecommunications and determined that the manufacture and sale of equipment should be deregulated. Basic telephone service would remain regulated. "Enhanced services," those which combined telecommunications with data transmission, or "information services" would be deregulated.⁵⁸

But AT&T would have to establish separate subsidiaries to sell unregulated products and services. Communication between and among the companies would be restricted to avoid giving an advantage to the subsidiary over competitors. Subsidiaries could not own transmission facilities.⁵⁹

The FCC decision fanned the controversy and debate over H.R. 6121, the 1980 bill. The debate largely became focused on how AT&T should conduct business through and with separate subsidiaries. A similar bill, S. 2827, raised the issue of FCC authority. The Senate language retained FCC authority to intervene in making further structural changes; the House version barred the FCC from such changes.

AT&T responded in two ways. First, it took preliminary steps to

⁵⁸FCC, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) Docket No. 20828. (1980). Final Decision reported at 77 FCC 2d 384 (1980); modified at 84 FCC 2d 50 (1980) and 88 FCC 2d 512 (1981); affirmed at Computer and Communications Industry Association v. FCC, 693 F. 2d 198 (D.C. Cir. 1982).

⁵⁹Henck and Strassburg, 141-142.

comply with the approach embodied in these two bills and CI-II by forming the American Bell subsidiary to market unregulated products and services. Second, it began to seek a negotiated settlement to the lawsuit.

Five weeks after the Judiciary Committee killed H.R. 6121, the voters rejected Jimmy Carter and reversed party control in the Senate. The lame duck period seemed to offer a window of opportunity to negotiate a settlement between the company and the Department of Justice. An agreement at this point could have obviated the need for legislation and could have provided a political anchor against a political swing; it would have kept the solution "professional," that is, decided among a small group of lawyers and policy makers intimately knowledgeable about the arcane details of telecommunications and of antitrust law.⁶⁰ But as negotiations proceeded during the transition period, a settlement became more elusive. The Justice Department and AT&T remained at loggerheads and the discussions came to naught.⁶¹

At this point, the beginning of the 97th Congress in 1981, events in all the arenas were reaching critical junctures. The antitrust lawsuit had been proceeding slowly since filed in 1974. Data had been collected and written briefs prepared, but the courtroom, or trial phase, had not yet begun. Now it was scheduled to begin on April 4. Legislative prospects, despite the failures of preceding years, appeared to be somewhat brighter. If the Bell System was to achieve favorable

⁶⁰Temin, 209.

⁶¹Coll, 170.

legislation, 1981 seemed to offer a major opportunity for success because of the various electoral changes. Not only did Ronald Reagan's victory seem to herald a more sympathetic, conservative view of antitrust law, but a Republican majority in the Senate seemed to presage a less hostile environment for reaching a consensus on legislation.

The new Administration did bring sympathy to the cause, but little else. Because of contractual ties to the Bell System, the senior policy makers virtually all had to recuse themselves from the issue, including William French Smith, the Attorney General. However, William Baxter, appointed Assistant Attorney General for Antitrust Affairs in February, was not recused. He had distinctive ideas about the telephone company which he had published years earlier. That view included a belief that the telephone company was inherently anticompetitive.⁶²

Senator Packwood and S. 898

The shift to a Republican majority in the Senate had given Senator Robert Packwood (R-OR) the chairmanship of the full Commerce Committee; Senator Barry Goldwater (R-AZ) became chairman of the Subcommittee on Communications. On April 7, 1981, Sen. Packwood introduced S. 898. Cosponsored by Senators Goldwater, Schmitt and Stevens, it was titled the "Telecommunications Competition and Deregulation Act of 1981."

As introduced, the bill would have replaced rate-of-return regulation by establishing "as national policy the promotion of marketplace competition, deregulation, and reliance on the private sector

⁶²Baxter.

to provide telecommunications services."⁶³ Basic service was to be regulated until "universal service" could be assured without regulation. All other services were to be deregulated over a transition period. Bell was to be allowed to offer unregulated competitive services and equipment with structural safeguards. "FSAs," that is, fully separated affiliates, were to be created to provide unregulated services. The Bell System was to be proscribed from offering cable television services or from offering mass media services through its own transmission facilities. Hearings were scheduled for June.

Packwood had previously cosponsored bills on telecommunications while serving as the ranking minority member, but S. 898 represented the first time he had taken the lead on a telecommunications bill. He described several facets in an interview ten years later.⁶⁴

He offered the bill in the context of deregulation of other industries. For three years, the committee had been engaged in "deregulating" various industries, including securities and trucking.

"I had a sense," said Senator Packwood, "that communications would move so fast that regulation couldn't keep up with it. I wanted to put the bill out there and see what happens [sic]. I was thinking about

⁶³[Donald K. Weaver], "Communications Act Revisions," Internal AT&T working paper, n.p., 1984, 8. This document was prepared by the AT&T government relations staff as a background piece soon after divestiture. For the best neutral narrative histories, see N.A., Congressional Quarterly Almanac, 97th Congress, First Session, 1981. Vol 37, (Washington, D. C.: Congressional Quarterly Press, 1982): 555-560, and Mary W. Cohn, ed. Congress and the Nation. Volume VI, 1981-1984. A Review of Government and Politics, (Washington, D. C.: Congressional Quarterly Press, 1985): 270-272.

⁶⁴Senator Robert Packwood (R-OR), interview by author, April 22, 1991.

communications as radio and television and telephone. In this bill, we were only dealing with the one part -- telephones."⁶⁵

Between the introduction of the bill and the opening day of hearings, it became clear that there was considerable disagreement within the Administration over the bill. On the first day of hearings, June 2, Packwood, Goldwater and Schmitt "lambasted" the Administration for failing to take a definitive position. While many of the witnesses who testified supported the bill generally, they also had significant, if largely predictable, reservations. FCC Chairman Fowler, for example, testified in support of the policy goals and "thrust" of the bill, but argued it was important for the FCC to retain regulatory authority over Bell's conduct and structure. Henry Geller, the Carter Administration's Assistant Secretary of Commerce, also endorsed the measure while urging "that the FCC be granted more flexibility to deal with AT&T structure."⁶⁶

At the same time, both the Defense and Commerce departments argued within the Administration for dropping the lawsuit. At the initial Cabinet task force meeting on June 4, the President demurred. Commerce Secretary Baldrige and Ed Meese, then the President's Political Director, had contrived to have the President agree to drop it. Baldrige had personally lobbied the votes of the Cabinet Council in support of dismissal. But the moment was lost. Baxter argued more forcefully than Baldrige, and Reagan lapsed into a story that added nothing substantive to the discussion. The meeting adjourned without establishing a

⁶⁵Ibid.

⁶⁶Ibid., 9.

definitive position on the overall issue or a plan for proceeding in the court and Congress.⁶⁷

The Baldrige-Meese effort to have the lawsuit dropped was resolved inconclusively by a President disengaged from the details of government and recovering from a gunshot wound. But Baxter was a man with a mission. He wrote to Budget Director David Stockman, one of the president's major policy advisors, urging that the Reagan Administration not support S. 898. His letter was "leaked" to the Hill and "became known" prior to the second day of hearings. On June 11, the public confusion increased when Baldrige announced the Administration's support for the thrust of the bill and said legislation patterned after S.898 "should be enacted this year."⁶⁸

Packwood, the chairman and sponsor, was aware of this confusion. He was upset that the Administration "couldn't get its act together." His public comments during the first hearing were largely designed, it appears, to stimulate the Administration to develop a cohesive position.

Hearings continued on June 15, 16, and 19. The witnesses, including AT&T Chairman Charles L. Brown, discussed technology, long-distance competition, terminal equipment, and data processing. All seemed to agree that legislation was a vital aspect of a solution to the problems of competition and technology in the telecommunications industry.

Senator Hollings (D-SC) made a serious effort to modify the bill. He offered an amendment in the subcommittee which would have substantially altered the level of regulation. The amendment, which required ten

⁶⁷Coll, 220-222.

⁶⁸Weaver, 9.

percent outside ownership of the separate subsidiaries, would have effectively placed the Bell System, for the first time, under the regulatory control of the Securities and Exchange Commission. Hollings lost 8-9 in committee. The amendment was later included in the House version, H. R. 5158.⁶⁹

On July 16, the Commerce Committee voted the bill out 16-1, with Senator Hollings (D-SC) the lone dissenter. It was expected that the Majority Leader, Senator Baker (R-TN) would grant floor consideration prior to the August recess. A "hold" was placed on the bill, however, by Senator Thurmond (R-SC), chairman of the Judiciary Committee. Thurmond argued that since the issue was an antitrust case under the jurisdiction of the Department of Justice and the trial court, it was appropriate that his committee hear the bill. The Judiciary Committee had held hearings on the "monopoly" issue and continued to do so; much of those hearings focused on the likely impact of S. 898.⁷⁰

At this point, Baxter asked the judge to suspend the case for 11 months pending congressional action. That request infuriated Judge Greene and may well have accelerated the court's timetable. Baxter seems to have finessed a White House request that this be done on behalf of the Administration, knowing the judge's probable reaction.⁷¹ His maneuver would be the last endeavor to drop or otherwise dispense with the suit

⁶⁹Thomas Cohen, Minority Counsel, U.S. Senate Commerce Committee, interview by author, October 15, 1991.

⁷⁰Weaver, 10.

⁷¹Coll, 239-253.

before the agreement was reached in December. As the court case advanced, the legislative timetable accelerated. Anticipating court action early in 1982, the pressure on Bell to achieve a legislative solution increased dramatically, based upon its assessment that the judge was unmovable.⁷²

S. 898 came to the floor at the beginning of October. Floor consideration continued for three legislative days. Two minor Bradley (D-NJ) amendments were adopted. So were two very significant packages of amendments known as "Baxter I" and "Baxter II."

Adopted by unanimous consent and offered by Sen. Thurmond on behalf of the Judiciary Committee and the Justice Department, these two packages were perceived by Bell as very adverse to its interests.⁷³ The first dealt with procurement practices. In effect, it required the Bell System to go through an open bidding process similar to that required of government agencies, and with dramatically tougher disclosure requirements than the government imposed on any other business. The second package required equal interconnection to network facilities.

After three days of debate on the 5th, 6th, and 7th, the bill passed the Senate as amended 90-4. Hollings tried his outside ownership amendment again. He lost again, this time by the decisive margin of 26-68.

While the bill was long and complex, it did four fundamental things. First, it amended the Communications Act of 1934 to empower the

⁷²Trienens.

⁷³Michael D. Baudhuin, Corporate Vice President and Attorney, AT&T, interview by author, October 6, 1988.

FCC to deal with competition in telecommunications. The FCC would have authority over the states on long distance regulation. It could deregulate services, but only when it determined that there was effective competition and that services were universally available at reasonable rates. Second, it required the "dominant regulated carrier" to establish separate subsidiaries to provide all but basic telephone services. Included in the dominant carrier classification were the 22 local Bell operating companies and Long Lines. Special regulations would fall on the operating companies, including the requirement to provide equal grades of access to the local loop for all competing long distance carriers by a fixed date three years in the future. Third, a joint board of the FCC and the state regulatory commissioners was created to deal with the problems of cost allocation, cross subsidy -- particularly between regulated and non-regulated affiliates, and disclosure rules. Fourth, the bill established the requirement for separate subsidiaries and a lengthy set of terms and conditions for their establishment and operation. Penalties of up to \$1 million were authorized for violations of these rules, which covered everything from advertising to marketing to provision of services in times of public peril. It further specified those businesses from which AT&T and its separate subsidiaries would be proscribed, including fire and burglar alarms, electronic information systems, and cable television. The bill was sent to the House, where it was referred, on October 20th, to the Committee on Energy and Commerce. Here it would languish.

Charlie Brown publicly praised the bill. Calling it "doubly

tough," he nonetheless saw it as "the most significant milestone yet in congressional efforts" with regard to developing telecommunications policy reflective of competition and technological change.⁷⁴ But some opponents remained more critical. The Ad Hoc Committee for Competitive Telecommunications (ACCT) was a group of large telecommunications users, mostly major corporations who sought lower rates, particularly for long distance. The executive vice-president, Herbert N. Jasper, described the Baxter amendments as making the bill "simply atrocious, rather than outrageous," and went on to argue that the separate subsidiary could never really be separate. Rather, it would become "a giant clone of Bell."⁷⁵

Brown was correct that it was a milestone. After five years of debate, S.898 was the first bill to clear a committee and pass from one chamber to the other. It had done so with an impressive vote margin and without a procedural attempt to return it to committee. But the compromise was far from complete, as Jasper's comments suggest.

That it passed is surprising, given the context in which the bill was considered. One of the standard excuses lobbyists give to members not to legislate is the argument that litigation is pending. The House Judiciary Committee, for example, had made that one of its points the previous year when it was concerned about not having enough time to consider H.R. 6121. It wanted to "assess its impact on the pending Justice Department antitrust suit."⁷⁶ While there were some discussions

⁷⁴Congressional Quarterly Almanac 1981, 558.

⁷⁵Ibid., 71.

⁷⁶Ibid., 557.

within the Administration and some advocates for dropping the lawsuit, that notion never really went anywhere. Baxter worked the Hill hard to achieve his two amendments, but he never fully embraced the legislation. The bill itself, S.898, disclaimed a legislative intent to affect pending antitrust lawsuits. The Administration eventually endorsed the "thrust" of S.898. Packwood told the Administration that, given the passage of S.898, the reverse situation would be true. The Justice Department lawsuit would impede House action and prevent a legislative compromise.

The lopsided vote suggests general agreement, at least among the members of the Senate. Packwood certainly described it as a consensus.⁷⁷ But at Bell, the adoption of the two Baxter amendments provoked serious disagreement between Brown and Trienens. Trienens wanted to pull the plug; in his view, the Baxter amendments made the bill too onerous to support. Brown did not disagree with Trienens' assessment of the impact. He did disagree on the appropriate public response.⁷⁸

Brown still advocated, publicly at least, the legislation. He praised the bill, while calling it "tough." From the Bell perspective, it was. But having passed by such a wide margin, the bill had considerable legislative weight and momentum. And procedurally, an alteration could only come through House action or in conference.

Congressman Wirth and H.R. 5158

While the Senate had been engaged with S. 898, the House had been

⁷⁷Packwood.

⁷⁸Trienens.

busy with hearings. The new chairman of the Subcommittee on Telecommunications, Consumer Protection and Finance, Tim Wirth (D-CO), had begun his tenure with an informal "base-line review" of telecommunications issues designed to "educate" the members.⁷⁹ These hearings were to be followed by formal hearings on the status of competition and deregulation in telecommunications. Hearings on the status of competition in the telecommunications industry began May 20 and continued May 27 and 28. Wirth announced that the formal hearings would serve as "prelude and underpinning" to legislation he expected to introduce "in September or October of this year."⁸⁰

In June, Wirth scheduled two more hearings on "user needs and concerns." He held another on "user's perspectives" in September. He held two more in September on "diversity of information sources." He authorized a field hearing in Boston for Congressmen Markey and Tauke.⁸¹

On July 2, he did something unusual. Just at the point when Packwood was beginning a markup of the Senate bill, Wirth sent a public letter to Reagan urging him not to drop the lawsuit.⁸² The letter sent a strong signal to the Administration that Wirth and his subcommittee intended to be players on the issue.

In the letter, Wirth argued that it would be "inappropriate" to

⁷⁹Weaver, 11-12.

⁸⁰Ibid.

⁸¹Ibid.

⁸²Congressman Tim Wirth, letter to President Ronald Reagan, July 2, 1981.

drop the suit. The Congress was strongly committed to legislate and only through such legislation could a "fully competitive" telecommunications marketplace be developed. The court's responsibility lay with "liability." In this phase, argued Wirth, the court was "only addressing the issue of whether AT&T has violated the Sherman Act...by abusing its position of market dominance by engaging in certain restrictive practices designed to preserve and extend its monopoly position." This issue, he further argued, was "straightforward" and involved "no novel questions of antitrust theory."⁸³

If AT&T were found guilty, that is, liable, then divestiture might be an appropriate remedy. The arguments for dropping the suit revolved around divestiture. Hence, argued Wirth, the "merits of the suit" were not being discussed, but only the question of how to deal with the defendant if liability was assessed. He offered counterarguments to the "national security" question and the issue of market uncertainty. He concluded that dropping the lawsuit would call "into question the credibility of the government's antitrust policy."⁸⁴

It is curious that a non-lawyer with an interest in the telecommunications policy side of the issue would raise a question so clearly under the purview of Peter Rodino's Judiciary Committee. The following Tuesday (the letter had been mailed on a Friday), Wirth issued a press release that focused on the "Cabinet Task Force" recommendation that the suit be dropped and clarifying that he, Wirth, had no position

⁸³Ibid.

