

# Judge Harold H. Greene: A Pivotal Judicial Figure in Telecommunications Policy and His Legacy

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## I. INTRODUCTION

On August 5, 1983, Judge Harold H. Greene of the United States District Court for the District of Columbia gave final approval to a consent decree breaking up the largest corporation in the world – AT&T. The settlement, which concluded a 1974 antitrust suit filed by the U.S. Department of Justice (DOJ) to end the regulated monopoly that AT&T had exercised for decades over the U.S. telephone network, was attributed in large part to Greene’s skills as a trial judge and to his gift for synthesizing highly complex issues. The AT&T case was considered by many to be too complex and unwieldy for any court to handle.

In a remarkable display of judicial activism, Greene had the responsibility for administering the terms of the AT&T/DOJ settlement for 12 years in accordance with what he perceived to be in the “public interest” in addition to the normally full docket of noteworthy cases assigned to a federal judge. Earlier in a distinguished judicial career that has spanned 30 years, Greene played a major role in drafting the groundbreaking civil rights legislation of the 1960s and helped to restructure the criminal court system of Washington D.C.

As a graduate student within the Telecommunications Program at George Washington University (GWU), I was privileged to personally meet Harold H. Greene as an unexpected surprise. For a class project I decided to learn more about Harold H. Greene and in the middle of my research I received a telephone call directly from Judge himself asking “Why are you investigating me?”<sup>1</sup> He was gracious when I revealed my intent and expressed interest in reading the final product. I did share my biography with Judge Greene and his long time secretary Sharon Treichel (with extra copies for Judge Greene’s law clerks and family). In follow-up telephone conversations and subsequent letters, Judge Greene graciously accepted my invitation to visit our student group and answer questions. Judge Greene routinely turned down speaking invitations except for a select few community and law school events (once a year).<sup>2</sup> To my knowledge this was the only appearance Judge Greene made to a student group and my personal insight is that it was partially the result of my biography and partially a result of his affinity for night students at GWU (his alma mater). This rare interview is contained in its entirety in Appendix B.

This paper is a revision of the very biography I shared with Harold H. Greene in 1990-93, updated to include his own comments and a retrospective on his life given his recent death. I seek to describe Harold H. Greene and his accomplishments, why he remains controversial, and the motivations and aspirations of a man who has arguably

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<sup>1</sup> William Yurcik, *Judge Harold H. Greene: Telecommunications Czar or American Hero?* Technical Report, George Washington University, Graduate Telecommunications Program, TCOM 220/Dr. Jack Ousland, July 18, 1990.

<sup>2</sup> Two such examples: (1) *Recent Developments in Telecommunications Policy*, The Beth El Congregation of Montgomery County, 8215 Old Georgetown Road, Bethesda MD Feb. 2 1989 (personally attended by the author); (2) *The AT&T Litigation and Executive Policies Toward Judicial Action*, The Winston Howard Lecture delivered at the University of Wyoming College of Law, Apr. 22 1988.

had more effect on telecommunication policy than any other judicial figure. I intentionally do not limit the scope of Judge Greene's impact on telecommunications policy only to the U.S., most countries around the world have (or are in the process of) deregulating government telecommunication monopolies in part due to the successful U.S. transition which was precipitated by the divestiture of AT&T.

The remainder of this paper is organized as follows: Section II gives a glimpse into Harold Greene's fascinating personal history. Section III describes Judge Green's early judicial career. Section IV introduces the landmark antitrust case against AT&T, which will be forever associated with Judge Greene. Section V briefly surveys other noteworthy decisions Judge Greene has written. Section VI attempts to synthesize Greene's judicial philosophy. Lastly, I conclude with a summary and personal insights on Harold H. Greene the person in Section VII. I have also provided rare background material in the Appendices: Appendix A is the "official resume" Judge Greene provided me upon initial acquaintance and Appendix B contains a previously unpublished personal interview recorded September 14, 1993.

## II. FAMILY

Of Jewish parentage (Irving and Edith), Harold Herman Greene was born Heinz Grunhaus on February 6, 1923, in Frankfurt, Germany. In an interview for the Washington Post, Greene recalls no "overt acts" by the Nazis Government his family before their flight from Germany in 1939.<sup>3</sup> "I don't think about it too much. Too many people are concerned with what they were in Europe, before they came to the United States."<sup>4</sup> It will become clear when following the remainder of his life that these events did have a most dramatic effect on Greene's life.

After passing through Belgium, Spain, and Portugal, the Grunhaus family finally settled in the U.S. in 1943. The following year, Heinz became a naturalized U.S. citizen, Americanized his name to Harold Greene, and enlisted in the U.S. Army. Assigned to military intelligence, Greene spent most of his two-year tour of duty in Allied-occupied Germany. He saw combat action in Germany but escaped injury. On his discharge from the service with the rank of staff sergeant in 1946, Greene joined his parents in Washington D.C. where they had opened a jewelry shop. On September 19, 1948, Greene married the former Evelyn Schroer, a native of the Saar region of the German-French border.

Supporting himself by working as a translator for the U.S. Department of Justice, Greene attended night school at the GWU where he finished two years of undergraduate work and three years of law school in just four and one-half years despite learning a new language, working full time, and being newlywed. He received his B.S. degree in 1949 and his J.D. degree in 1952, finishing first in his law class. Shortly after law school

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<sup>3</sup> James Hoagland, *Revolutionary Judge on the General Sessions Bench*, WASHINGTON POST POTOMAC MAGAZINE, Sept., 25, 1966, pp. 10-13.