⁸⁴Ibid.

on the case itself. A copy of the letter to Reagan was appended.

On November 3, two weeks after the Senate bill had been referred to his subcommittee for a hearing, Wirth released a staff report on "Telecommunications in Transition: The Status of Competition in the Telecommunications Industry." The main thrust of the report was the need to nurture competition in telecommunications markets before they were freed from government regulation. The report was described as reflecting the views of the Democratic majority and not been endorsed by the Republican minority. Wirth indicated his intent to use the report as the basis for subcommittee legislation.

The report challenged two main assumptions of S. 898: first, the "assumption that there is competition in telecommunications markets," and second, the "assumption that separate subsidiaries alone will adequately protect users' interests." The Bell System should be required to create separate subsidiaries to sell "unregulated" products and services. But the products and services would remain largely regulated.⁸⁵

This approach was virtually one hundred eighty degrees from the approach in S. 898. Where S. 898 deregulated and sought safeguards to competition through a separate subsidiary, the staff report and H.R. 5158, the bill which Wirth introduced on December 10, called for regulatory strictures on Bell that were "finer and stronger than any restraints the Lilliputians threw over Gulliver."⁸⁶

H.R. 5158 did deregulate customer premises equipment. Basic

⁸⁵Weaver, 9-10.

⁸⁶Baudhuin.

telephone service would be regulated. But AT&T could only enter unregulated markets through separate subsidiaries with separate accounting and significant "public" ownership. One subsidiary would be required to handle services that would compete with AT&T's own services, such as private line service, a type of dedicated business service. Other subsidiaries would be created for other services.

AT&T would be banned from electronic publishing, except for directory information, which would be handled by another subsidiary. The cross subsidy between long distance and local service would be retained by the operation of a National Telecommunications Fund which would collect from long distance services to subsidize low residential rates. What the Bell System had done through the separations and settlements process, Wirth proposed to do through a government agency.

Thus, Wirth's bill differed dramatically from Packwood's in three regards. First, it required greater fragmentation of the System through separate subsidiaries and separate accounting. Second, it took the approach that deregulation should occur only after competition was established and not as a stimulus to competition. Third, it maintained regulations in place that Bell regarded as especially onerous, but only for Bell; the OCCs and smaller local exchange companies would not be included as "dominant carriers."

But Wirth was not through. Four days after introducing the bill, he did something extraordinary. He called two meetings with the top executives of Bell's largest users and competitors to urge them to support H.R. 5158. Communications Daily said, the "Invitation list was blue-

ribbon, including CEO's and chairmen of 20-25 companies, including Honeywell, CDC, Datapoint, GM, Ford, American Express, ITT, GTE, MCI, SPCC, Rolm, SBS, Hitachi, and U.S. Telephone."⁸⁷

The last was a Dallas-based reseller of telecommunications services. Its executives asked the other executives at the meeting "to join and contribute money to grassroots campaign to whip up public support for legislation and to counter expected effort by AT&T in support of less strict Senate bill (S.898)."⁸⁸ It named Sol Linowitz and Robert Beckel, "former top Carter Administration officials," as those responsible.⁸⁹

Wirth's action was decried as "unprecedented" by his critics. "This is the first time I've ever heard of a congressman calling a meeting to attempt to rally financial support to lobby for passage of a bill he sponsored," said one who was quoted in the press.⁹⁰ Others said Wirth left the room while Linowitz gave the "hard sell," asking for \$100,000 from each company for the campaign. Wirth's aides, allegedly including David Aylward, the subcommittee Staff Director and Chief Counsel, remained in the room while the pitch was made. Wirth's office later denied the charge that an effort was made to raise money, though conceded that meetings took place on the indicated day.

Beckel admitted that contributions were discussed, but denied

⁸⁷Communications Daily 1, no. 235 (Tuesday, December 22, 1981): 1.

⁸⁸Ibid.

⁸⁹Ibid. Beckel would become campaign strategist for Senator Walter Mondale's presidential campaign in 1984. Linowitz had been an ambassador.

⁹⁰Ibid.

that "specific amounts" were sought. The purpose of the effort, he claimed, was not to target congress, but the "public." Alleging that AT&T had "unlimited resources," he believed the Bell System had already begun a campaign to "weaken" Wirth's bill. The attacks on Wirth over the program to develop a grassroots campaign was part of an effort to "smear Wirth and hurt his credibility."⁹¹

When, on December 10, Wirth introduced H.R. 5158, "The Telecommunications Act of 1981," the worst fears of Bell executives were confirmed. It "marked a substantial departure from previous regulatory and legislative initiatives, particularly in its pro-regulation thrust."⁹² Under the bill, the FCC would have substantial regulatory authority over any new competitive subsidiaries. It would have substantial new authority over manufacturing and research entities. It would also become a sort of securities and exchange commission in miniature for the Bell System; it would regulate the issuance of securities for the new subsidiaries.

How ironic that on December 10, the same day that Wirth introduced the bill, Bell's chief counsel, Howard Trienens, was calling Baxter to make an appointment. The next day the two met in Washington. Trienens probed Baxter's position on divestiture. Would, the Bell System wanted to know, divestiture end the line of business restrictions in the 1956 Consent Decree? Baxter said yes.⁹³

Brown pondered his options and made the decision to go forward

⁹¹Ibid.

⁹²Weaver, 12.

⁹³Temin, 265.

with divestiture along the lines proposed by Baxter.

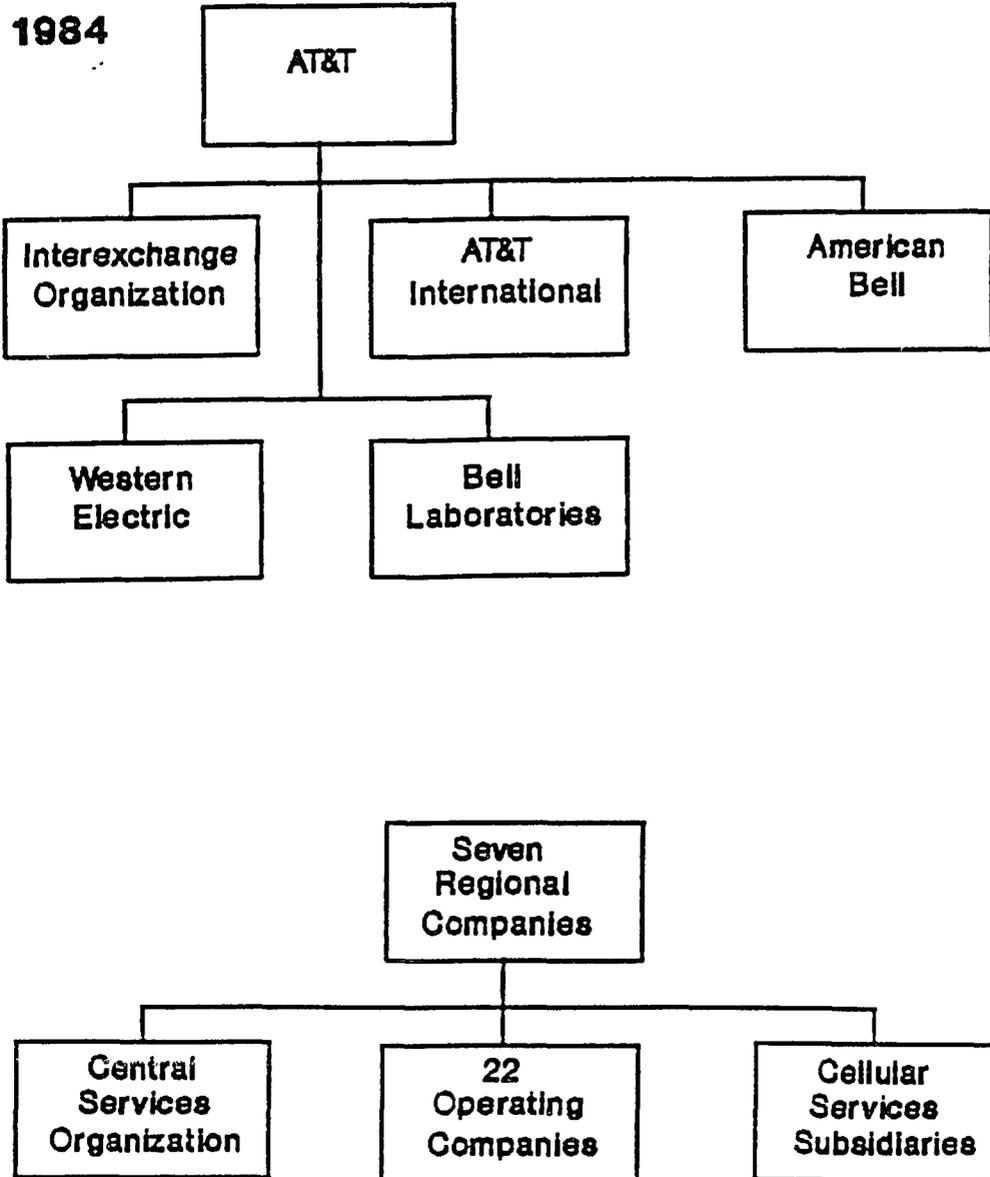
Unaware of these conversations, Wirth proceeded with his efforts to move H.R. 5158. On December 20, while the Congress was recessed for the Christmas holiday, Wirth sent around a "Dear Colleague," a letter to his fellow Members of Congress explaining the bill, the state of the telecommunications industry, and his desire that they cosponsor the bill.

On January 8, 1982, the Justice Department and the Bell System publicly announced their agreement. (See Figure 3.4) But Wirth was unwilling to let go. On January 12, only four days after the announcement, he fired off another "Dear Colleague" letter contending the "proposed settlement does not obviate the need for legislation. Instead, it makes passage of legislation in this Congress critical."⁹⁴ Wirth clearly and fully intended to maintain his presence as a key player and to influence the outcome of events. He announced further that his own bill, H.R. 5158, would become the vehicle for addressing what he perceived as "basic issues" of competition, universal service, and employee protection.

The committee chairmen in both chambers initiated oversight hearings on the agreement and upon its general impact on pending telecommunications legislation. Both the Commerce and Judiciary Committees of the Senate held hearings on January 25th. Packwood, the Commerce chairman, raised questions about the impact on local rates. Thurmond, the Judiciary chairman, asked questions about the impact on

⁹⁴Congressman Tim Wirth, Dear Colleague letter of January 12, 1982, 1.

Figure 3.4. Postdivestiture Organization of the Former Bell System



Source: AT&T 1982 Annual Report

local rates, too, and further asked about the applicability of Tunney Act procedures which would allow for public comments before the court on the decree and "the future competitiveness of the industry." Baxter testified that, while the Tunney Act did not specifically apply, it was the intent of the parties to pursue "Tunney Act-like" proceedings to provide public input. Baxter further testified (in contrast to his earlier position) that Congress should wait at least six months before legislating, because no one yet knew what the divestiture plan would be.

The Senate disengaged, having satisfied itself that there would be no precipitate rise in local rates, a fear fanned by consumer lobbyists and state regulators, and that there would be an opportunity for public input. Inaction would be the prudent course. Packwood said, for example, he "heard nothing on these issues from [his] Oregon constituents, only from industry moguls. I just intuitively [his emphasis] knew Congress would avoid a controversy. The House won't[sic] do anything. If they did, we'd deal with it in conference."⁹⁵

Packwood's comments express a strong folk wisdom in the Congress. If another entity deals with an issue, it is inappropriate for the Congress to upset it. The Senate staked out, through its questions on local rates and public input, some ground to intervene at a later time if its fears of public dissatisfaction proved founded. The agreement involving the Administration, the agencies, and the regulated entity seemed, with its "severed limbs," to be the "victory" over the Bell System that many had sought. Brown played this point up in his testimony before

⁹⁵Packwood.

the Senate. The agreement was not, he said, "our idea. . . it's what the public wants us to do."⁹⁶

The House was less sanguine. The next day, January 26, the Telecommunications and Monopolies Subcommittees of Energy and Commerce and Judiciary, respectively, began holding joint hearings. The Judiciary chairman, Peter Rodino (D, NJ-10), suggested that the agreement did not fully address the issues of local rates and the ability of other firms to compete with AT&T. He further questioned the procedures that had produced the decision.

In his opening remarks, Wirth was more strident. He disagreed with those who suggested legislation should be deferred until the agreement was in final form. He went through the motions of an oversight hearing -- both he and the Senate held two days of hearings to listen to Baxter describe the separation of regulated monopoly services from products and services potentially or actually competitive.

But Wirth was determined to proceed. On February 2, he began hearings on his own bill, H.R. 5158. Two panels of regulators testified that legislation was necessary. AT&T's summary succinctly describes the testimony of the witnesses Wirth had selected for the panels. "The state commissioners were," the statement reads, "largely unanimous in their views and supportive of H.R. 5158."⁹⁷ Eight more days of hearings followed between early February and mid-March. Most of the witnesses, including state public utility commissioners, consumer advocates, Bell competitors,

⁹⁶Brown testimony, quoted in Weaver, 13.

⁹⁷Weaver, 14.

and independent telephone companies, among others, repeated the litany: legislation is necessary now and H.R. 5158 is the necessary legislation. The sole exception, other than Bell System witnesses, was Assistant Commerce Secretary Bernard Wunder, who testified for the Administration that legislation should await final court action and a divestiture plan.⁹⁸

On March 2, Wirth received a missive from his staff, entitled "Competitive Issues -- Remaining Problems and Legislative Solutions."⁹⁹ The memo argued that H.R. 5158 addressed many of the issues raised by the settlement, but some remained that yet needed to be addressed, including cross subsidies, network integrity, patents, and others. Four legislative options were identified to deal with the problems described. The first option was to enact separate subsidiary provisions to prevent cross subsidization. As a practical matter, this would have split both the Bell Labs and Western Electric between Long Lines and American Bell, the new customer premises equipment subsidiary.

The second option was to adopt the separations requirements of the FCC's Computer Inquiry II decision. Accounting procedures would be the sole method of preventing cross subsidization. The third option called for a separate long distance subsidiary.

The last option was "no further restructuring of AT&T" beyond the settlement. It cited Baxter's January 28 testimony before the

⁹⁸Ibid.

⁹⁹Subcommittee Majority Staff [David K. Aylward, Howard Symons, David Leach, Scott Rafferty, and Tom Rogers], letter to Congressman Tim Wirth "RE: Competitive Issues -- Remaining Problems and Legislative Solutions," dated March 2, 1982.

subcommittee that "the settlement [made] any further restructuring of AT&T unnecessary to promote vigorous competition in the telecommunications industry." But the memo further argued that was an unacceptable answer. The potential for AT&T to cross subsidize its unregulated activities with revenues from its regulated long distance service remained. The FCC was perceived as being inadequate to the task. The memo concluded that the "records before the subcommittee makes[sic] clear that the FCC and its accounting projections alone have not and cannot resolve these problems. In any event, Congress will have lost the opportunity to develop telecommunications policy that will promote full and fair competition in this industry."¹⁰⁰ The staff was clearly encouraging Wirth to go ahead with legislation.

After the conclusion of these hearings, Wirth's staff negotiated for a fortnight individually with the members of the subcommittee. As the equinox approached, "it became clear that Chairman Wirth would be able to gather most of the private interests and a clean majority of the Subcommittee members around a revised version of H.R. 5158."¹⁰¹ On March 22, Wirth held a press conference to promote his "Amendment in the Nature of a Substitute" to H.R. 5158, which he would offer at the beginning of a markup on the bill two days hence. The amendment would substantially alter the consent decree and would retain the strong regulatory approach embodied in the original H.R. 5158. The new version would codify details of structure as well, unlike the Senate bill, which delegated that

¹⁰⁰Ibid.

¹⁰¹Ibid., 15.

authority to the FCC.