<sup>4</sup> Id. at 12.

graduation, he was admitted to practice before the bars of the District of Columbia, the State of Maryland, the U.S. Supreme Court, and the Military Court of Appeals.

An admitted workaholic, Judge Greene was a short man, slightly rotund, gray hair, tortoise-shell glasses, and a smile that showed deep and unaffected warmth. He had a distinct German accent he was self-conscious about. Judge Greene belonged to few organizations stating, “I don’t think a Judge should be too much involved in outside activities” however, he was a football season ticket holder (Washington Redskins), a lunchtime restaurant connoisseur, an occasional bridge player, and an avid reader (one of his close aides’ estimates that Greene must read between 2000 and 3000 words a minute).<sup>5</sup> Greene usually left the courthouse between 6 p.m. and 7 p.m. with a stack of papers under his arm; it is apparent that his favorite hobby was also his profession. He served a 45-year career as a government lawyer and federal judge (never set up a private practice). Judge Greene died January 29, 2000 of a cerebral hemorrhage after a series of brain operations and is survived by his wife of 51 years; two children - Michael David, a doctor; Stephanie Alison, an elementary school teacher; and three grand children.

### III. EARLY JUDICIAL CAREER

Upon graduation from GWU law school, Greene became a clerk for Bennett Champ Clark at the U.S. Court of Appeals in the District of Columbia (D.C. highest court at that time). Following this year of apprenticeship Greene was hired as an Assistant U.S. Attorney for the District of Columbia where he worked on the Little Rock Arkansas school integration case among other matters – specifically examining the use of the U.S. military to enforce federal law.

In 1957 he accepted a job in the DOJ’s Office of Legal Counsel. A year later he was chosen to be the first head the Appeals and Research Section of the Department’s Civil Rights Division which Congress had recently established to enforce existing civil rights measures and prepare comprehensive legislation that would ban discrimination based on color, race, national origin, religion, or sex.

When Robert Kennedy became Attorney General in 1960, the Civil Rights Division (along with the Organized Crime Division) became invigorated with energy and activity due to Kennedy’s personal style of leadership. Career DOJ lawyers who had never met an Attorney General face to face found themselves invited to Kennedy’s office for informal discussion over beer and coffee. Greene soon befriended Kennedy and earned his confidence, becoming closer to him than any other government lawyer.<sup>6</sup> The commitment and vision of Kennedy were especially compelling to Greene who did not take his country or its ideals for granted. In Harold Greene’s own words:

The attorney general would call at 5 o’clock in the evening and say: ‘Tomorrow morning we are going to try to integrate the University of Mississippi. Get us a memo on what we’re likely to do, what we can do if the governor sends the National

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<sup>5</sup> *Judge Greene’s Philosophy* WASHINGTON POST Oct. 19 1970, p. B5.

<sup>6</sup> Jonathon Groner, *Profile of a Court: Homegrown and Diverse*, LEGAL TIMES, Jan. 9, 1989, p. 1.

Guard there – and I want to have it on my desk at 8 o'clock tomorrow morning.' That's the kind of thing I did and my people did.<sup>7</sup>

Working closely with Kennedy, Greene wrote the Civil Rights Acts of 1960 and 1964 and the Voting Rights Act of 1965, arguably the two most important pieces of legislation passed by Congress in the last 30 years.<sup>8</sup> When Kennedy made his only appearance before the U.S. Supreme Court to argue a civil rights case, Greene there with him, helping him refine his arguments.<sup>9</sup> Greene refers to Kennedy as a “great man”.<sup>10</sup> Kennedy referred to Greene as “the guy with the answers”.<sup>11</sup> Greene disclaims “authorship” of those landmark civil rights statutes, saying it “belongs more properly to people like Lyndon Johnson and Martin Luther King Jr.” Greene will admit that he was their “chief craftsman.”<sup>12</sup>

In drafting the 1964 Civil Rights legislation, Greene and his team based the act on the commerce clause of the Constitution and not on the 14<sup>th</sup> Amendment of the Bill of Rights which bars discrimination since the former was more sound position for legal challenges. The overt and intended effect of the Act to eliminate discrimination was immediate Greene observed: “Within days it was everybody all over the South – restaurants, hotels, motels – just gave up their previous challenges.” Greene was participant and witness to historical passage of his own bill, in his own words:

I do remember sitting in the Senate Gallery on the day that the filibuster was broken. That was an historic moment because a Senate filibuster had never been broken on a civil rights measure. You needed a two-thirds vote to break a filibuster, and this time the pro civil rights forces got exactly 67 votes. Senator Clare Engle of California was on his death bed. He was dying of a brain tumor and could not speak. He was brought in on a stretcher and made a gesture with his hand, and that was the vote that broke the filibuster. So that was a major turning point. I remember feeling that I was witness to a very significant event.<sup>13</sup>

In July 1965, a month before Congress passed the Voting Rights Act, President Lyndon B. Johnson appointed Greene to the post of Associate Judge of the D.C. Court of General Sessions. Greene's decision to trade in his promising Justice Department career

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<sup>7</sup> Robert D. Hershey Jr., *Harold H. Greene, Judge Who Oversaw the Breakup of AT&T, is Dead at 76*, NEW YORK TIMES, Jan. 31 2000.