Wirth was clearly reflecting the views of all the opponents of the Bell System, whether business user, competitor, or residential customer. He had carefully cultivated this diverse group for some months. In December, he had solicited affluent corporate groups to raise money for a grass roots campaign in support of his original bill.¹⁰² By March, it was clear that he was still trying to represent their interests in his legislative approach. He moved his bill quickly.¹⁰³

On March 24, markup began. The next day, the bill was passed unanimously by the subcommittee, 15-0, after adopting a series of "agreed" amendments resulting from overnight negotiations. The subcommittee vote showed a substantial consensus against the settlement and in favor of legislation to supersede it.

In passing the subcommittee 15-0, the bill sent a strong signal of being noncontroversial, other than criticism from Bell. It seemed well on its way toward rapid passage. But Chairman Dingell had focused the full committee on other legislation. The subcommittee report would wait until that was done.

AT&T vehemently opposed the bill. It argued that Congress should delay legislation until the agreement was approved by the court. It contended that the legislation "tilted the playing field" against AT&T by unfairly limiting its operations while simultaneously making it easier for

¹⁰²Communications Daily. Vol.1, 235, p.1.

¹⁰³Baudhuin; Corcoran.

**Figure 3.5. Major Lobbying Interests on Telecommunications Issues,
1981-1982**

AT&T

Unions

Communications Workers of America (CWA)
International Brotherhood of Electrical Workers (IBEW)

Other Common Carriers (OCCs)

MCI

Independent Telcos (ITCs)

GTE, Con Tel, Rochester, Others
Organization for the Protection and Advancement of Small Telephone
Companies (OPASTCO)
US Independent Telephone Association (USITA)
National Telephone Cooperatives Association (NTCA)

Manufacturers

burglar alarms and fire alarms
Computer and Business Equipment Manufacturers' Association (CBEMA)

Cable TV

Publishing

American Newspaper Publishers Association (ANPA)
National Newspaper Association

Users

Ad Hoc Telecommunications Users Group

Consumers

Consumer Federation of America

State Public Utility Commissioners

its competitors. It began what became the largest grassroots lobbying campaign of its kind to that point. AT&T urged its million employees, three million stockholders, and 190,000 retirees to write to their congressmen to protest. Thousands of letters flooded into House offices.¹⁰⁴

But organized letter writing campaigns alone, while dramatic, seldom defeat legislation which has unanimously cleared a subcommittee. AT&T began an intense lobbying effort to save the settlement from being destroyed by congressional action. Its field organization and staff worked with Members and Hill staff to provoke controversy and cause delay.

Where Packwood intuitively understood the reluctance of Congress to deal with a controversial matter, Wirth impelled the Congress to act. And, at this point in the process, he was succeeding. He had put together a substantial coalition of "private interests and committee members" and he had succeeded in marking up his bill with unanimous agreement from his subcommittee.

At this point, he was well ahead of the court. If he could move the bill out of the House, he could force Packwood to deal with the issue; by amending his bill onto S. 898 in the House, he could force a conference. He had yet to clear the full committee and gain a floor vote. His chairman, Dingell, seemed highly supportive.

Wirth had challenged a major deregulatory initiative of the Reagan Administration in a subject under John Dingell's jurisdiction under the Rules of the House. One could reasonably expect Dingell, a Democrat, to

¹⁰⁴Block.

ensure that his committee performed an adequate oversight of this Reagan Republican initiative. A court decision alone, whether adjudicated or consent decree, would nonetheless be under the purview of the Judiciary Committee; by preempting the decree, Dingell could protect his committee's territory and perhaps expand it.¹⁰⁵

John D. Dingell, (D, MI-16) was one of the three or four most powerful members of the house. In 1981, he married the granddaughter of one of General Motors' Fisher brothers. His electoral and financial support included the Big Three auto manufacturers and the United Auto Workers.¹⁰⁶ Accordingly, Dingell's primary issue was the Clean Air Act, and in the spring of 1982, he was preoccupied with that issue. Through April and May, the Energy and Commerce Committee focused on its chairman's bill; Dingell did not grant full committee time to H.R. 5158 until mid-June. The delay gave AT&T time to cultivate dissent and controversy.

The full Energy and Commerce Committee began its deliberations on the bill on June 17th. The session began innocently enough with opening statements by the members. The issues of local rates, structures, competitiveness and consumer protection were predictably raised by the various speakers. At the conclusion of the statements, Congressman Tom Corcoran (R, IL-14) rejected a routine unanimous consent request to consider the bill as read and to proceed to amendments. He rejected a

¹⁰⁵Alan Ehrenhalt, ed., Politics in America, Washington, D.C.: Congressional Quarterly, Inc., 1985, 1281. and Michael Barone and Grant Ujifusa, eds., The Almanac of American Politics 1984, Washington, D.C.: National Journal, 1983, 891 describe Dingell's "turf" orientation. They also describe Wirth's ambition.

¹⁰⁶Barone and Ujifusa, 645.

suggestion by the chairman that the committee staff merely provide a section-by-section explanation of the bill and answer the members' questions. Rather, he insisted on the "usual order," that is, the parliamentary rule requiring the committee clerk to read each section of the bill aloud in its entirety before proceeding with amendments and other consideration of the bill. Dingell promptly and abruptly adjourned the session until the next week.

Corcoran devised this and other dilatory tactics to slow the bill down. Coming from the subcommittee as it did, 15-0, the bill had considerable legislative momentum. Wirth, having obtained time on the committee calendar from his chairman, clearly expected the full committee to be malleable to his bill and methods, as the subcommittee had been. The bill had a high probability of success, but Corcoran was increasing the cost in terms of time spent. He continued these tactics until the Congress recessed for the Fourth of July holiday.¹⁰⁷

That recess generally marks the beginning of a period of intense activity in the House, particularly in the second year of a session. If an authorizing committee is going to gain time on the floor, it must get its bill out and begin to get through the Rules Committee. Late September and October, until recess or adjournment, are spent preoccupied with the business of running the government. Appropriations, budget bills, and reauthorizations of agencies and the like dominate the floor calendar. The time for debate of all other legislation becomes extremely limited as

¹⁰⁷Congressman Tom Corcoran (R, IL-14), interview by author, October 3, 1991.

it gets later in the year.

The primary periods for floor consideration of major legislation are the two weeks immediately prior to the August recess and the two weeks immediately after that recess in early September. This limited floor time is sought with sometimes intense competition among the committees. The chairmen and leadership work to prioritize legislation and work out the times for debate. A fairly simple bill that is too controversial for a consent calendar may receive a rule granting an hour of debate and perhaps one or two amendments. But like a football game, an hour on the clock takes several hours to play. As a rule of thumb, only about three to five pieces of legislation can be debated on a given legislative day. During the twelve to fourteen legislative days that might be available in July and early September, fewer than fifty pieces of legislation are likely to go to the floor. Twenty-two House standing committees vie for this time, as well as another dozen or more joint, select, and special committees.¹⁰⁸

Before the Fourth of July recess, Corcoran's actions had been merely a nuisance. After the recess, they could have wreaked havoc with the committee's time schedule. Dingell worked to forestall Corcoran. When the committee reconvened on July 13, Corcoran told the committee that he would cease his delaying tactics based upon assurances he had received from the chairman that the committee would "give this bill a fair hearing so that we are not going to have laid in front of us 150 pages of amendments totally rewriting the subcommittee's products" followed by a

¹⁰⁸Congressman Floyd Fithian (D-IN), interview by author, January 10, 1991.

quick markup.¹⁰⁹

Thus reassured, the committee began a full week of consideration of amendments. The markup continued until a quorum was lost late in the afternoon of July 16. At that point, a number of amendments remained for consideration, including those on the most controversial sections of the bill, the ones dealing with the organization and structure of AT&T.

That evening, Wirth returned to his district in Boulder, Colorado. Over the weekend, something happened that caused him to withdraw his bill. On Tuesday, July 20, the committee reconvened. Chairman Dingell recognized Congressman Wirth for opening remarks. Wirth recited the long history of his efforts, of his subcommittee efforts, of his hearings and drafts. He vehemently reaffirmed his view that legislation was urgently needed. Barely self-controlled, he spat at "the campaign of fear and distortion that has been waged by AT&T to kill H.R. 5158." He concluded that, with the limits on the House calendar, "the only way to pass legislation now is to accept an agreement dictated by AT&T." He insisted that he was willing to compromise on details and on substance, but he "would not compromise basic principles."¹¹⁰ He withdrew his bill and moved that the committee adjourn.

But Wirth still sought to influence the divestiture. A week later he wrote Judge Greene urging that he adopt a number of the safeguards that

¹⁰⁹Weaver, 17.

¹¹⁰Congressman Tim Wirth, "Statement," July 20, 1982.

had been placed in H.R. 5158.¹¹¹ This exceptional nine page document, cosigned by Representatives Swift, Markey, Tauzin, and Tauke, in effect asked the court to implement legislation which the bill's sponsor had withdrawn prior to a final committee vote. Because it was from Congress, it did not violate ex parte rules that would have applied had either AT&T or the Administration sent a similar letter. Had, for example, President Reagan written the Judge asking him to "rubber stamp" the deal, there would have likely been cries of outrage at a presidential attempt to influence a judicial decision. But no such public reaction followed Wirth's foray into the judicial process.

In fact, the Judge followed several of those recommendations despite the opposition of both AT&T and the Justice Department. The court's modifications included allowing the local operating companies to produce "Yellow Pages" advertising directories. While Baxter deemed this to be outside the "natural monopoly," Greene transferred the service to allow the local companies to retain the revenue. H.R. 5158 had contained a similar provision.

The court allowed the local companies to market (though not to manufacture) customer premises equipment. The original settlement transferred this right exclusively to AT&T. H.R. 5158 was more complex. It had allowed the operating companies to keep customer premises equipment already in use (the "embedded base") and to receive the lease revenues for nine years. After five years, the companies could sell, but not

¹¹¹Congressman Tim Wirth, letter to Judge Harold Greene, dated July 27, 1982.

manufacture new telephone sets and other terminal equipment through a separate subsidiary.

The court further acted to bar AT&T from electronic publishing for seven years over its own transmission facilities. The settlement did not address the issue; H.R. 5158 had proscribed electronic publishing. AT&T would be allowed to enter the unregulated fields of computers and data processing. H.R. 5158 addressed this item only obliquely by requiring separate subsidiaries and separate accounting for all new ventures. Neither the original agreement nor the final decree contained such a restriction.

H.R. 5158 had additionally barred the unregulated parent company from owning transmission facilities outside of its long distance subsidiary. The court took no action on this element.

The Judge urged the two parties to accept his "suggestions" or face a resumption of the antitrust trial. The Department of Justice and AT&T stipulated the changes on August 19, and Judge Greene approved the agreement on August 24, 1982. The divestiture would be implemented on January 1, 1984, the same date that customer premise equipment would be deregulated under the FCC's Computer II decision.

The adoption of the Modification of Final Judgment (MFJ) by Judge Greene marked the decision of the entire government to accept divestiture as a condition of AT&T's entry into unregulated markets. The Justice Department was, of course, the initial party to accept it. The Congress failed, albeit not without serious effort, to pass legislation to delay or radically modify the agreement. The Judge made some adjustments, but

the fundamental structure embodied in the agreement stayed largely intact.

The MFJ represented a new era in telecommunications regulation. This era would be characterized by competition in long distance and equipment and by a continuation of the regulated monopoly at the local exchange.

The decision required political acquiescence. The court, the Administration, and the Congress all had powers which could alter or eliminate the tentative agreement reached between AT&T's legal counsel, Trienens, and the Assistant Attorney General, Baxter, in December of 1981.

Wirth's actions had first stimulated and then threatened the divestiture decision. The Bell System abruptly altered its legislative strategy by negotiating a settlement with the Justice Department and opposing Wirth's subsequent bill. Yet no major analysis exists in the divestiture literature to explain this critical influence on the decision nor explains why, in the end, legislation failed. Much of historical significance has been ignored. These issues will be taken up in Chapters IV and VI.

CHAPTER IV:
THE BELL SYSTEM PERSPECTIVE

This chapter will review the options available to the Bell System when it decided to accept the Baxter plan in lieu of pursuing a legislative solution. Each option had specific implications and each also imposed some limitations that were distinct from one another. The divestiture option was preferred as the solution most likely to succeed in meeting the Bell System's needs as well as the political needs of the Congress.

The public announcement by Bell and the Justice Department that an agreement had been reached came on January 8, 1982. The agreement seemed to supersede both the Senate and House bills. By divesting the operating companies from the long distance, research and development, and manufacturing functions, the Bell System was acceding to a major structural separation that was of far greater magnitude than the separate subsidiaries created in either S. 898 or H.R. 5158.

But the agreement in no way precluded Congress from acting. The agreement settled the lawsuit -- what Wirth had termed the "liability phase" in his letter -- but did not directly address many major issues of broad telecommunications policy. The question of "dominant carrier" status, for example, remained a function of FCC action. Market entry,

regulation of long distance rates, and the sale of equipment also remained subject to the provisions of the Telecommunications Act of 1934 and subject to review by the FCC.

When Wirth introduced H.R. 5158, the range of options was considerably altered. To Bell, the Packwood bill represented what it believed to be the limit of restrictions that would still allow it to compete effectively. The Wirth bill was well outside that limit. The Bell System could only expect the legislative process to adopt something somewhere between those two points. Any other solution was perceived by Bell as placing it at a competitive disadvantage. Brown and his lobbyists carefully calculated the possibility of passing acceptable legislation.¹¹²

To pass any bill would require great effort. Worse, Wirth had shown a greater predilection towards studying legislation than passing it. His "base-line review" and subsequent bill had taken ten months. He had written the President opposing dropping the law suit. There was little to suggest that Wirth would, or even could, act before the suit would come to a close, probably in March of 1982. And Trienens believed the Bell System had "less than a fifty-fifty chance" of avoiding a major restructuring in the court.¹¹³

The disparity between the House and Senate bills and the shortness of time forced Brown to make his decision among dramatically reduced options. He chose Assistant Attorney General Baxter's proposal. Subject to judicial review and a concerted attack by Wirth, the structural

¹¹²Baudhuin; Trienens; Zeglis.

¹¹³Trienens.

separation of AT&T, Western Electric, the Bell Laboratories, and Long Lines from the operating companies, was the basic plan that went into effect on January 1, 1984.

Brown always said publicly that the decision to divest grew over a period of time and was not made in any one incisive moment. Others within the company suggest that the decision hinged on a lack of alternatives.¹¹⁴ Trienens expected Judge Greene to take a narrow approach to antitrust law and likely propose a radical reorganization which Bell could not control. The FCC lacked statutory authority to deal with certain organizational aspects and with remaining antitrust issues.

But the Congress had full authority to resolve what was essentially a conflict between the Communications Act and the Sherman Act. It had not legislated, to be sure, to protect the monopoly. But neither had it legislated an alternative. Its actions between Labor Day and Christmas of 1981 became crucial. S. 898 flew out of the Senate with Bell's support, but the Baxter amendments caused significant concerns for Trienens and Brown. Wirth's introduction of H.R. 5158 represented a serious threat. The prospects for negotiating an acceptable position within a conference committee seemed dim. Bell was left with poor options in all three venues -- the congress, the commission, and the court.

¹¹⁴Trienens; Ed Block, "Remarks," J.L. Kellogg Graduate School of Management, Northwestern University, November 21, 1988. Trienens developed the legal strategy. Block developed the public relations package surrounding the divestiture to "sell" the proposal to the public as well as to stockholders, customers, and investors. Neither dealt directly with the Congress.

The decision did not necessarily guarantee the resolution of all the issues in any one venue, either. If the Department's terms were to be accepted after years of opposition, the company must "sell the deal and make it stick right there."¹¹⁵ If it didn't "sell," AT&T's bargaining position could be still worse in the other arenas, Congress and the court. Among the three main government actors, the Bell System's need meant satisfying the Congress that this agreement was "something better than they could think of."¹¹⁶ AT&T feared that the FCC, which was largely excluded from the negotiating process, would generate a complex and lengthy review procedure that would jeopardize a speedy implementation. It also feared that Judge Greene would impose a Tunney Act review and change the essential terms and conditions of the agreement. The Tunney Act is the familiar name of the Antitrust Procedures and Penalties Act of 1974. The act provides for a public review of the terms and conditions in an antitrust settlement and requires the judge to make a finding in regard to "the public interest." This public interest standard proceeding allows other stakeholders, including competitors, to participate.