<sup>8</sup> A historical point agreed upon by these three references in addition to the author: Margaret E. Kritz, *Ring the Bells* NATIONAL JOURNAL, Feb. 4 1989, p. 272; Steve Coll, *THE DEAL OF THE CENTURY*, 1986, p. 126; David Johnston, *Jail Poindexter, Prosecutors Urge* NEW YORK TIMES, June 6 1990.

<sup>9</sup> A direct quote from Greene from the *April/May 1996 Bar Report*: “The traditional practice is that the justices don't ask the attorney general any questions, so as not to embarrass him. But Bobby Kennedy had let them know that he didn't mind if they asked him questions and they did. They asked quite a few questions. I remember sitting there kind of trembling when the justices began to bore in on him, but he handled it very well. So that was a rewarding experience.”

<sup>10</sup> David Johnstone, *Judge in Iran-Contra Trail: Forceful Wielder of the Law*, NEW YORK TIMES, March 3 1990, p.10.

<sup>11</sup> see Coll, p. 126.

<sup>12</sup> see Groner.

<sup>13</sup> *Legends in the Law: A Conversation with Harold H. Greene*, BAR REPORT April/May 1996.

for a term on the bench of D.C.'s problem-plagued People's Court" puzzled many observers. Most previous appointments to this position had been based upon political rather than judicial considerations. Greene evidently relished the challenge of reforming a court notorious for its lack of decorum and turnstile justice. One highly placed official in the DOJ made it clear that Greene's role in helping to build a model system would not be limited to his work on the bench. The Court would also embrace his serving as an example to potential appointees: "A lot more of our people have become interested in this type of appointment since Greene went down there."<sup>14</sup>

During his first year on the General Sessions bench, Judge Greene wrote 235 pages of opinions – more than the Court's 14 other judges combined! His diligence and regard for the rights of criminal defendants won him the admiration of the *Washington Post*, formerly a sharp and frequent critic of General Sessions.<sup>15</sup> In order to insure the best available representation for the indigent defendants who crowded his courtroom, Greene set up a Federal payment system for court-appointed attorneys by extending a stipulation in the Criminal Justice Act of 1964. Greene brought law students into court to represent indigent clients. Greene eventually persuaded the U.S. Comptroller General to draw up a similar scheme to cover the serious misdemeanor cases that made up the bulk of the General Sessions trial docket. "Since he took over, you can really see the difference in the spirit and atmosphere of the court" said Barbara Bowman, director of D.C.'s Public Defender Service. "Now you can get cases to trial; now things happen there, now there is a sense of hope."<sup>16</sup>

Impressed by Greene's accomplishments in his short time on the General Sessions bench, President Lyndon Johnson named him the General Sessions Chief Judge in November 1966. Immediately upon taking office, Greene implemented sweeping administrative reforms intended to reduce the huge case backlog without jeopardizing defendant's rights. Greene set up an assignment court to distribute incoming criminal cases to lawyers and judges thus preventing defendants' lawyers from deliberately postponing their cases while they shop for a lenient judge or a plea bargain. By hiring more judges and lengthening the workday, Greene managed to trim the average delay between arrest and trial for defendants from three months in 1966 to six weeks in 1970.

During the 1968 riots following the assassination of Dr. Martin Luther King Jr., Judge Greene ordered his court to remain open 24 hours a day so each case could be tried individually. The court system was overloaded but Greene was determined to make it work. *Washingtonian Magazine* named Greene the *Washingtonian of the Year* in 1971 for 'untangling many of the knots strangling the District's judicial system...'<sup>17</sup> In Greene's own words:

... I could see flames from the windows of my chambers. For the next three or four days we had major rioting here in Washington and I stayed at the court day and night.

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<sup>14</sup> see Hoagland, p. 13.

<sup>15</sup> *Id.*

<sup>16</sup> Maurine E. McLaughlin, *Superior Court's First Chief Seeks 'Civilized Redress'* " WASHINGTON POST, Oct. 19 1970, pp. B5.

<sup>17</sup> *The Washingtonians of the Year*, WASHINGTON MAGAZINE, Jan. 1972, p. 35.

Several thousand people were arrested. We were the only major city which experienced heavy rioting that arraigned and processed every defendant individually.<sup>18</sup>

In an effort to curb D.C.'s escalating crime rate, Congress passed an omnibus legislative package that called for a reorganization of D.C.'s judicial system of overlapping federal and local jurisdictions. Greene helped the Justice Department officials design the plan and he lobbied legislators hard for its passage. Greene was personally selected by the acting Attorney General, Ramsey Clark (Robert Kennedy's successor), for the task of reforming the Court. The Court reorganization placed the General Sessions, Juvenile, Tax, and Domestic Relations Courts, as well as all local criminal and civil cases, into a new D.C. Superior Court which emerged after a three-year transition.<sup>19</sup>

In one of his first actions as Chief Judge of the restructured court system (D.C. Superior Court), Greene ordered city officials to develop an alternative to detaining juveniles awaiting trial in the dilapidated and overcrowded Receiving Home for Children. Greene shut down the facility and set up an innovative home detention program, which also incorporated halfway houses. Praised by the independent judicial tenure commission for his skills as a trial judge and as an administrator, Greene easily won reappointment to a second term as Chief Judge of the D.C. Superior Court in 1976.