There were numerous interested stakeholders who had participated in the debate for nearly eight years. These stakeholders had clear positions which the decision to divest could contradict. Shareholders, for example, were very loyal and, for many, the investment was very personal. State regulators were left with the task of "tidying up." The

¹¹⁵Ibid.

¹¹⁶Ibid.

unions would now have eight units to bargain with rather than one. Consumer concerns were among the most important. For years, the Bell System had been telling people that a radical restructuring of the telephone system would mean higher monthly rates. A "loud backfire" from any of these constituents could make the deal politically untenable.

So why did Charlie Brown consent? According to Howard Trienens, it was the least of several evils.¹¹⁷ The court appeared hostile. If the court imposed a draconian order, it might take years to appeal. In the meantime, uncertainty and confusion would reign. Bell had long hoped to go to Congress for a "reasonable" bill. Yet each iteration of the legislation seemed to get worse from the Bell perspective. The string was played out as far as possible, but after the Republican Senate passed its bill, there was less hope in the House or conference.¹¹⁸

John Zeglis characterized the decision with a metaphor:

It was like groping down a dark, narrow hallway.
But each time we tried to go through a door, it
was closed. When the door marked "Congress"
closed, there was no more hope.¹¹⁹

Faced with limited options, the company chose a nonlegislative solution. The Baxter model seemed to allow economic viability for the spin-off companies and at the same time forced a more competitive internal restructuring of both the organization and culture of the remaining AT&T.

¹¹⁷Trienens.

¹¹⁸Ibid.

¹¹⁹Zeglis.

Figure 4.1. Comparison of Alternatives to the Status Quo, 1981-1982

	<u>S. 898</u> (as passed Senate)	<u>H.R. 5158</u> (as introduced)	<u>MFJ</u> (as adopted)
Action:	Passed Oct. 7, 1981	Introduced Dec. 10, 1981	Stipulated Jan. 8, 1982
Jurisdiction:	Telecommunications Act of 1934 Senate Commerce, Judiciary	Telecommunications Act of 1934 House Energy & Commerce	Sherman Act & Tunney Act Court
Approach:	<ul style="list-style-type: none"> * some structural separation * moderate regulation * deregulate to stimulate competition 	<ul style="list-style-type: none"> * some structural separation * maximum regulation * regulate until competition exists 	<ul style="list-style-type: none"> * major structural separation * implied deregulation

So despite the fact that the Baxter model was a more radical restructuring than Wirth's original bill, it offered the advantages of flexibility and an apparent solution to other problems.¹²⁰

Interactions between the company and the government had historically been ambivalent. The company had sometimes obtained assurances from various parts of the federal government while being attacked by other parts. At fairly regular intervals the System was subject to rigorous scrutiny through congressional hearings and antitrust lawsuits. Yet, until 1981, no fundamental change occurred, either in the structure of the Bell System or the nature of the relationship between Bell and the government. In past fights, the Bell System had divested its holdings in other technologies and peripheral industries such as motion picture sound, broadcasting, and electrical equipment manufacturing. But the decision in 1981 cut into the very core of the business. The pressures to change, both in response to competition and from the agencies, court and Congress, were very great. In fact, the introduction of H.R. 5158 forced the decision to accommodate Baxter as the best available option.

Coll quotes at length from an anonymously-penned analysis by "an AT&T executive" as to why Brown shifted gears after the introduction of Wirth's bill. "Who can AT&T deal with to get a way out of the quagmire?" the executive wrote. 'One person proposed a coherent antitrust theory, can make a deal and have it stick: Baxter.' The omnibus. . . approach

¹²⁰Trienens.

of Justice has gradually been replaced by a workable scheme, the dimensions of which offer AT&T a valuable commodity -- reasonable certainty as to the future."¹²¹

So the deal was cut, and on January 8, 1982, the agreement was announced. As Block indicated, the challenge would be to "sell" the plan to the public -- and its duly elected representatives.¹²²

The secondary literature has tended to view the decision to divest primarily in the context of the court and the general considerations of technological change and ad hoc deregulation. In fact the decision clearly reflects a shift of legislative strategies. The clearly stated goal for six years had been the passage of legislation. Legislation offered permanence and the authority to deal with the whole gamut of critical issues from universal service to cross-subsidies to organization to line of business restrictions, including entry for Bell into computer markets. Wirth's bill signalled, unequivocally, that legislation meeting Bell's needs could not be achieved within the time constraints imposed by court action. Thus, the divestiture decision was the default rather than the primary goal. Brown had had a separation model staffed for about fourteen months; he knew the costs, the risks, and the uncertainties reasonably well.¹²³

But knowing that "Baxter could deal and make it stick" did not preclude legislative action to undo, supersede, or otherwise tinker with

¹²¹Coll, 296.

¹²²Block.

¹²³Ibid.

and upset the agreement with Baxter. The new strategy, however, would be much easier; it is easier to kill a bill than to pass one.¹²⁴ With the DOJ agreement, the Bell System position would be to resist any such effort. Tim Wirth would make that effort.

The announcement on January 8 still required a judicial sanction. There were a number of technical points that had to be completed including a Tunney Act review to determine whether the public interest had been served. Such a review would allow the judge to determine whether the antitrust settlement was in the public interest. Such proceedings would allow interested parties who had not previously been part of the lawsuit to voice their opinions.

The settlement required AT&T to divest its twenty-two local exchange operating companies. These would be formed under seven regional holding companies and would retain the central office switch-to-consumer portion of the business. Long Lines, Western Electric, and the Bell Labs would form the nucleus of the "new," competitive AT&T. An 18-month transition period would be allowed, with AT&T to file a detailed plan with the Justice Department within six months of the effective date of the Modification of Final Judgment (MFJ), also known as the Consent Decree.

A review of the features of each of the options available to the Bell System shows that each sought to create market regulation of telecommunications products and services and that each contained structural separations. The three options did differ in the extent of

¹²⁴Robert Sherrill, Why They Call It Politics: A Guide to American Government 2nd ed., (New York: Harcourt, Brace, Janovich, 1974).

regulation which would remain following structural separation and the admission of Bell into unregulated markets.

When Bell chairman Charles Brown looked at his options in 1981, he faced several uncertainties. Public policy, including the judicial, regulatory, and legislative areas, were important sources of uncertainty. But perhaps more important, and certainly more immediate, was the problem of inflation. For the preceding half dozen years, inflation had been growing; by 1981, the rate was in double digits and was the single greatest source of uncertainty in business planning.¹²⁵

For an organization like the Bell System, inflation was particularly difficult. The revenues of the Bell System were a product of regulation. The rate of return method using fully distributed cost allocations applied to Bell both by the FCC and the state public utility commissions meant that for any given tariffed rate change sought, extensive information had to be submitted to state and federal regulators to justify the change in price. The process required months of review. The data submitted was usually two years old. The regulatory process aggravated management efforts to deal with rapidly inflating costs by significantly limiting the rate at which revenue could grow. The regulatory process assured there would be a lag between the incursion of an inflation-driven cost increase and the time the cost was recovered in the increased tariffs.

Prosperity in the computer industry, triggered by the development of the microchip, was proceeding despite inflation. Calculators were

¹²⁵Trienens.

going down in price, "personal" computers were being developed with the power and capacity that had required a main frame fewer than five years before.

The Bell System thought it had the capability to participate in this technological revolution. Its large switches, actually computers but termed "processors," were as complex and sophisticated as anything that IBM had marketed. But this capability was only a potential in 1981, largely as a result of the prohibitions in the 1956 Consent Decree on marketing computing services and computers.¹²⁶ The Bell System could make computers for its own use, but was forbidden to sell them.

The Bell System's infrastructure, or physical plant, was ubiquitous, but analog. Millions of miles of twisted pairs of copper wire crossed the country. The costs of maintaining that imbedded base of equipment were amortized and depreciated over forty years. Shifting from the existing technology of twisted copper wire to the promising medium of fiber optic cable would require an investment in the range of \$100 billion.¹²⁷ Even in the best of circumstances, such an investment would have been daunting. Coupled with cumbersome regulatory procedures and dramatic inflation, it could be impossible.¹²⁸

Further, the 1980 Computer Inquiry decision of the FCC effectively opened Bell's equipment market to competition from world-wide suppliers. Detariffing of equipment, set to take place on January 1, 1984, would mean

¹²⁶Ibid.

¹²⁷Block.

¹²⁸Ibid.

more choices for consumers, more rapid introduction of technology and, at least initially, more confusion. For Bell, it was another source of uncertainty. Would the System lose its embedded base of equipment customers? Who would pay for the depreciation of equipment already in place? Would Bell be able to compete successfully against other subscribers?¹²⁹

Under the CI-II ruling, the manufacture and sale of terminal equipment -- everything from household telephones to computer terminals -- would be detariffed. Only "basic" telephone service would be regulated; "enhanced" services would not be. The Bell System would be required to create a separate subsidiary to sell unregulated products or services. The flow of information between the parent, AT&T, and the new subsidiary, initially called American Bell, would be limited to prevent anticompetitive behavior and insider dealing.

This ruling created nearly as much uncertainty as it resolved. As an administrative ruling, it stretched the limits of the Telecommunications Act authority held by the FCC. There was some doubt that the Congress would tolerate the procedures the ruling created. There was also adequate time before the implementation date for competitors and legislators to undo the ruling altogether. The FCC order offered a solution, but one lacking the permanence that legislation offered. It was subject to tinkering by successive regulators and by the Congress.¹³⁰

Similarly, the Court created uncertainty. The trial phase was due

¹²⁹Ibid.

¹³⁰Trienens.

to begin April 4, 1981. The newly assigned judge, Harold Greene, was making it clear he intended to proceed with some dispatch. But even if everything went right for AT&T in the trial, it was nonetheless on the defensive in the judicial arena. It could reasonably expect the trial and appeals -- whichever way the judge decided -- to last for years. After the final judgment was rendered at some indeterminate point, the Congress could still pass a law -- one that could either repeal or alter the result. As with the FCC computer inquiry decision, the Congress was perceived as having the final say.

Since congressional action seemed likely in any event, to achieve it sooner rather than later would reduce uncertainty during the period of time that the case would otherwise be pending. However, to achieve this reduction in uncertainty, any bill that passed must also result in the termination of the lawsuit. The worst outcome for Bell would be to make regulatory and structural concessions in the Congress, only to have a more draconian resolution ordered by the court.¹³¹

Thus, the uncertainties produced by the general economy, the ad hoc admission of competitors, and the new digital technologies impelled Bell to actively seek resolution of the public policy questions which also caused uncertainty. The options included an administrative rule making, the successful conclusion of a lawsuit in which Bell was the defendant, or an act of Congress. For six years, Bell's assessment had been that congressional action was least risky. The congressional solution implied

¹³¹Baudhuin; Block; Trienens.

a greater permanence than administrative or judicial action would allow.¹³²

The Bell System had to determine which strategic option offered the greatest probability of success from its own perspective. The Congress seemed to offer the greatest probability. But events were unfolding simultaneously in all of the government arenas and the actions in each had a significant affect in the others.

All this presupposed that the decision makers could agree with each other and with Bell on the "solution." To Bell, that meant a regulatory instrument providing it with flexibility to meet changing market conditions and protecting both universal service and the core businesses.¹³³

As events unfolded in each arena, Bell would reassess its position on various fine points, but for the most part, it would continue to prefer a congressional solution until December, when Wirth introduced H.R. 5158.

By 1981, all of the units of government who were active in the process of legislating or adjudicating regulatory changes were agreed on one fundamental point. The Bell System, as organized by Vail, would have to change. Each government entity included structural separations as a fundamental element of its preferred solution. The FCC had included structural separations as part of the "safeguards" or regulatory strictures imposed upon Bell as a precondition to creating a competitive

¹³²Trienens.

¹³³Ibid.

equipment market in CI-II.¹³⁴ The Department of Justice had consistently sought "severed limbs," that is, a major restructuring of the company as the only means of avoiding monopoly leveraging in adjacent markets.¹³⁵ S. 898 had included "FSA's," fully separate affiliates. H.R. 5158 separated Pacific Bell, Western Electric and Long Lines from the other operating companies. While the specifics differed, the common feature among these different approaches was some form of structural separation.

The Bell System had consistently opposed structural separations. It had argued that "the unavoidable effect of the structural separation rules is to increase dramatically the uncertainty -- and thus the business risk -- surrounding new services."¹³⁶ Here was the nexus of the problem. The Bell System thought that structural change would increase the cost of developing new products and services. It should, it believed, be allowed to develop what it called the synergies in the System and use its complex revenue streams in ways which would allow it to efficiently compete. That is, it essentially hoped to use many of the cross subsidies built into the separations and settlements process to its competitive advantage. Competitors and the government viewed these cross subsidies as inherently anticompetitive and demanded structural separations. The distinction between organizational synergy and cross subsidy was blurred.

One choice the Bell System had to make was the degree of

¹³⁴Petition of AT&T for Relief; to FCC, Amendment of section 64.702 of the Commissions Rules and Regulations (Second Computer Inquiry), p. 54.

¹³⁵Verveer.

¹³⁶Second Computer Inquiry.

structural separation it would accept. Each of the available alternatives was slightly different. The Baxter model was distinctive in its structural approach. It separated the local exchange monopoly from the competitive businesses. For the former, traditional rate-of-return regulation would remain in force. The operating companies would be allowed to enter businesses other than telecommunications. The 1956 consent decree had limited the Bell System to that general area of business. The only limitations would be upon those businesses deemed anticompetitive under the leveraging theory -- information services, long distance, and equipment manufacturing. The competitive businesses, long distance, research and development, and manufacturing, would be regulated by market forces.

The legislative alternatives incorporated both structural separations and regulations in their designs. One item differentiating the House and Senate bills was the extent to which accounting methods were used to control cross subsidization. Tom Cohen, the Senate staff Counsel, said that the history of the monopoly Bell System and its regulation was clear: "the FCC couldn't regulate effectively -- that's why we wanted structural safeguards -- bright clear lines."¹³⁷ Wirth's staff argued the same thing in its post-divestiture report to the subcommittee. It concluded with the statement that "records before the subcommittee makes [sic] clear that the FCC and its accounting procedures alone have not and cannot resolve these problems."¹³⁸ Wirth's bill was more stringent than

¹³⁷Cohen.

¹³⁸Subcommittee Majority Staff letter to Wirth, 11.

Packwood's on accounting rules. The court lacked constitutional authority to address this procedural issue.

The requirement of outside ownership offered in Hollings' Senate amendment and later in the original H.R. 5158 was another example of a legislative attempt to impose more regulation. The requirement would have had the effect of placing the separate subsidiaries under additional regulatory requirements enforced by the Securities and Exchange Commission.¹³⁹ Such regulation would have increased the cost of doing business for any Bell subsidiary, by requiring more filings, more reporting, and more effort to comply. The ability of the company to compete would have been affected by this increased cost. To the Bell System, the cost was untoward.¹⁴⁰ The court lacked constitutional authority to address regulation by the S.E.C., as well.

The court also lacked authority to deal with the specific issue of deregulation, that is, the authority of the FCC to determine the prices the Bell System could charge for its products or services. Basic ratemaking remained a function of the FCC and the states under the Communications Act of 1934. In accepting the Baxter plan, the Bell System did not address the basic question of rate of return regulation. The boundaries of the industry were addressed, including the admission of Bell into computing services, and the permanent injunctions against monopoly leveraging in "information services," long distance, and manufacturing by the regional holding companies, but "deregulation" of products and

¹³⁹Cohen.

¹⁴⁰Trienens.

services and the authority of the FCC were not addressed.¹⁴¹ The FCC would continue to regulate long distance rates, access, customer line charges, shared tenant services, and separations and settlements.¹⁴²

The Bell System would pay a regulatory price under any one of the available options. The issue was which would be the least onerous. When it chose the divestiture it chose the one it perceived as least onerous.

The decision was also subject to some constitutional constraints. The choice of venues implied limited constitutional authority which in turn affected the impact on the company. The court could deal with the antitrust concerns, but not the authority of the FCC. The FCC could deal with some of the competitive concerns, but not the antitrust concerns. The relative constitutional authority of the various institutions gave primacy to Congress. For Bell, the decision to accept court-ordered structural changes provided no guarantee against a legislative effort to overturn the agreement such as the one Wirth mounted. But the Bell System did make the decision within the context of what it thought was possible within the limited options it perceived as available.