Two years later, on May 17, 1978, President Jimmy Carter named Harold Greene to the Federal Bench of the U.S. District Court for D.C. Greene would be replacing John J. Sirca of Watergate fame who was retiring. Almost immediately upon assuming his new office, Greene inherited a case that was to occupy much of the rest of his legal career.<sup>20</sup>

#### IV. THE U.S. VERSUS AT&T

In the early 1970s senior FCC staff correctly suspected that AT&T was generating excess profits on equipment sales from its vertically integrated subsidiary, Western Electric. Under rate-of-return regulation, if AT&T could "pad" its rate base then its allowed revenue would increase. This investigation subsequently was transferred to the DOJ.<sup>21</sup>

The U.S. DOJ versus AT&T antitrust case was filed in October 1974 by Attorney General William Saxbe, an aging former Senator from Ohio. Saxbe replaced Elliot Richardson who had just resigned in protest over the firing of Archibald Cox by President Nixon.<sup>22</sup> Saxbe would last as the U.S. Attorney General for only one year having distanced himself from both the Nixon and Ford White House's. The DOJ was still in

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<sup>18</sup> See *Legends of the Law*.

<sup>19</sup> See McLaughlin, p. B1.

<sup>20</sup> Caroline E. Mayer and Peter Behr, *Greene: No Regrets About AT&T Breakup*, WASHINGTON POST, Dec. 2 1984, p. F1.

<sup>21</sup> Alan Pearce, *RIP: Harold Greene*, AMERICAS NETWORK, Mar. 1 2000, p. 44. {Alan Pearce was Chief Economist of the FCC during this time and closely involved in investigating Western Electric}

<sup>22</sup> a Watergate event referred to as "the Saturday Night Massacre"

shambles following the renowned Watergate investigations and Saxbe was looking for bold and decisive action to improve public opinion of the DOJ. Saxbe filed the case without even consulting with then-President Ford.<sup>23</sup>

Within the Department of Justice a succession of antitrust chiefs handled the case until 1981 (Thomas Kauper, John Shenefield, Sanford Litvack, and William Baxter). The Attorney General in 1981 was William French Smith who was recused from the AT&T case because he was a past Board Member of Pacific Telephone. Reagan's designated number-two man at DOJ, Deputy Attorney General Edward Schmults, was also recused because of law firm dealings with AT&T. This made the then newly appointed Antitrust Chief, William Baxter, the top ranking Government official directing the case.

William Baxter was an eccentric Stanford University Law Professor who had not addressed a court in session for about 20 years. Baxter considered himself an economist although he had no formal training as such. Baxter's nomination and the disqualification of his superiors created an ironic situation. Baxter had publicly argued that no one company should be able to integrate regulated and unregulated divisions of its business because it could use the "safe" profits from its regulated side to subsidize the price of unregulated products (a cross-subsidy). Reagan's closest advisors including William French Smith, Edwin Meese (Counselor), Malcolm Baldrige (Commerce Secretary), and Casper Weinberger (Defense Secretary) believed unequivocally that the DOJ's case against AT&T should be dismissed. This created a situation that if AT&T sympathizers in the Reagan inner circle were going to intervene, they would have to quickly go through or around Baxter. Baxter would have none of this and stated before a press conference staged to announce the case, "The case is perfectly sound...and I intend to litigate it to the eyeballs."<sup>24</sup>

Between 1974 and 1980, both DOJ and AT&T went through an elaborate "discovery phase" in which documents were gathered on both sides. "I drew the case the first day I came to work," recalled the newly appointed Judge Greene.<sup>25</sup> The case had originally been assigned to Judge Joseph Waddy who eventually succumbed to cancer, this case among others were distributed randomly to other judges on the bench. It is a strange twist of fate that the AT&T antitrust case was assigned to Judge Greene. Judge Waddy had even expressed some sympathy for AT&T's position during the preliminary jurisdictional arguments.<sup>26</sup> Judge Greene was a new judge who could not be psychoanalyzed easily by the large experienced legal team assembled by AT&T.<sup>27</sup> During the prior six years under Judge Waddy, there had been several abortive attempts by DOJ and AT&T to settle the suit before going to trial. Since no agreement had been reached, Greene announced that the trial would begin January 15, 1981.<sup>28</sup>

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<sup>23</sup> See Coll pp. 64-65.

<sup>24</sup> Id. p. 188.

<sup>25</sup> personal communications with Judge Greene repeated in other interviews

<sup>26</sup> Sanford Bingham, *Judge Greene's Logic: Why He Disallowed Manufacturing and Long Distance* CO MAGAZINE, Nov. 1987, pp. 24-27.

<sup>27</sup> a defense legal team often referred to as "the well-oiled machine" even by the AT&T lawyers themselves

<sup>28</sup> Trudy E. Bell, *The Decision to Divest: Incredible or Inevitable?* IEEE SPECTRUM Nov. 1985, p. 49.

Within three months of being assigned to the case, Greene issued a pretrial order that put lawyers for both sides on strict schedules designed to get the trial underway by September 1, 1980. To move the process along, Greene gave AT&T and DOJ attorneys deadlines for filing statements detailing what they intended to prove and what evidence and witnesses they would use to do so. Eighteen months later, what seemed to be an unmanageable mess had been clearly laid out in five bound volumes totaling more than 4,000 pages.

Given the volume of material, Greene insisted on the stipulation process to separate “the contested wheat from the uncontested chaff.”<sup>29</sup> For almost a full year, as many as 17 different teams of attorneys labored over the 92 “episodes” the case had been divided into to determine areas of agreement. As a result of this tedious and often contentious procedure, the government dropped 13 episodes it planned to present at trial and AT&T trimmed to just 900 its list of witnesses.