S. 898 included some structural separation and moderate regulation. Its approach to competition was to deregulate Bell in order to stimulate more competition. H.R. 5158 contained structural separations

¹⁴¹This is the point for which Faulhaber faults Brown. Faulhaber argues that Brown should have insisted upon complete deregulation and not accepted the line of business restrictions in order to maximize the value of the agreement to the company. Perhaps his solution might have increased profits for the companies, but it is hard to see how, under the circumstances, Brown could have argued for more. See Faulhaber, 159-175.

¹⁴²Ibid., 140.

as well. But it also contained a distinctly more onerous method of regulation and would continue that regulation for the Bell System until competition fully existed. Bell's understanding of the legislative process suggested that a bill likely to gain final passage would come out of a conference committee somewhere in between. In the subjective judgment of Bell's executives, such a bill would include more regulation than they deemed could allow them to effectively compete.

The Baxter plan was less onerous. While the structural separation appeared more draconian, the Bell System believed that the new companies would all be viable. Deregulation, outside the technical scope of the decree, was nonetheless implicit; the structural features which had been used to argue for more regulation would be removed.

In the next chapter the literature relevant to an analysis of congressional decision making will be reviewed, and a framework for analyzing the decision by the Bell System to divest will be developed.

CHAPTER V:
THE LITERATURE ON CONGRESS

Numerous studies have empirically examined the process of legislative decision making. These studies have focused on "environment factors" within the Congress, including both structural and procedural influences, and the interactions among Members. A newer literature has developed in recent years that focuses upon relationships between and among Congress and other institutions, especially regulatory agencies. In this chapter, these studies will be reviewed and an analytical framework developed for examining the divestiture decision.

Environment Factors

The bulk of the work in Congress is done in committee. Committee action is, "perhaps the most important phase of the Congressional process.... That is where the most intensive consideration is given to the proposed measures and where the people are given their opportunity to be heard. ...where such a tremendous volume of hard work is done by the Members...."¹⁴³

¹⁴³Edward F. Willet, Jr., ed., How Our Laws Are Made (Washington, D.C.: U.S. Government Printing Office, 1986). This excellent little booklet, often revised, is prepared under the auspices of the House Judiciary Committee. It is an excellent source, frequently used on the Hill by Members and staff. See also, N.A., Our American Government: What

The articulation and shaping of the issues, the formulation of the agenda, and the first actions toward shaping and moving legislation occur in the committees of original jurisdiction. The rules, particularly in the House of Representatives, place a premium upon the committee structure. It is in the committees that witnesses are called, testimony heard, and the greatest part of legislative drafting and amending performed. Because of the large number of members and the large number of issues, the committee process is utilized to examine the details of legislation. There simply is not enough time for every member to deal personally with every detail on every issue.

The House actually controls floor debate by exceptions to its own formal rules. The granting of a "rule" by the rules committee effectively closes the debate by delimiting the time to be allotted to the subject on the floor and, often, the number and scope of acceptable amendments. This limiting of floor debate reduces a member's capacity to influence the final outcome by limiting access to the debate. The committee process allows a more open consideration of legislation and direct interaction between the committee considering legislation and the constituencies likely to be affected by it.

Custom and tradition tend to reinforce the position of the committees. Committee chairmen, for example, seldom vote against the prerogatives of other chairmen. A bill cleared by another committee is

is It? How Does It Function? 150 Questions and Answers (Washington, D.C.: U.S. Government Printing Office, 1981), issued jointly by the Clerk of the House and the Secretary of the Senate.

presumed by most chairmen to have been perfected by the "expert" committee. As a courtesy to the chairman who has done the work, other chairmen will support the legislation and will, in turn, expect the other chairmen to honor the work of their own committee.¹⁴⁴ The rules also provide that the standing committees have a responsibility to do more than simply review the specific bills introduced; each standing committee

"is required to review and study, on a continuing basis, the application, administration, execution, and effectiveness of the laws dealing with the subject matter over which the committee has jurisdiction and the organization and operation of Federal agencies and entities having responsibility for the administration and evaluation of those laws."¹⁴⁵

This large writ of authority to the committees to oversee the agencies and their own subject matter gives them, when coupled with the limitations on floor debate and custom and tradition, substantial power to deal almost exclusively with the matters before them. The committees provide a preliminary check on the flood of bills introduced, systematic input by interested and affected parties to the legislation, and a workable way of finding the "merits" of an issue and crafting, through the "mark-up" of a bill, a piece of legislation to be considered in a

¹⁴⁴Fithian; Tom H. Dawson, Administrative Assistant to Congressman Neal Smith (D,IA-4), interview by author, October 13, 1989. Dawson has been A.A. to Smith since the late 1960's. Congressman Smith chairs the Appropriations Subcommittee on State, Justice, and Related Agencies, which funds the FCC, Justice, and the court system. Charles R. Hilty, interview by author, February 3, 1989. Hilty was Administrative Assistant to Congressman Edward R. Madigan (R,IL-21), a member of the Energy and Commerce Committee.

¹⁴⁵Willet, 17.

substantially more limited form on the floor.¹⁴⁶

Favorable committee action may not necessarily mean ultimate success in a bill becoming law; it still must pass through both chambers in identical form. But the failure of a committee to act or its issuance of a negative report generally means a bill's defeat. There are parliamentary procedures for discharging a bill from a committee directly to the floor, but these are used extremely infrequently in either chamber.

After a bill passes both chambers, there may be substantive differences to resolve between the chambers. A conference committee composed of both Senators and Representatives is formed to resolve such differences and report recommendations back to the respective chambers. The power of the original committee is reinforced by these conference committees. The conferees, appointed by the presiding officers of the two chambers, are generally selected from the committees having charge of the bill. They usually represent the majority and minority positions on the bill. For most major legislation, the "managers," or conferees, include the chairman and ranking minority member of the appropriate committee and subcommittee of original jurisdiction. Custom and tradition govern, generally, the conduct of conference committees. Such custom suggests that a conference report may make significant or radical changes to a bill in order to effect a compromise between the two chambers.¹⁴⁷

Scholars have focused carefully upon committees and their

¹⁴⁶Ibid., 17-19.

¹⁴⁷Ibid.

behavior. Richard Fenno's Congressmen in Committees is the seminal work on how environment factors influence policy formulation.¹⁴⁸ David Price's Policy-making in Congressional Committees: The Impact of 'Environment' Factors expanded and refined Fenno's work.¹⁴⁹ These works argued that committees have the greatest relative importance in policy formulation and that factors influencing committee actions and dynamics have a major impact upon the policies formulated. Two earlier studies by Lees and Goodwin had identified the importance of committees and seen them as a microcosm of the larger process respectively, but Fenno and Price developed the notion of a much stronger impact.¹⁵⁰ In subsequent years, various environment factors including seniority, staff, calendar, committee assignment, and campaign priorities have been examined in some detail.

In an earlier work on environment factors, Price viewed legislators as rational maximizers and determined that committees -- one can reasonably infer subcommittees, as well -- make policies as a product of individual member choices. Incentives for policy initiative were

¹⁴⁸Richard F. Fenno, Congressmen in Committees (Boston: Little, Brown, and Co., 1973).

¹⁴⁹David E. Price, Policy-making in Congressional Committees: The Impact of 'Environment' Factors (Tucson: University of Arizona Press, 1979).

¹⁵⁰John David Lees, The Committee System of the United States Congress (New York: Humanities Press, 1967); George Goodwin, The Little Legislatures: Committees of Congress (Amherst: University of Massachusetts Press, 1970).

studied. Legislative action is least likely in low-salience, high-conflict policy realms, "including for example the regulation of... communications."¹⁵¹

Smith and Deering¹⁵² and Unekis and Rieselbach¹⁵³ show how the "reform" of the House committee structure in 1974 altered the traditional pattern of seniority-based committee action significantly. The adoption of David Obey's amendment to the House Rules, authorizing subcommittee chairmen to hire their own staff, gave them effective power at the expense of their full committee chairmen. This grant of authority tended to fragment and diffuse power throughout the House, giving more people more leverage over issues at a lower level. Television, argues Hedrick Smith, exacerbated the fragmentation of power by offering "shortcuts and a showcase."¹⁵⁴ Smith describes Tim Wirth as among those individuals who were "irreverent toward the congressional Establishment" and who "helped break up the policy monopolies of established committees."¹⁵⁵

¹⁵¹Price, 131.

¹⁵²Steven S. Smith and Christopher J. Deering, Committees in Congress. (Washington, D.C.: Congressional Quarterly Press, 1984).

¹⁵³Joseph K. Unekis and Leroy N. Rieselbach, Congressional Committee Politics: Continuity and Change. (New York: Praeger, 1984).

¹⁵⁴Hedrick Smith, The Power Game: How Washington Works (New York: Random House, 1988), 39.

¹⁵⁵Ibid., 38.

Bruce Oppenheimer's study of House reform is more focused.¹⁵⁶ He argues that the net effect of this decentralization has been negative, based upon studies of energy legislation. He asserts that decentralization effectively weakened leadership and threatened the full committee chairman's authority. New opportunities for delay were created, a balkanization of the legislative process followed, and party leadership lacked sufficient authority to check the limits of the newly empowered subcommittee chairmen. Hammond and Langbein are stronger still. They argue that the effect on legislative output has been negative and that output has fallen because committees have had to deal with increasingly complex issues and constituencies.¹⁵⁷

These essays on the power of subcommittees in the House suggest that seniority, a factor of great significance identified by Tobin,¹⁵⁸ Murphy,¹⁵⁹ and Hinckley, was less important after 1974.¹⁶⁰ Conflicting with this view is a study by John Berg which argues that reform of the

¹⁵⁶Bruce J. Oppenheimer, "Policy Effects of U.S. House Reform: Decentralization and the Capacity to Resolve Energy Issues," Legislative Studies Quarterly 5, No. 1 (February 1980): 5-30.

¹⁵⁷Susan Webb Hammond and Laura Orwin Langbein, "The Impact of Complexity and Reform on Congressional Committee Output," Political Behavior 4, No. 3 (1982):237-263. See also Steven H. Haebeck, "The Institutionalization of the Subcommittee in the U.S. House of Representatives," Journal of Politics 40, no. 4 (November 1978): 1034-1065.

¹⁵⁸Maurice B. Tobin, Hidden Power: The Seniority System and Other Customs of Congress (New York: Greenwood Press, 1986).

¹⁵⁹Thomas P. Murphy, The Politics of Congressional Committees: The Power of Seniority (Woodbury, N.Y.: Barron's, 1978).

¹⁶⁰Barbara Hinckley, The Seniority System in Congress (Bloomington: Indiana University Press, 1971).

seniority system had no impact on the movement of legislation. Using volume of bills as a measure, he argues there was no appreciable difference before or after "reform," despite the stylistic differences.¹⁶¹

The next structural element to review is the issue of control of the legislation. The shift in control from full committee to subcommittee in the House is demonstrated by floor management. According to Christopher Deering, floor management of bills by subcommittee chairs has accelerated.¹⁶²

The last structural element is that of committee selection. A perceptive study by Lynette Perkins shows that members are attracted to certain committees by various goals, including reelection, policy making, and prestige, with reelection paramount.¹⁶³ Smith and Deering trace changes in priorities of committee selection to changes in the policy agendas of the committees. These changes in policy agenda reinforce reelection as the primary factor in selecting committees because the shifts in agenda more fully reflect the perceived reelection needs of

¹⁶¹John Berg, "Reforming Seniority in the House of Representatives: Did It Make Any Difference," Policy Studies Journal 5, no. 4 (Summer 1977): 437-443. Berg studied the Agriculture, Armed Services, and Banking Committees of the House. Ralph K. Huitt, "Congress: Retrospect and Prospect," Journal of Politics 38, no. 3 (August 1976): 209-227, argues that organization into committees guarantees piecemeal, and hence weak, representation.

¹⁶²Christopher J. Deering, "Subcommittee Government in the House: An Analysis of Bill Management," Legislative Studies Quarterly 7, no. 4 (November 1982): 533-546.

¹⁶³Lynette P. Perkins, "Member Recruitment to a Mixed Goal Committee: The House Judiciary Committee," Journal of Politics 43, no. 2 (May 1981): 348-364.

incumbents.¹⁶⁴ Burdett Loomis adds that the member's career advancement potential is also a factor in committee selection, but complicates the task of legislative bargaining and compromise.¹⁶⁵ Alan Ehrenhalt sees the emergence of a new class of "professional" politicians who spend their full time pursuing their personal political agendas; reelection needs drive the committee agenda.¹⁶⁶

Shepsle and Weingast see significant implications from the growth of subcommittees in the House. Because legislators gravitate to those subcommittees which have the most immediate effect on their constituencies and their reelection prospects, they develop a vested interest in protecting existing programs and agencies under the oversight of the subcommittee.¹⁶⁷ Bender and Moe find that a legislator's policy positions reflect the relative strengths of constituent votes and interest group contributions.¹⁶⁸ Subcommittee power is further enhanced by the conference committee process, which gives the "manager" of a bill an opportunity to

¹⁶⁴Steve S. Smith and Christopher J. Deering, "Changing Motives for Committee Preferences of New Members of the U.S. House," Legislative Studies Quarterly 8, no. 2 (May 1983): 271-281.

¹⁶⁵Burdett A. Loomis, "Congressional Careers and Party Leadership in the Contemporary House of Representatives," American Journal of Political Science 28, no. 1 (February 1984): 180-202.

¹⁶⁶Alan Ehrenhalt, The United States of Ambition: Politicians, Power, and the Pursuit of Office (New York: Random House, 1991).

¹⁶⁷Kenneth A. Shepsle and Barry R. Weingast, "Political Consequences of Government by Congressional Subcommittees," Proceedings of the Academy of Political Science 35, no. 4 (1985): 114-131.

¹⁶⁸Jonathan Bender and Terry M. Moe, "Agenda Control, Committee Capture, and the Dynamics of Institutional Politics," American Political Science Review 80, no. 4 (December 1986): 1187-1207.

directly negotiate the resolution of differences between the chambers.¹⁶⁹

Various efforts have focused upon the emergence of a "critical mass" leading to a change in public policy. A study by Hurley, Brady, and Cooper shows that policy innovation is negatively correlated to membership continuity.¹⁷⁰ Brady and Sinclair reinforce this study and also indicate the coalition-building process is sudden, rather than gradual or evolutionary.¹⁷¹

Bullock argues that Senate committee assignments remain strongly related to seniority.¹⁷² Richard Champagne's study of the Senate suggests a greater ability to move legislation after that body is realigned.¹⁷³

The literature reviewed to this point clearly touches upon various aspects of the way Congress works and may have worked as it considered legislation affecting the telecommunications industry in 1981 and 1982. For the House, studies that focus upon the subcommittees appear most relevant. Most of the legislative action was confined to Wirth's

¹⁶⁹Kenneth Shepsle and Barry A. Weingast, "The Institutional Foundations of Committee Power," American Political Science Review 81, no. 1 (March 1987): 85-104.

¹⁷⁰Patricia Hurley, David Brady, and Joseph Cooper, "Measuring Legislative Potential for Change," Legislative Studies Quarterly 2, No. 4 (November 1977): 385-398.

¹⁷¹David Brady and Barbara Sinclair, "Building Majorities for Policy Changes in the House of Representatives," Journal of Politics 46, No. 4 (November 1984): 1033-1060.

¹⁷²Charles S. Bullock III, "U.S. Senate Committee Assignments," American Journal of Political Science 29, no. 4 (November 1985): 789-808.

¹⁷³Richard A. Champagne, "Conditions for Realignment in the U.S. Senate, or What Makes the Steamroller Start," Legislative Studies Quarterly 8, no. 2 (May 1983): 231-249.

telecommunications subcommittee. It was only after the divestiture decision was announced and Wirth moved his modified version of H.R. 5158 that the full Energy and Commerce Committee came into play. Champagne's conclusion appears to apply in the Senate -- a new majority moved a bill, relatively easily, through the chamber in a short time period.

These studies suggest the following key points. First, since the committee is the primary unit for congressional action, research into an issue should focus there rather than on floor debate. The growth of subcommittees in the House since 1974 requires a careful analysis at that level as well.