After the DOJ prosecution finished its presentation, AT&T submitted a 500-page brief moving for dismissal based on the grounds that the prosecution had not proved its case. Judge Greene, however, had no intention of dropping the suit and his response, dated September 11 1981, was clear, “The motion to dismiss is denied. The testimony and the documentary evidence produced by the Government demonstrate that the Bell System had violated the antitrust laws in a number of ways over a lengthy period of time...the burden is on the defendants to refute the factual showings...”<sup>30</sup>

This preliminary ruling by Greene eventually served a dual purpose. First, it prevented intervention by the Reagan White House since any action now would leave the Administration open to the accusation that they were favoring “malefactors of great wealth.”<sup>31</sup> The ruling also pushed AT&T to settle the case on its own terms rather than risk a potentially devastating loss. AT&T was particularly interested in retaining Western Electric and Bell Labs. AT&T was also aware that litigation was draining company resources, estimated at 3,000 personnel assigned to the case at a cost of an estimated \$375 million over seven years. In comparison, the DOJ were more modest with 125 people, including 55 lawyers and a traceable cost of only \$18 million.<sup>32</sup>

The details of the decision AT&T made to divest itself are complex and described in detail in several excellent texts on the subject.<sup>33</sup> Ultimately, when the trial was within a few weeks of completion, the parties arrived at a settlement in the form of a proposed consent decree. Ironically, the hard-working Judge was taking a vacation in the Caribbean when AT&T and the DOJ reached their settlement, the absolute last party to the case to be informed.<sup>34</sup> The proposal was submitted to Greene’s court for approval under the Tunney Act. The Tunney Act, for reasons related to the financial clout of

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<sup>29</sup> David Pauley et. al., *AT&T: Now, the Fine Print*, NEWSWEEK, Jan. 25 1982, p. 52.

<sup>30</sup> see Bell p. 50.

<sup>31</sup> Id. p. 53.

<sup>32</sup> Id. p. 51.

<sup>33</sup> My two personal favorites are: *THE FALL OF THE BELL SYSTEM* by Peter Temin and Louis Galambos and *DEAL OF THE CENTURY* by Steve Coll.

<sup>34</sup> personal communications with Judge Greene and corroborated in COLL (see reference 33)

typical antitrust defendants, does not permit the DOJ alone to settle such suits, but requires a court finding that the particular settlement is in the public interest.

There are three main provisions to the decree. First, AT&T was required to divest all its local subsidiaries, the so-called RBOCs (Regional Bell Operating Companies). This was required because anyone wishing to operate in either the long distance or the telephone manufacturing market must use the switches and wires of the local RBOC for the last leg of transmission. This last leg of transmission became categorized as “essential facilities”. The second major provision prohibits the new RBOCs from entering those lines of business in which their “essential facilities” would provide an unfair advantage, most notably long-distance and telecommunications manufacturing. This provision also prohibits the RBOCs from providing information services. The third provision of the decree requires the RBOCs to provide the same access to their networks for all common carriers. In return, AT&T retained Western Electric and Bell Laboratories with intentions to expand into electronic data processing and computer sales which were previously prohibited by a 1956 Consent Decree.

After an 11-month trial in which 1 billion pages of documents were submitted as evidence and the testimony of hundreds of witnesses were heard, Greene confessed to one reporter that he felt a twinge of disappointment when the negotiated settlement of the AT&T suit deprived him of writing a major antitrust opinion.<sup>35</sup> Judge Greene stated to the author on several occasions that he was not sure what he would have decided and written in this opinion.<sup>36</sup>

In a 178-page opinion delivered on August 11, 1982 (case 82-0192), Greene approved the basic framework of the settlement as being in the “public interest” but insisted on important safeguards designed to protect customers and competitors alike. This consent decree is commonly referred to as the Modification of the Final Judgment (MFJ) since technically the settlement amended the previous 1956 AT&T consent decree in an unsuccessful legal attempt to remove the case from Judge Greene’s court.<sup>37</sup> To forestall anticipated consumer rate increases, Greene sought to boost the RBOC earnings by allowing them to sell telephones and related equipment and by returning the lucrative publishing rights to Yellow Page Directories. To permit competitive conditions to develop in burgeoning electronic information services, RBOCs were prohibited from providing these services for at least seven years. Greene also ordered AT&T to relinquish the Bell logo for exclusive use of the new RBOCs.

Two important procedural aspects of the decree specify that when the technological and economic situation has changed sufficiently to make it unlikely that the RBOCs will engage in anticompetitive activity, they may be relieved by the court of the line-of-business restrictions. In an unprecedented move, Judge Greene specifically ordered

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<sup>35</sup> Lenda Whitely, *Judge Greene: The Man Behind the Bench*, INFOTEXT, Sept. 1989, p. 40.

<sup>36</sup> Personal communications with Judge Greene which is also supported by several public statements by himself (*Legends of the Law*) and his son (see Hershey).

<sup>37</sup> Alan Pearce, former Chief Economist of the FCC, often amused Judge Greene proclaiming only in America could we “modify” the Final Judgment!

“triennial reviews” before his court (every three years) to make sure rapid technological developments in the telecommunications industry did not overtake or harm AT&T, the RBOCs, and most importantly the public.<sup>38</sup> Secondly, Judge Greene’s court will have the obligation to decide any and all disputes regarding the interpretation of the decree.