Second, the balkanization of the House legislative process through subcommittee growth has reduced the likelihood of legislation being passed. This structural change exacerbates an attempt to pass telecommunications legislation, since legislation is "least likely in low-salience, high conflict policy realms, including...communications."¹⁷⁴

Third, the studies which suggest legislation is more likely when there is a turnover in membership somewhat offset this difficulty. Further, the process of legislative consensus building may be "sudden."¹⁷⁵

Fourth, consideration for the member's own reelection is essential to the decision-making process.¹⁷⁶

But these studies deal only with the structures and processes within the Congress. The quest for a new telecommunications policy was,

¹⁷⁴Price, 128.

¹⁷⁵Brady and Sinclair.

¹⁷⁶Perkins; Smith and Deering, and Ehrenhalt.

essentially, a quest for a new regulatory policy. Arguments for "competition" and "deregulation" were arguments for the replacement of a bureaucratic-administrative mode with a marketplace means of regulation. The literature dealing only with constraints internal to the workings of the Congress does not appear to allow analysis of the role of the antitrust lawsuit and the Second Computer Inquiry. Neither could those works provide a framework to fully explain the specific choice made, the divestiture, among the various choices available to the Bell System or the Members of Congress.

William Dutton examines the notions of multiple venues and multiple simultaneous "games" as they apply to telecommunications policy.¹⁷⁷ He describes an "ecology of games" in which an individual or corporation simultaneously plays a "game" in different arenas with different rules. Variations in the markets, legal-institutional frameworks, and value systems to some degree impact the political outcomes and hence the economic and technological outcomes. The result, he argues, is more subjective, less governed, and less predictable than most contemporary studies have allowed. Conflicts must be continuously negotiated and compromised and may not have anything to do with the "pure" values of economics or technological development.

He cites the decision to divest as an example of a case where telecommunications policy, as embodied in the Communications Act of 1934,

¹⁷⁷William H. Dutton, "The Ecology of Games in Telecommunications Policy" in Harvey M. Sapolsky, Rhonda J. Crane, W. Russell Neuman, and Eli M. Noam, eds., The Telecommunications Revolution: Past, Present, and Future (London: Routledge, 1992): 65-88.

was "overwhelmed by anti-trust policy." This example suggests that interactions across different "domains" of corporate and public affairs generate outcomes that cannot be explained within the scope of most of the theoretical work done to date. He argues that existing models are inadequate descriptions of actual practice.

Questions of choice of regulatory instruments and conflicts among various institutional players have been addressed in the literature of legislative choice developed by political scientists and economists.

Legislative Choice

The study of regulation is essentially divided between a traditional approach, which describes regulation in terms of protecting the public, and a "revisionist" approach that posits that regulation serves the interest of the regulated as well. Traditional theories of regulation were deeply imbued with idealism. Policy makers first identified an "ideal" public policy. The efforts of regulators were then measured against that idealistic standard. Not too surprisingly, their results were often found wanting, particularly when the regulated industry appeared to be better served than the public at large.

Since the early 1970s, a revisionist literature has developed recharacterizing regulation as a normal economic function. Regulation exists, according to this view, not only for the benefit of the general public, but also for the benefit of more narrowly defined constituencies, including the regulated entity. The central task of the theory of economic regulation thus is "to explain who will receive the benefits or

burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources." ¹⁷⁸

In his seminal work, Stigler hypothesized that the power of the state is invoked by "every industry or occupation that has enough political power."¹⁷⁹ Such invocation is used to restrict market entry, fix prices, and reduce intra-industry competition. But the benefits obtained by the industry are not always obtained without costs. Certain limitations are placed upon the industry in exchange for the state's restrictions on competition. These include the costs generated by the requirements of public processes; the admission of powerful outside forces into the decision-making process of the industry (that is, a relinquishing of control), and an alteration of the balance of power between firms within the industry: the political strength of various firms has a larger policy influence than in an unregulated environment. This political influence may or may not be proportional to market power.¹⁸⁰

The disparity between political processes and market processes is further exacerbated, according to Stigler, by two constraints. First is the demand for simultaneity of decision. Voting on issues both compels a permanence and eschews marginal shifts because of its relatively high cost. Second, the political process demands participation by "all;" participation in proportion to interest and knowledge is prohibited by the

¹⁷⁸George J. Stigler, "The Theory of Economic Regulation," Bell Journal of Economics and Management Science 3 (1971): 3-21.

¹⁷⁹Ibid., 5.

¹⁸⁰Ibid., 7-10.

political process.¹⁸¹

Sam Peltzman reviews Stigler and refines his approach. Describing Stigler's work as the basis for a "producer protection" viewpoint, he defines the political process in these fundamental economic terms: "The essential commodity being transacted in the political market is a transfer of wealth, with constituents on the demand side and their political representatives on the supply side."¹⁸² He argues that a cost is inherent in the regulatory process.

Stigler's description of the admission of "powerful outsiders to the industry's councils," is to Peltzman a "fact integral to regulatory processes."¹⁸³ The quest for regulation becomes a quest not for economic efficiency and the redistribution of wealth to secure a rational distribution of economic benefits, but a quest for political efficiency to protect the political position of the regulator.¹⁸⁴

One key implication in this quest for political benefits is that "either naturally monopolistic or naturally competitive industries are more politically attractive to regulate than an oligopolistic hybrid."

¹⁸¹Ibid., 10-12.

¹⁸²Sam Peltzman, "Toward a More General Theory of Regulation," Journal of Law and Economics XIX, no. 2 (August 1976): 211-248.

¹⁸³Ibid., 217.

¹⁸⁴Ibid., 231. This generalization applies to structures of costs and benefits that maximize political returns. The specific calculation of political advantages is also understood to cause the regulator to weigh more heavily some economic forces than others that might otherwise affect the price structure. The effect is a circumstance in which regulation is a "normal good" in the economic dynamics, but one rarely, if ever, oriented toward profit maximization.

He specifically cites telephones as an example of the former.¹⁸⁵

H.C. Peterson compares a "pure" monopoly and a "pure" competitive firm. He summarizes the argument that "competition results in the lowest prices consistent with the survival of the firm, [while] the monopolist charges the highest price consistent with profit maximization."¹⁸⁶ He further describes an income distribution effect between shareholders and consumers. An evaluation of the transfer from the latter to the former often stimulates "a legislator's call to take action [based upon] the unfairness of the income distribution."¹⁸⁷ Kahn echoes this notion in stating that "economic efficiency is not the only socially appropriate goal of pricing."¹⁸⁸

These studies suggest that the question of which regulatory instruments would be chosen in 1981 would have been influenced by the benefits to affected constituencies. MCI and the other OCCs would have, according to Stigler, representation that would exceed their market power. They could invoke the theme of "fairness" to stimulate congressional debate, according to Peterson. So long as telephones remained a monopoly, they remained attractive to regulate. But monopoly produces higher prices and competition yields lower prices. The consumer could be better served

¹⁸⁵Ibid., 224.

¹⁸⁶H.C. Peterson, "Market Structure and Economic Efficiency," Business and Government, 2d ed. (New York: Harper & Row, 1985).

¹⁸⁷Ibid., 20.

¹⁸⁸Alfred E. Kahn, The Economics of Regulation Principles and Institutions, Volume II: Institutional Issues (Cambridge, Mass.: The MIT Press, 1988), 151.

by competition, even while the competitors might be better served by regulation.

At least three government entities were empowered to participate in the design of regulation. The Congress could change the underlying law, the FCC had acted to "deregulate" customer premise equipment, and the Department of Justice had filed its antitrust suit in federal court.

According to Samuel P. Hays, the various institutions of government offer "merely different settings in which political controversy and choice are ordered."¹⁸⁹ The courts, the administrative and regulatory agencies, and the legislative bodies are the forums in which choices, based upon the political needs of the decision makers, are made. But what if these various institutions have competing political needs? To this point the literature has dealt with relatively simple problems. Differences of opinion between decision makers with differing constituencies suggest a need to understand how the various politicians and political entities compete in their attempts to fashion policies which more nearly distribute the benefits of regulation according to their own views of "fairness" and their own weighing of political and economic factors and forces.

Thomas Gilligan, William J. Marshall, and Barry R. Weingast study the distribution of interests within committees and the impact of

¹⁸⁹Samuel P. Hays, "Political Choices in Regulatory Administration" in Regulation in Perspective: Historical Essays, ed. Thomas K. M. Caw (Cambridge: Harvard University Press, 1981), 196.

bicameralism upon legislative choice.¹⁹⁰ This study identifies a need to understand multi-interest group perspectives.¹⁹¹ Recalling Peltzman's dictum that "the essential commodity being transacted in the political market is a transfer of wealth," they suggest that the politics underlying decisions about railroad regulation reflected the political power of competitors, producers, and users -- interest groups in competition with the railroads for the benefits of regulation. Adversely affected by the rise of the railroads, these groups organized to seek relief. The authors show that political institutions played a key role in enfranchising certain groups and in endowing others with veto power.¹⁹²

Barry R. Weingast and Mark J. Moran attribute dominance to Congress in this process and suggest a model of legislative choice. Their model characterizes the nature of the policy equilibrium described by Stigler and Peltzman potentially leading to predictions about the nature of policy change.¹⁹³ This "congressional dominance" approach reflects many of the structural considerations such as constitutional authority, committee power, and committee selection described above in the political science literature. It further uses the analytical tools of economists to define the parameters of legislative choice. The result is a very

¹⁹⁰Thomas W. Gilligan, William J. Marshall, and Barry R. Weingast, "Regulation and the Theory of Legislative Choice: the Interstate Commerce Act of 1887," Journal of Law and Economics 32 (April 1989): 35-61.

¹⁹¹Gilligan, Marshall, and Weingast, 40.

¹⁹²Ibid., 59.

¹⁹³Barry R. Weingast and Mark J. Moran, "Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission," Journal of Political Economy 91, no. 5 (1983): 765-800.

strong model which, intuitively at least, has a strong appeal for analysis of the divestiture decision.

The congressional dominance approach assumes that Congressmen on relevant committees possess sufficient rewards and sanctions to create an incentive system for "agencies." Weingast and Moran describe a "support maximizing politician" who demonstrates distinct biases in the selection of public policy. These biases reflect a complex but subtle understanding of interest groups which are the basis for the politician's own political support. The committee system allows benefits to be simultaneously delivered to these diverse interest groups because the committees have "near monopoly jurisdiction over a small set of issues," and members "self-select" committees to gain more leverage over the issues most relevant to maximizing their own support and advancing their own political fortunes.¹⁹⁴

Congress becomes the arbiter deciding which interest groups receive which benefits. The agency, that is, a unit of government authorized to regulate, becomes the conduit. When the system is working optimally, an equilibrium will be reached between the agency and the Congress. The agency will signal to the committee its intent to reflect the objectives of the members of the committee having jurisdiction over it as it perceives them. So long as its perception is essentially correct, the agency can proceed without congressional interference. But markedly different viewpoints or preferences on the committee can lead to shifts in agency behavior and policy decision-making. Any vote by the

¹⁹⁴Ibid., 771.

committee would reflect a shift in the equilibrium point; the vote itself would confirm the new equilibrium point.¹⁹⁵ To change policy, one must change the preference of enough committee members to generate the creation of a new status quo through the voting process. The authors have defined policy change as a function of change in position by those on the committee with the property right to make proposals.¹⁹⁶

Four conclusions follow. First, congressional committees play an important role in agency decision-making. Since the committees have the statutory and constitutional authority to make proposals, including the power to veto agency recommendations or recommendations from outside the committee, the committees have dominant power to influence policy. Second, policy will remain stable if the committee membership remains stable. Third, the composition of the oversight committees is an important determinant of agency policy change. Fourth, agencies not pursuing congressional interests are liable to bring forth congressional sanctions.¹⁹⁷

John Ferejohn and Charles Shipan expand and refine Weingast and Moran's model, and specifically apply it to telecommunications policy.¹⁹⁸ They regard the model as "sufficiently flexible to accommodate most major issues having to do with congressional influence on telecommunications

¹⁹⁵Ibid., 773.

¹⁹⁶Ibid., 774.

¹⁹⁷Ibid., 775.

¹⁹⁸John Ferejohn and Charles Shipan, Congressional Influence on Telecommunications Policy, n.p., Stanford University (March 21, 1988): 34.

policy."¹⁹⁹ They note that the model allows for agency preferences influenced by presidential appointments, internal organizational processes, or external ideological shifts.²⁰⁰ They further account for the influence of election results. To the extent that election outcomes shift the median positions of the two chambers, congressional restraints become weaker on agency behavior and other factors may influence policy choices more.²⁰¹

But where Weingast and Moran equate a vote with an equilibrium, Ferejohn and Shipan identify a new constraint. They see the degree to which congressional preferences are imbedded in outcomes "as dependent upon several factors, including the constitutional relationship between the agency and Congress, the degree to which Congress has publicly committed itself, and the degree of homogeneity of congressional preferences."²⁰²

In this model, the range of options occurs between, rather than within, committees with oversight responsibility. The agency gets to make proposals. Each committee tries to induce it to locate as close to its own ideal point as possible.

The processes of hearings, mark up, and letter writing inform the agency of the committees' preferences and "may induce the agency to shift

¹⁹⁹Ibid., 4.

²⁰⁰Ibid., 6.

²⁰¹Ibid.

²⁰²Ibid., 7.

its policy choice in order to forestall legislative correction."²⁰³ Several types of sequential strategies are possible, depending upon the positions of various committees within and between the two chambers.

In the course of their argument, Ferejohn and Shipan expand the definition of "agency" used in the earlier works. Where Stigler, Peltzman, and Weingast and Moran referred specifically and exclusively to regulatory agencies, appointed by the President and overseen by the Congress, this work expands the scope of the definition to virtually any institutional player, including the regulated entity. In their study of telecommunications policy, they incorporate the behavior of the court and AT&T as well as the FCC and the Department of Justice. The common thread in this definition is largely behavioral rather than structural: "That Congress does not enact legislation. . . may just as well reflect the tendency of affected groups to adjust to threatened congressional action in time to obviate the need (or motivation) for legislative intervention."²⁰⁴

Jose Edgardo L. Campos, argues that legislators have a decisive influence on instrument choice in the regulation of markets.²⁰⁵ He assumes regulation can be represented as a wealth transfer with gains to some groups in society and losses to others. A regulatory instrument is a

²⁰³Ibid.

²⁰⁴Ibid., 3.

²⁰⁵Jose Edgardo L. Campos, "Legislative Institutions, Lobbying, and the Endogenous Choice of Regulatory Instruments: A Political Economy Approach to Instrument Choice," Journal of Law, Economics, and Organization 5, no. 2 (Fall 1989): 333-353.

specific configuration of gains and losses. His study focuses less upon the relationship between a regulatory agency and Congress, and more upon the problem of instrument choice, concluding that political choices are, generally, economically inefficient. He argues that a decision to regulate involves choosing both an instrument (or method) of regulation and a corresponding level (or rate) of regulation.²⁰⁶ While the legislature votes in two stages, decisions are effectively made in the first stage; the choice of instruments constrains the range of rates that can be voted on at the second. Thus, decisions are effectively made at the point where the instrument is chosen; the level is, in effect, simultaneously determined. The median legislator predicts the outcome.²⁰⁷

In the second half of this essay, Campos describes the effect of lobbying upon the equilibrium. The objective of a lobby is to induce legislators or regulators to choose the allocation that maximizes the net per capita gain to its members. He concludes that, for a given allocation of resources, the maximum gain can only be the choice of the median legislator. Since the median member's position predicts the outcome, the lobby need only gain a simple majority of support to maximize its own gain.²⁰⁸ No other constraint is critical.

²⁰⁶Campos, 336. He indicates that a regulation can be implemented in various ways. For example, imports may be restricted through tariffs or quotas. The specific form that is used to implement the transfer of wealth is referred to as a regulatory instrument. The term "level" of regulation refers to the rate at which the revenues of the regulated entity are taxed.

²⁰⁷Campos, 338-340.

²⁰⁸Ibid., 341f.

This argument has strong implications for effective lobbying and institutional constraints. Legislators from districts which have few (perceived) beneficiaries of regulation will lose votes by supporting the regulation and will thus be induced to vote against it. Therefore, when perceived beneficiaries are limited to a few votes within a congressional district or within a few districts, a lobby (the true beneficiary) can succeed only if it can induce a majority of legislators to vote against their constituents' interest. The institutional focus, argues Campos, of committee system, amendment process, and procedural rules combine to facilitate political trades among members. In the process of choosing committees, members trade influence over a large number of policies for influence over a small number of significant value to themselves. Equilibrium depends not upon the efficiency of the regulatory instrument, but upon "the number and distribution of beneficiaries across districts" and, presumably, within the committee.