In 1983, the last full year before the divestiture took effect, the Bell System’s total assets were \$150 billion, making it bigger than GM, GE, US Steel, Eastman Kodak, and Xerox combined! AT&T annual revenues were nearly \$70 billion, representing approximately 2% of the U.S. GNP. AT&T’s net income was nearly \$6 billion, slightly smaller than the total NASA budget at that time. AT&T employed just under 1 million people, making it the largest employer in the U.S. Effective January 1, 1984, AT&T’s total assets became just under \$40 billion. AT&T spun off three-quarters of its assets into the seven “baby Bells”, each of which is roughly the size of ITT. In 1984, AT&T’s annual revenues were about \$33 billion and its net income was just under \$1.4 billion. Six years after the consent decree, AT&T employed about 350, 000 people.<sup>39</sup>

Greene asserts, “I think (divestiture) *will* accomplish what it’s supposed to. I’m a great believer in the competitive system, and think that competition will bring us greater innovation and put American industry in information ahead of everyone also.”<sup>40</sup>

#### A. *The Sherman Antitrust and Tunney Acts*

Congress passed the original antitrust laws in 1905 and they have not been changed since this time. The second branch of government, the executive branch – acting through the attorney general – not only initiated the antitrust lawsuit against AT&T but in a sense dictated the outcome by agreeing to the decree. The antitrust case against AT&T was first filed under Ford and then continued under the subsequent administrations of Carter and Reagan thus forging limited bipartisan support.

“The Sherman Act is similar in the economics sphere to the Bill of Rights in the personal sphere,” Greene observes. “Now Congress has exempted a number of industries from the Sherman Act – insurance, baseball, and civil aviation. My obligation was to apply the Sherman Act. In fact, it would have been a gross dereliction of duty if I *hadn’t* gone along with it.”<sup>41</sup> Greene comments on the pressures he had been receiving from the media, DOJ, White House, Congress, the FCC, other court systems, and the public. In this quote, Greene emphasizes that most of the parties do not fully comprehend the appropriate place of the Sherman antitrust legislation in the legal structure versus policy decision making:

...antitrust decrees are not written unlike leases for apartments, on a month-to-month basis. They are written for a long, long, time, typically, particularly a big decree like this. And then to come along and say, a couple of years late, ‘Oops, we made a

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<sup>38</sup> Two triennial reports were produced, the most notable being the “Huber Report” of 1987.

<sup>39</sup> see Bell p. 48.

<sup>40</sup> Id. p. 55.

<sup>41</sup> see Bell p. 48.

mistake; let's forget it', it's obviously a change in policy...I'm hopeful that we're back on an even keel now.<sup>42</sup>

Senator Sherman himself said that, “if we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life.”<sup>43</sup> This is an allusion to the fact that there are other dangers beside the impact of monopoly control on the consuming public. There is the danger of a concentration of political power that frequently accompanies economic power.

On January 8, 1982 – the same day that the settlement of AT&T case was announced, the DOJ dropped the 13-year antitrust case against IBM. Of course some parallels can be drawn. Both AT&T and IBM were dominant in their fields and had an interest in entering each other's market; IBM positioning itself to sell computers and data processing for its network.

Richard Levine of the DOJ Antitrust Division was assigned to ensure that the settlements obtained in the IBM and AT&T antitrust cases were consistent. Richard Levine explains, “Antitrust theory has something called the essential facilities doctrine, which says that if a company owns an essential facility, it must give reasonable access to competitors. AT&T's local exchanges were regarded as essential facilities...IBM had no such equivalent facilities.”<sup>44</sup> In retrospect, Levine observes, “The best relief in the IBM case was to release AT&T from the 1956 consent decree so that AT&T could provide a significant competitive challenge in computers.”<sup>45</sup>

### *B. Media Coverage*

The antitrust case against AT&T was not widely popular with much of the public wondering why the government was trying to disassemble the world's best telephone system. To his detractors, Judge Greene was a one-man regulatory agency. They depicted him as a self-appointed telecommunications czar – someone whose idiosyncratic vision kept the various pieces of “the Bell System” from playing their rightful role in the information revolution. To all of which Greene replies with a simple fact, “I did not write the (line-of-business) restrictions.”<sup>46</sup> Greene himself scoffs at the idea that he is acting as a one-person regulatory agency: “They say I am a regulator and I think it is just an effort not to comply with the decree. I do not do anything except what the decree requires me to do.”<sup>47</sup>

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<sup>42</sup> Margaret E. Kriz, *Ringling the Bells*, NATIONAL JOURNAL, Feb. 4, 1989.

<sup>43</sup> Harold H. Greene, *Natural Monopoly, Consumers, and Government*, A New York Law School Law Review Lecture delivered at the Communications Media Center of the New York Law School, Mar. 15, 1989.

<sup>44</sup> see Bell p. 49.

<sup>45</sup> Id.

<sup>46</sup> Kathleen Killete, *Profile of Harold H. Greene, U.S. District Judge* COMMUNICATIONSWEEK, Nov. 13 1989, p. C2.

<sup>47</sup> Id.

The RBOCs claimed that the line-of-business restrictions should be lifted based on the following arguments: (1) the FCC is more capable of regulation; (2) there are seven RBOCs while there was only one AT&T; (3) equal access had been substantially implemented; (4) GTE is nearly as big as any RBOC and yet remains unregulated; and (5) new antitrust suits can be filed if newly unregulated RBOCs behave anticompetitively. Judge Greene refuted each point stating: (1) the FCC has less staff in 1990 than when it was proved inadequate in 1982; (2) the fact that there are seven RBOCs is the result of the decree and, therefore, no argument against the decree which required future changes; (3) equal access was also part of the decree and even if it had been done (which was not the case in 1990) could always have been easily undone; (4) GTE is unregulated because it has no local monopolies; and (5) it would be illogical (or unethical) to destroy one of the two pillars of a decree that was adopted after lengthy litigation, lasting almost 10 years, on the basis that the DOJ would bring a new antitrust action to start the cycle all over again if an RBOC was found to be in violation.<sup>48</sup>

The RBOCs appealed Greene's rulings and lobbied Congress to take enforcement of the divestiture agreement away from Greene and give it to the FCC on the grounds that the future of the U.S. telecommunications infrastructure should not rest in the hands of one federal judge. This position had a certain amount of support. "I think he's outlived his usefulness," stated an analyst for Paine Webber, "He affects things that go beyond his jurisdiction and that disrupts the investment market... I find it distasteful that a federal judge with a limited staff and limited expertise is ruling on such far-reaching matters."<sup>49</sup>

Lawyers for AT&T claim that Judge Greene went too far. "He was very cynical about big business and very untrustworthy of people who run big corporations. (The AT&T case)...was unnecessary, unproductive, and it was destructive of a great corporation." In fact, many of the Judge's close friends thought he was wrong. "For a while, even in the house of good friends for dinner or for cocktails, they would really be upset," Judge Greene recalls, "they thought I had single-handedly destroyed the best phone service in the world."<sup>50</sup>

Greene remained impervious to such criticism. "He's tough, very strong-minded, and he wants things done just so," says Gerald Connell, former lead counsel for the U.S. DOJ AT&T trial team.<sup>51</sup> "From our standpoint, total deregulation means that these guys can get back together again. Thank God we have Judge Greene," says the VP of a new common carrier.<sup>52</sup> "He's the only one immune from the incredible political pressure of seven of the twenty largest corporations in America," said Catherine Sloan, at the time a GWU Telecommunications Programs instructor and Director of Legislative Affairs for the Competitive Telecommunications Association (representing new entrant long distance companies).<sup>53</sup>

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<sup>48</sup> See Sanford pp. 26-27.

<sup>49</sup> See Killete.

<sup>50</sup> see Johnston, p. 10 and personal communications with Judge Greene.

<sup>51</sup> See Killete, p. C2.

<sup>52</sup> John Burgess, *Judge Greene Under Pressure*, WASHINGTON POST, Dec. 20, 1987, p. K1.

<sup>53</sup> Id.

Greene concisely summarized his feeling of isolation from the DOJ in the period right after the consent decree 1984-86: “If ever a sequel is written to John F. Kennedy’s book, *Profiles in Courage*, the DOJ is not likely to have a place in such a volume, if that place were to be based on the Department’s post-divestiture silence when public criticism of the break up and its effect on telephone service was at its height.”<sup>54</sup>

While Dennis Patrick was Chairman of the FCC (1983-89), Judge Greene accused him of urging the RBOCs to disobey court orders. Patrick responded that he was only suggesting strictly legal alternatives before them, such as filing briefs and seeking legislation, but relations between the two men were never repaired.<sup>55</sup>

Alfred Sikes, the chairman of the FCC (1989-93), had been a constant critic of Greene since he served at the NTIA. Sikes openly sought public support for a judicial action to transfer the RBOC line-of-business restriction oversight to be transferred from Judge Greene to the FCC. Greene responds, “...some of the people want to send the enforcement and oversight over the restrictions to the FCC on the assumption that the FCC will just let them drop and will not enforce them. And obviously, if they want to have the restrictions removed, a statute saying the restrictions are hereby removed can do it more directly. It is kind of a little bit almost dishonest (sic) and hypocritical to send them to an agency which sort of indicates they do not believe in these restrictions and say they should enforce them, knowing full well that is not what they are going to do.”<sup>56</sup>

Judge Greene is human, however, and several attacks took a personal turn. In one instance Greene read an inaccurate editorial in the *Washington Post* that attacked the divestiture and him personally. Judge Greene responded with an editorial of his own that humiliated the original author with a biting wit while bringing forth the correct facts.<sup>57</sup> Ultimately it is Greene’s strength of character that overshadowed this singular instance, in his own words:

I could have easily said, ‘The parties to the lawsuit came up with the consent decree and I had no choice but to approve it.’ But I didn’t say that. I took the position from day one that it was the right decree, that the modifications I made to the decree were proper, that the correct outcome had been obtained, and that in due time all of that would become apparent. And it has become apparent.<sup>58</sup>

The wisdom of Judge Greene’s decisions have now become obviously clear now but there still remains the unapologetic actions and statements of his past critics. The first is that many failed to separate their opinion of his decisions from their opinion of the Judge. There is room to disagree but critics did not confine their attacks to Judge Greene’s rulings. Maybe because the rulings were so fundamentally sound they left no alternative but to attack the Judge himself. Judge Greene repeatedly emphasized that his

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<sup>54</sup> Harold H. Greene, *The 1987 Roscoe Barrow Memorial Award Acceptance Speech*, The Tenth Annual COMM/ENT Banquet (Hastings Journal of Communications and Entertainment Law), Apr. 17, 1987.

<sup>55</sup> See Burgess.

<sup>56</sup> see Kriz.

<sup>57</sup> personal communications with Judge Greene.