Because this distribution varies from issue to issue and instrument to instrument, the legislature has a decisive influence on the choice. The legislature is not "a black box that accepts lobbying input from and systematically processes regulatory benefits for interest groups."²⁰⁹ Rather, the legislative process stimulates members to calculate the benefits to their constituencies and the electoral incentives the particular choice may create. The result is a policy, according to Campos, that may or may not be economically efficient.

²⁰⁹Ibid., 333.

Implicit is the assumption that economic efficiency occurs only rarely.²¹⁰

This legislative choice literature posits that choice is a function of congressional institutions. Congress has the institutional authority to dominate the process of regulatory choice; within the Congress, committees have the most leverage. A "support maximizing politician" will select a policy that simultaneously distributes benefits to diverse interest groups.

An equilibrium will be reached with the Congress so long as the agency correctly interprets signals from the committee and shifts its behavior to reflect the preferences of the committee "in order to forestall legislative correction."²¹¹ Elements significant to this adjustment process include strategies for dealing with multiple "games," the homogeneity of preferences within the committee and the congress as a whole, the instrument choice itself, and the distribution of benefits within and across members' districts.

²¹⁰Ibid., 348.

²¹¹Ferejohn and Shipan, 3.

CHAPTER VI: EXERCISING CHOICE

The legislative choice literature posits that a choice of regulatory instruments is a function of congressional institutions. As indicated in the previous chapter, that literature strongly argues that political benefits to members, rather than economic or social benefits, are the driving force behind the choices made. But members need not legislate to influence policy. They may send signals to other entities which induce those entities to change their policy choices in accord with the preferences of the congressional oversight committee. Such entities may be regulatory agencies, lobbies, other units of government, or the regulated industry or company. If the members are satisfied that the choice distributes benefits in conformity with their own political interests, legislative intervention will be unnecessary. In this chapter, the relationship between congressional action and the decision to divest will be analyzed, from the perspective of the legislative choice literature.

Earlier it was shown that there were some similarities among the available options, S. 898, H.R. 5158, and the Baxter plan, as well as important distinctions and implications of choosing any one option over another. Legislation was the Bell System's generally preferred choice.

But its effort to obtain a legislative solution had gotten only as far as action in one chamber. With time limited by impending court action, the attitude of the House subcommittee would partly determine the feasibility of passing a bill. A number of signals had been sent and received which the Bell System properly interpreted as an indication that Congressman Wirth's position would make legislation either unlikely to be passed or likely to be unsatisfactory if it was.

The various players had been signalling their intentions to each other throughout 1981. The Administration had signaled, through its testimony and Baxter's comments, that it would not drop the lawsuit. The Court had signaled its intent to prosecute the case rigorously and expeditiously. Most important, Congress had signalled its likely actions to the Bell System.

Wirth signalled his intent to legislate clearly. His position on legislation had been established the previous year, before he became subcommittee chairman, with his amendment to H.R. 6121. His actions on becoming chairman were seen by the Bell System to presage a highly regulatory bill. The first signal to Bell that legislation might not go its way came with the adoption of the Baxter amendments in the Senate. Final passage of S.898 signalled the base position of legislation in that body.

After Senate action had begun, Wirth began to clarify his intent. His June letter to Reagan regarding continuation of the lawsuit suggested he would take a strong approach toward the level of regulation continuing after a court ordered structural separation. That position was confirmed,

first by his staff's report and second by the original H.R. 5158. As Bell's executives all indicated, the Bell System saw the introduction of his bill as an indication that its own legislative strategy could not be achieved before the court would act.²¹² If legislation could, in fact, be adopted, it was likely to be too onerous. In fact, the receipt of that signal prompted the Bell System to alter its strategy in a way that would require it to seek to preclude legislative action.

Wirth also signalled, through his large number of hearings, an inordinate amount of time might be consumed prior to any House action. The process would preclude timely action by Congress before the court would act. When Wirth finally introduced his bill in December, Brown and the Board decided that their legislative strategy could not succeed. They altered their strategy.

Since 1976, the Bell System's strategy for dealing with the problems engendered by competition and new technologies had been to legislate. DeButts had begun the Bell System's effort to pass legislation. That strategy had been consistently pursued until December of 1981. The introduction of H.R. 5158 prompted a new legislative strategy. The Bell System would accept a negotiated judicial settlement rather than pursue legislation. This strategic decision was prompted by the "pro-regulation thrust" of H.R. 5158 and the assessment that any legislation likely to pass would be too slow in coming or too onerous to accept.²¹³ The decision meant that the Bell System would seek to defeat

²¹²Baudhuin; Block; Trienens; Zeglis.

²¹³Weaver, 12.

any legislation that threatened the settlement. Such a strategy would be easier to implement than the strategy of passing a bill.

The difficulty of legislating has long been recognized. President John F. Kennedy expressed, with no little exasperation, the effect of the mechanics of the process when he described it thus:

The Constitution and the development of the Constitution give all advantage to delay. It is very easy to defeat a bill in the Congress. It is much more difficult to pass one. To go through a committee. . . -- to go through one of its subcommittees and get a majority vote, and then the full committee and get a majority vote; then go to the Rules Committee and get a rule; then go to the floor of the House and get a majority; then start over again in the Senate -- subcommittee and full committee -- and then go to the Senate floor where there is unlimited debate. . . and then unanimously get a conference between the House and Senate to adjust the bill. . . and have this done on a controversial piece of legislation where powerful groups are opposing it -- that is an extremely difficult task. . . particularly when the seniority system may place particular individuals in key positions who may be wholly unsympathetic. . . .²¹⁴

Many individuals within the Congress might qualify as "individuals in key positions." The Speaker and Whip, the conference officers, and certain minority party members would certainly qualify as "key." But other members may also become "key."

One of the major difficulties the Congress faces is the huge volume of issues and ideas it confronts. Robert Sherrill has indicated that, in the 1970s, more than 30,000 bills were introduced each year.²¹⁵ By 1981, the number of bills was smaller, but the number of issues was not. The demand for time to debate legislation remained far greater than the time available to debate it. The House operated, as indicated above,

²¹⁴Robert Sherrill, Why They Call It Politics: A Guide to American Government, 2d Ed. (NY, Harcourt, Brace, Janovich, Inc., 1974), 128.

²¹⁵Ibid., 131.

largely by exceptions to rules. These exceptions limited the time and scope of debate.

Limiting the time and scope of floor debate placed more responsibility on the standing committees to deal with issues before they came to the floor. But the committees are constrained by similar limitations of time and volume. On the floor, the exceptions to the rules are granted by the Rules Committee. In the committee, the ordering is done by the chairman.²¹⁶

Chairman Dingell's decision to defer consideration of H.R. 5158 until the Clean Air bill was finished aided the Bell System's efforts to defeat Wirth. Corcoran was able to use delaying tactics to thwart Wirth's efforts to move his bill. In this sense, Corcoran became a "key player." While he was originally motivated by a strong belief that Wirth's approach was ideologically wrong, he became critical to the effectiveness of using congressional processes to Bell's tactical advantage to defeat H.R. 5158. Illinois Bell's lobbyist, Ray Nolin, worked closely with Corcoran for months providing information, coordination, and lobbying assistance.

Corcoran's efforts were also designed to focus the members' attention on fine points in the legislation which appeared to him to favor "special interests."²¹⁷ His reference to "special interests" may also reflect his belief that the benefits of regulation embodied in Wirth's bill did not reflect his own perceptions of a "fair" distribution of them. Various devices exist within the congress to ensure that each member

²¹⁶Price, 128.

²¹⁷Corcoran.

receives benefits for his or her own constituencies. Most important are the trades which precede legislative action.

As noted above, Peltzman has described the political process in economic terms: "The essential commodity being transacted ... is a transfer of wealth with constituents on the demand side and their political representatives on the supply side."²¹⁸ To obtain this authority to transfer wealth, political representatives must successfully be appointed or elected to the unit of government with authority to effect the transfer. In this regard, the commodity is a transfer of authority with voting constituents on the supply side and the representatives on the demand side. The committee becomes the vehicle for delivering benefits "simultaneously to diverse interest groups."²¹⁹ The committee institutions further "facilitate trades," according to Campos²²⁰.

The fact that the Bell System had reached an agreement with the Justice Department did not preclude the Congress from acting. Other interests also had access to the legislative process. State regulators, competitors, user groups, and independent telephone companies were among those who intervened and sought to convince Congress that the divestiture jeopardized some aspect of their portion of the benefits of the old order. Most advocated some form of legislation to preempt or supersede the divestiture agreement. Many encouraged and supported Wirth's efforts to pass legislation after the agreement was announced. The members would

²¹⁸Peltzman, 212.

²¹⁹Weingast and Moran, 767.

²²⁰Campos, 341.

need to distribute benefits among all these affected groups "simultaneously" if they hoped to "maximize support." Trades between and among constituencies were the devices for sharing the benefits.

One anecdote illustrates the complexity of procedure in the trading process. Barbara Mikulski (D-MD) introduced an amendment to H.R. 5158 in the full committee markup that would have required resellers to pay the same access charges as other interexchange carriers. Mikulski represented an urban Baltimore district with a large black population and many union blue collar workers. Her amendment was designed to protect local telephone ratepayers by maintaining one part of the cross subsidies between long distance and the local exchange. "Resellers" were companies that bought blocks of service at wholesale prices and resold them to retail customers, usually at rates much lower than the tariffed rate set by the regulators. "Access charges" are the fees paid by long-distance carriers to access the local loop, that is, to pay for the portion of the costs related to providing service from the telephone customer through the central office to the long-distance carrier. The term "LATA" -- Local Access Transport Area -- had not yet been devised, so "interexchange" could mean either between area codes or between exchanges -- represented by the first three numbers of a seven-digit phone number. The basic trade involved the transfer of wealth from the resellers to Mikulski's union and consumer constituents. The latter represented a substantially larger number of voters than the resellers in virtually every district.

After considerable discussion of Mikulski's amendment Wirth offered a substitute that amended her amendment by altering a number of

definitions. It won narrowly. The Mikulski amendment, as amended by Wirth, was then passed.

The next day, the committee reconsidered both votes. Congressman Broyhill (R-NC), the ranking Republican member, argued that his proxy vote had been wrongly cast in support of the Wirth substitute. He then offered a "perfecting amendment" to clarify definitions in Mikulski's original, unamended amendment. He argued that his amendment dealt with Wirth's stated objectives better than Wirth's did. After more discussion, Wirth agreed and withdrew his amendment. Chairman Dingell then announced the adoption of the Broyhill perfecting amendment and the Mikulski amendment, as amended by Broyhill. This convoluted, arcane discussion took nearly two days of committee time on July 14 and 15. What should have been a fairly simple transfer of wealth between a relatively obscure constituency and a relatively significant constituency proved to be a substantially complex legislative trade.

The legislative debate surrounding the divestiture offers myriad examples of such complex trades. Another example had to do with the issue of the "Rural High Cost Fund." Rural communities tended to have a higher unit cost per telephone for basic service; with more distance and hence more poles and wire, and fewer customers, the cost of building and maintaining the system was higher on a per customer basis than in an urban area. The portion having to do with physical plant and separate from the number of minutes of service used, was referred to in the debate as a "non-traffic sensitive cost." The purpose of the Rural High Cost Fund was, essentially, to create a cross subsidy from lower unit cost areas to

the rural high cost areas to pay for higher rural non-traffic sensitive (NTS) costs.

The current legislative choice models would predict that members from rural districts, who stood to gain from the creation of the high cost fund, would support it. Members from urban districts, whose constituents would, in effect, pay the higher averaged rates, would oppose it. The high density and short distances in urban areas would have a substantially lower NTS cost for urban customers. Thus, the urban members' constituents' interest would appear to run against support of a Rural High Cost Fund. Similarly, Senators from rural states would presumably support a rural high cost fund, Senators from urban states would presumably oppose it, while Senators from states with a rural-urban mix would have to make a more careful calculation.

But "Lifeline" service, a minimum basic telecommunications service coupled with the provision of an inexpensive customer premise instrument, offset the Rural High Cost Fund politically and became a basis for trades. By making available such low-cost service, in 1981 priced at about \$6 per month, members could target lower rates for the poorer, often urban minorities and the aged, for whom the telephone was a necessity.

Urban members or minority members -- or liberals -- would easily see the efficacy of trading votes for Lifeline for votes for Rural High Cost areas. But both features would tend to increase, however little, the average monthly cost of service for all subscribers. In a system where high long-distance rates had cross-subsidized local exchange service and equipment priced substantially below cost, there had been relatively

little or no problem with funding such programs.

This discussion suggests that at the "earlier, less public phase" where "trades occur" and "support is maximized," there are several potential outcomes. The member must sort through those options with a sensitivity not only to marginal electoral position, but also in the context of his or her political, economic, and social values. Being consistent with publicly-stated values may create a political benefit such as "credibility" or "integrity" that transcends the structural approach developed in the legislative choice literature so far. It is important to emphasize that a political benefit accrues from such intangibles.

The process of calculating the political benefit is, therefore, a subjective one. Prior beliefs, opinions, and experience make some potential solutions more desirable or more probable than others. Weingast and Moran refer to this concept as the "distinct bias" legislators demonstrate in selecting policy.²²¹ The subjectivity involved may produce trades for which the benefits are not readily apparent.

To this point, the discussion has reflected the actions of an individual member. After each member works within the institutional framework of lobbies, constituents, and hearings to determine the position maximizing his or her own support, the members must act collectively. At this point, the committee and the Congress as a whole must begin to sort out its preferences.

One of the practical problems of researching the congressional process is the problem of determining member's positions without votes.

²²¹Weingast and Moran.

In the early stages of the legislative process, when trading occurs and the situation is fluid, it is most difficult to assess how the committee will vote. The divestiture offers two unique contemporary artifacts useful for examining members' positions and public opinion on the same issues. The first, a collation of member responses to constituent letters, is a basic source of information about members' positions prior to voting. This compendium came from an effort by the Bell System staff to confirm the assessments of its lobbyists about member's positions on H.R. 5158. Simply enough, the Bell System had its employees write to their congressmen asking their positions on the bill. The members' responses were collected and returned to the Washington office, where a team of staff analysts catalogued and categorized the responses. The response rate was very high. Eighty-six percent of House members and ninety-one percent of the Senate answered their constituents' inquiries. The study began March 25, 1982.

The second, a Harris Poll specially commissioned by the Bell System, surveyed public opinion on legislation and the divestiture. The poll was conducted by telephone between March 22 and March 28, 1982 with a sample of 1254 adults.

These artifacts will be examined to compare the members' preferences between H.R. 5158 and divestiture. The tabulation of members' positions from constituent letters can be used to calculate the "median member's position" as used in the choice literature to test whether it could be used to predict the known outcome.

Any support likely to produce a vote should have been reflected

in members' publicly stated positions to their constituents. Member responses to a constituent inquiry other than support of the bill could represent support for either the bill or divestiture. If a member's response was to wait until court action was final, the position would suggest support for the divestiture, at least during the interim. If a member took no position, the member could be presumed to go either for the bill or for the divestiture. However, if a member actually voted for the bill, that vote would constitute better evidence of intent to vote on final passage than a letter might. In the instance that a vote was cast, it would be presumed to supersede any other stated position. The distinction becomes important since the poll of member positions was conducted only once, while votes in the subcommittee and full committee occurred following that poll and the collation of the members' positions.

Using the positions of Senators from the Bell System's compilation of letters in Table 6.1, the distribution for the Commerce Committee and its Communications Subcommittee are quite clear. Of the 17 members, 5 opposed the bill, 5 wished to wait until final court action, and 7 had no comment. Even if the seven "no comment" responses would support legislation, the apparent vote would have been 10-7 in favor of the divestiture.

Table 6.1. Positions of Senators on H.R. 5158 as Stated in Letters to Constituents

Senate Commerce Committee, 1981-1982

	Oppose	Wait	Support	No Comment No Answer
<u>Republicans</u>				
Packwood		X		
Goldwater*	X			
Schmitt*	X			
Danforth			X	
Kassebaum			X	
Pressler*			X	
Gorton	X			
Stevens*	X			
Kasten			X	
	4	5	0	0

	Oppose	Wait	Support	No Comment No Answer
<u>Democrats</u>				
Cannon	X			
Long				X
Hollings*				X
Inouye*				X
Ford*				X
Riegle				X
Exon				X
Heflin				X
	1	0	0	7

*Communications Subcommittee members

Source: AT&T tabulation of responses to written replies to constituents
March 25, 1982 - July 31, 1982

Table 6.2. Positions of Members on H.R. 5158 as Stated in Letters to Constituents

House Energy and Commerce Committee, 1981-1982

	Oppose	Wait	Support	No Comment No Answer
<u>Democrats</u>				
Dingell		X		
Scheuer*				X
Ottinger			X	
Waxman*			X	
Wirth*			X	
Sharp				X
Florio		X		
Moffett				X
Santini			X	
Luken*				X
Walgren			X	
Gore		X		
Mikulski	X			
Mottl*			X	
Gramm		X		
Swift*			X	
Leland			X	
Shelby			X	
Collins (IL)*				X
Synar				X
Tauzin*			X	
Wyden				X
Hall			X	
	1	5	11	7

*Telecommunications Subcommittee Members

Source: AT&T tabulation of responses to written replies to constituents
March 25, 1982 - July 31, 1982

Table 6.2--Continued.

	Oppose	Wait	Support	No Comment No Answer
<u>Republicans</u>				
Broyhill			X	
Brown				X
Collins (TX)*				X
Lent		X		
Madigan		X		
Moorhead*				X
Rinaldo*				X
Marks*				X
Corcoran	X			
Lee		X		
Damemeyer				X
Whittaker				X
Tauke*			X	
Ritter	X			
Rogers				X
Benedict		X		
Coats			X	
Bliley*			X	
	2	4	4	8
TOTALS	3	9	15	15

*Telecommunications Subcommittee Members

Source: AT&T tabulation of responses to written replies to constituents
March 25, 1982 - July 31, 1982

Table 6.2 displays the House Energy and Commerce Committee and the Telecommunications Subcommittee's written positions on the bill. Using the same standard as in the Senate, that is, that a "wait" position represents support for the divestiture and a "no comment" could go either way, the result appears to be 15-12 in favor of legislation, with 15 undeclared. The theoretical potential vote could range between 30-12 in favor of the bill to 15-27 against.

But 7 of the members identified as taking no position, not commenting, or not answering the letter had already voted in favor of the bill in subcommittee -- Scheuer, Luken, Collins of Illinois, Collins of Texas, Moorhead, Rinaldo and Marks. That vote had been 15-0 in favor of H.R. 5158. If the positions of those seven members registered as "no comments" are added to the support column, the median shifts in favor of the bill; it potentially had 23 votes in the full committee. The median position predicts the passage of legislation in the House, according to the legislative choice literature.

Further, the House committee position and the Senate committee position differed. The argument that the "median member's position" in the relevant committee accurately predicts the outcome appears fallacious, since no legislation passed, and the House committee members would arguably have supported the bill.

The Harris survey queried attitudes of the public toward many of the restrictions on AT&T proposed in H.R. 5158. The survey demographics reflect a representative sample for party affiliation, political philosophy (self-identified "conservatives," "liberals," and "middles-

of-the-road"), age, ethnicity, education, income, and gender. It asked 12 sets of questions, with up to eight detailed questions in each set, depending upon the response to the basic question.

The results of the March poll indicated that 58% of the public who were polled had heard or read of the divestiture agreement. Curiously, this number was lower than the 65% answering yes to the same question in an earlier poll on January 16-17. Of those who had heard of the divestiture agreement, 57% of the respondents approved of it, up slightly from 55% in January.

The question, "Do you think Congress should pass new legislation before the federal judge has finally approved the agreement, or should Congress wait until the new agreement has gone into effect" yielded responses of: 14% "Congress should pass legislation"; 80% "Congress should wait"; 6% "Not sure." Asked to agree or disagree with various statements, the responses produced the following results:

	<u>Agree</u>	<u>Disagree</u>
"A big advantage is. . . competition	80%	15%
". . .it should be left as it is"	48	49
"wouldn't feel sure about universal service"	52	41
"worried that my bill might go up a lot"	57	38
"competition [will] improve value"	76	20

Harris described the overall response in the context of Wirth's bill succinctly. "Basically, the American people are not in sympathy with

such restrictions on the Bell System." He concluded "there certainly is no mandate in this study for the legislation now under consideration in the House of Representatives. To the contrary, many of the provisions of that bill are plainly disturbing and worrisome to the American public."²²²

The responses about proposed restrictions on AT&T tended to favor AT&T more than 4 to 1. Overall, the survey reported opposition to the restrictions 82%-10% and that, 86%-11%, "it is wrong for Congress to have one set of rules for AT&T and another for competitors."²²³

The responses of Members of Congress to their constituent's letters showed an unwillingness of members to support legislation:

Table 6.3 Congressional Responses to Constituent Letters

	<u>House</u> %		<u>Senate</u> %	
Oppose H.R. 5158	48	11	11	11
Support H.R. 5158	38	9	5	5
Wait on legislation	117	27	29	29
No position or commitment	170	39	46	46
Respondents	373	86%	91	91%

Congress was less inclined to wait to legislate than the public at large when the responses in the House and Senate are compared to the public at large. Roughly a third each of the House and Senate were

²²²"Statement by Lou Harris," April 2, 1982.

²²³"Highlights of Lou Harris Survey of Public Reaction," April 2, 1982.

inclined to wait for legislation compared to the 80% of the respondents reported by Harris as opposed to legislation until after judicial review. On the whole, the Congress did not express significant support for the legislation, unlike the Energy and Commerce committee.

Any disparity between members' responses and the public opinion poll suggests that the members either were not closely attuned to their constituent's opinions on this issue -- a prospect which seems unlikely given the publicity and press interest which followed the issue that spring and summer -- or the members simply did not perceive the public's opinions on this issue to represent a threat or risk to their own political positions. In an election year following reapportionment, that explanation, too, seems unlikely on its face. But perhaps the complexities and subtleties within the legislative process could provide some less direct benefit both to the constituent and the members. Perhaps the consideration of the Clean Air Act in the same time frame as the telecommunications bill had some effect on the members' behavior. Trades may have easily occurred outside the narrow confines of the debate on H.R.5158 alone. If so, Dutton's argument that the theory should concentrate on an "ecology" of games becomes more significant for understanding the complexities in the process of developing communications policy.²²⁴ Acceptance of the divestiture by the public seems to have been reflected in the general lack of support for H.R. 5158 by the Congress.

²²⁴Dutton, 82. He describes the development of policy as "complex, but neither random or chaotic." His framework also allows for unanticipated or unplanned events, such as the divestiture agreement appeared to be to so many members of congress.

The legislative choice literature makes no provision for this complex process. Weingast and Moran deal with one oversight committee and one regulatory agency. Ferejohn and Shipan deal with multiple committees. But none deals directly with the specific circumstance facing the Bell System and the telecommunications industry in general when the divestiture decision was made.

The Bell System was active in several venues in its efforts to achieve a public policy that it deemed workable and that would allow it to compete in a competitive environment. The court, the commission, and the congress, and the administration were all involved in their own ways in the policy formulation process. Each venue offered a potential solution to part of the problem, but no one venue seemed to offer an overall solution other than congress. The available congressional options did not include the Baxter plan. The divestiture of the Bell System was a deus ex machina. The Congress only considered it after it had been agreed to by the Justice Department and the Bell System. Congress could accept or reject it, or pass legislation to supersede it. But if it did nothing, the divestiture would be implemented. It would become policy by default.

It is unlikely that Congress would have pursued the same approach. The options before the two chambers included the element of structural separation, to be sure, but they differed substantially from the Baxter plan in the type of separation and the degree of remaining regulation.

The members' constituents also preferred the divestiture over a

legislative solution, as indicated by the Harris Survey. A member's support for the divestiture would have coincided with his constituents' stated interest.

This chapter has argued that the Bell System was correctly reading signals between and among various institutional players, particularly the Congress, when it made the decision to divest. When Congressman Tim Wirth persisted with his efforts to legislate, after the announcement, the Bell System opposed him. The complex process of trades and the persistent efforts of Congressman Corcoran, coupled with Chairman Dingell's interest in the Clean Air Bill, gave the Bell System time to mount its lobbying campaign against the bill, including both an intense mail campaign and direct lobbying with the members. Members generally preferred the divestiture to Wirth's legislation, a position shared by their constituents. But the legislative choice theory, as currently constructed, could not have predicted this outcome. Rather, the existing theory would have predicted the passage of Wirth's bill, based upon his subcommittee support and probable committee support.

CHAPTER VII: CONCLUSIONS

The final decision, then, seems to have been less one of finding a "perfect" or "efficient" solution to the problem of telecommunications industry structure within the context of ad hoc deregulation, competition, and technological change than a problem of finding a solution that had a high probability of political success in multiple arenas.

The Bell System could only achieve its own political objectives within the context of probable outcomes. Not empowered at the witness table to introduce legislation or to vote, it had to work within the institutional constraints of the Congress, the courts, and the Administration through surrogates who were empowered to act. Corcoran became a key player on behalf of the Bell System. There were limits to what any member, or collection of members, could be convinced to do. So as an outsider, looking into the process, it was even more incumbent upon the Bell System to assess accurately the probable outcomes of legislative action and deduce the likely result.

The adoption of the Baxter plan and subsequent MFJ sliced through the legislative entanglements like Alexander's sword through the Gordian knot. It introduced a radical proposition, but one clearly understood by Bell's management to have a high probability of success.

Packwood understood that an outside solution would reduce the probability of congressional action even if Wirth didn't. The institutional constraints became an asset rather than an impediment; the Bell executives correctly understood that it is easier to kill legislation than to pass it.

Wirth, an iconoclast with a radically different approach to the legislative process, tried hard to control the issue. But his approach, despite some rhetoric that appealed to his subcommittee, was not up to the task. He succeeded in moving a bill through his own subcommittee, but proved unable to sustain his effort in the full committee. He also strove mightily to influence the outcome in other venues. There is, perhaps, no better example of interinstitutional signalling than Wirth's persistent - - and insistent -- letter writing to his colleagues, the president and the judge. His nontraditional approach to the legislative process, with the heavy emphasis upon behavior highly visible to actors outside the congress made it harder, rather than easier, to gain a legislative solution.

Members decided to accept the divestiture as a reasonable political solution. It produced some uncertainty, but less than the alternative proposed by Wirth. Wirth's approach had been largely rejected by the public at large. The public generally accepted divestiture.

In addition, the support of both the Bell System and the Administration gave credibility to the agreement. When the judge confirmed the decree with some relatively minor modifications -- some borrowed from Wirth's bill -- the process was complete.

The remarks of Trienens, Block, Zeglis, and Baudhuin leave no

doubt that the Congress was a key element in the thinking of the Bell leadership. They describe a direct relationship between the introduction of Wirth's bill and the decision to divest. Wirth would impede a legislative solution. The court case could not or would not wait. So the situation demanded an altered strategy. The Bell System responded by acceding to the Department of Justice and accepting Baxter's plan.

Having accepted that plan, they found themselves vulnerable to a potential legislative veto. The passage of legislation could undo the decree. The defeat of H.R. 5158 became an almost epic quest for the Bell System, critical to the success of the divestiture agreement. Finally, Wirth withdrew the bill.

As a case study, the decision to divest appears to confirm the essential tenets of the legislative choice literature. Members of Congress correctly perceived that the politically optimal choice was in support of the nonlegislative agreement rather than Wirth's bill. Because of the procedural evolution of the issue, the divestiture became the choice which would go into effect if the members failed to legislate.

Most members were comfortable with that choice. By accepting the divestiture, they seemed to create little or no risk for their own political positions. Wirth asked the members to shoulder more responsibility by supporting his legislation. They tacitly rejected his proposal.

The condition for equilibrium was created between the Congress and the agency, here meaning the regulated industry. It has also stood a test of time. In the ten years since the divestiture decision was made,

the Congress has not legislated on the decision nor made any revision of the Communications Act of 1934.

The condition of equilibrium was achieved in conflict with the likely committee vote on H.R. 5158. The subcommittee voted unanimously to pass it. But the full committee, despite a preponderance of support for the bill, did not act, and their Senate counterparts held an opposite opinion on the legislation.

The nonlegislative solution, divestiture, became the preferred choice. The result, a policy choice embodying a radical structural separation with relatively mild residual regulation, may or may not have been more economically or socially efficient than the legislative alternative. But members appear to have calculated the benefits and risks to themselves and made choices as the legislative choice literature describes.

The institutional authority of Congress to overturn or veto the choices of the other branches of government remains, subject to presidential veto power, absolute. The Bell System understood this division of power quite clearly. It consistently sought a legislative solution to the problems of regulation, competition, and technology.

In 1981 the introduction of Wirth's highly regulatory bill stimulated the Bell System to review its options. It perceived that Wirth and the Congress would not or could not pass timely, acceptable legislation before the court would act. It altered its strategy, chose the Baxter model, and proceeded to disrupt Wirth's effort to undo the agreement with the Justice Department.

When it chose the Baxter model, the Bell System chose several things. It chose an instrument of regulation, structural separation. It chose a level of regulation, implied deregulation. It accepted, by using a negotiated court solution, some institutional limits to the problems that could be solved. The court could not guarantee complete deregulation of long distance rates and the deregulation of customer premises equipment rates was actually under authority of the FCC. The agreement was subject to potential legislative veto or override through legislation. But the legislation was effectively defeated; the agreement represented an alternative to Congress that was politically acceptable and an equilibrium was reached.

The legislative choice literature offers a keen insight into the way the decision to divest was reached. The prediction that the Bell System would read congressional signals accurately and adjust its behavior to avoid legislative sanctions is supported by the facts.

Using the legislative choice literature to analyze the divestiture decision is generally consistent with the divestiture literature regarding the broad aspects of competition, technology, and the corporate culture. It also suggests that the divestiture was not a dysfunction of the public policy making process. The legislative choice literature posits that Congress can affect public policy without legislating. It did so in the case of the Bell System divestiture agreement in 1981.

But the divestiture of the Bell system also shows that the theory of legislative choice is limited in three areas. First, the theory

must be developed to allow consideration of multiple venues. As currently constructed, it addresses concerns between the Congress and the agency, but not among multiple institutional players simultaneously. In the Bell case, the Administration, the Department of Justice and the court were involved as well as the Congress, the regulatory agency, and the regulated firm.

Second, the argument that the median member's position predicts the outcome is, alone, inadequate. In the Bell System case on H.R. 5158, the Senate committee's median position was in opposition to legislation, the House's committee median favored legislation, and the two chambers as a whole preferred the divestiture to legislation. The median must be calculated at each legislative step to determine the outcome.

Third, environment factors play a larger role than the legislative choice literature considers. Power is not uniformly distributed within the committee. Seniority, agenda setting, and, perhaps most important, constrained time, combine to give the chair a greater role in the process. The chairman may, for example, still be able to exercise effective veto of a bill by controlling the agenda. The choice literature makes no allowance for this possibility.

The literature on the divestiture has generally understood that politics influenced the decision. That literature, however, has been imprecise in its treatment of political processes, particularly with regard to the role of Congress. This study has argued that the decision to divest was stimulated by Congress as a normal function of that institution.

It further argues that such a solution was not inconsistent with the Bell System's earlier behavior. It spent considerable time throughout the century negotiating with the government about its business. It reached settlements in 1912 and 1918. It gained legislative endorsement of the regulated monopoly in 1921. It divested itself of many of its holdings throughout the 1920's. The issues raised by the government based on the company's vertical integration dated to the 1930's. Monopoly leveraging was at issue in two antitrust lawsuits. The decision to divest in 1981 and 1982 solved many of the problems perceived to have stemmed from the company's organization.

But the divestiture was not inevitable. It was historically connected to the myriad events which preceded it. But it was a product of a very specific set of circumstances which occurred in the court, the FCC, the Administration, and the Congress in 1981. The Congress alone would not have produced that solution. Only when the Bell System's senior management perceived that no congressional solution was possible did they act to accept the divestiture model proposed by Assistant Attorney General Baxter. Wirth's actions precipitated the specific decision to divest.

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