<sup>58</sup> see *Legends of the Law*.

goal was simply to enforce the law. Greene remained vigorous well into his 70's, but the following remark was made at a major telecommunications conference and is an example of a typical remark, although intended as a joke – in extremely bad taste especially since Judge Greene has died: “We got bad news recently,” joked the Bell Atlantic Chairman, “He (Greene) has gone into an exercise program.”<sup>59</sup>

The second problem is that after a long-running and well-financed AT&T marketing campaign and the subsequent failure of the DOJ to enforce the divestiture, the telecommunications industry lapsed into a pervasive amnesia conveniently forgetting the original antitrust issues that led to the AT&T breakup. Greene pointed out that he had directly asked the Bell Operating Companies top executives – before divestiture – about the impact that the line-of-business restrictions would have on their companies, holding public hearings in which more than 120 parties appeared or submitted testimony. “Not a single one said ‘do not sign the decree,’ or that the breakup was a bad thing!”<sup>60</sup>

Judge Greene held that as long as the RBOCs have a monopoly in the local loop they will be regulated. Bypass was a far lesser threat than the RBOCs claimed. During Greene's court tenure he cited voluminous evidence to prove a local loop bottleneck.<sup>61</sup> The millions of miles of cable that make up the local loop are too expensive to duplicate unless some new technology made wires obsolete: “objective economic conditions entirely preclude the provision of local distribution functions at a lower or equal economic cost than could the local exchange carrier”.<sup>62</sup> Of course the new technology Judge Greene anticipated eventually did arrive in the mid 1990s in the form of wireless/cellular telephony and the Internet (voice-over-IP).

When the Telecommunications Bill of 1996 was signed in an elaborate ceremony at the Library of Congress in February of that year, the event was filled with politicians and telecommunication industry players but Judge Greene was not invited. This new act superceded the consent decree thus ending the litigation in Judge Greene's court concerning line-of-business restrictions after 12 years. This prompted many to refer to it as the “Judge Greene Retirement Act.” By 1996 it was clear that deregulation was “the” precipitating event that has enabled the incredible growth of the telecommunications industry but according to Judge Greene himself “not one person” acknowledged his pivotal contribution. Asked whether this bothered him, he shrugs. “Part of the job.”<sup>63</sup>

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<sup>59</sup> Peter Coy et. al., *Should the U.S. Free the Baby Bells?* BUSINESS WEEK, Mar. 12, 1990. (this Bell Atlantic Chairman is intentionally unnamed in the text but named in this reference)

<sup>60</sup> see Killete.

<sup>61</sup> “Only one tenth of one percent of interLATA traffic, generated by one customer out of one million is carried through nonRBOC facilities according to the 1987 Huber Report. In other works, 99.9% of all interexchange traffic, generated by 99.9999% of all customers, goes through the RBOCs or independents. Bypass accounts for about 250 million minutes carried by the RBOCs. Greene adds that the DOJ could only find 24 customers in the entire U.S. who managed to deliver their interexchange traffic directly to the interexchange carrier.

<sup>62</sup> see Bingham, p. 26.

<sup>63</sup> Leslie Cauley, *Telecom Czar Frets Over New Industry Rules*, WALL STREET JOURNAL, Feb 12, 1996, p. B1. In fact Judge Greene did have one loyal and vocal supporter over the years, a fellow GWU classmate Senator Daniel Inouye of Hawaii who was also Chairman of the Senate Communications Subcommittee where he was able to support and defend Greene from an array of attacks. Stanley Sporkin, a

## VI. OTHER NOTEWORTHY DECISIONS

Judge Greene was a workaholic by most standards. Even during the AT&T antitrust trial, he maintained a caseload above 100. Greene took work home almost every night and weekend.<sup>64</sup> Says Greene, “There would be nights when I would wake up and couldn’t get back to sleep. So I would go downstairs and write. The staff had a pool going on how many pages of typing I would bring in here in the morning.”<sup>65</sup>

What follows are highlights of the most noteworthy decisions acted upon by Judge Greene organized by year. The list is by no means all encompassing. Greene himself provides an introduction to this section when asked about his workload, “I like to deal with interesting, difficult legal questions. I do not want people to think that the only thing I have ever done is the AT&T case because I do other things.”<sup>66</sup>

### A. 1966

After finding a woman guilty of vagrancy, Greene said the District’s vagrancy law was unconstitutional and that the entire concept would eventually fall. He termed it “oppressive” to have persons arrested appearing to be ‘probable criminals’ rather than for the actual commission of a crime. Greene said he did not have the power to overturn the law since a higher court had upheld it, but Greene’s opinion eventually aided in getting the appellate court to reverse.<sup>67</sup> Greene’s deep opposition to arrests based on status may date back to his childhood experience in Nazi Germany.

### B. 1980

Greene ordered the FBI to stop destroying its surveillance files and to design a plan in which no files could be destroyed until historians and archivists could review them for historical value. Greene said it appeared the FBI has destroyed files to avoid complying with the Freedom of Information Act requests to see them.

### C. 1982

Greene ruled against a National Association of Broadcasting regulation that forbade having more than one advertisement in a 30-second spot. Greene said the regulation, by decreasing the supply of commercial time and increasing costs, violated antitrust laws.

### D. 1983

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federal district judge and colleague of Judge Greene’s said in memorium: “(the Consent Decree opinion) was one of the great decisions of all time, an important part of the technological revolution we’re now in.”

<sup>64</sup> David Pauley, et. al., *AT&T: Now the Fine Print*, NEWSWEEK, Jan. 25 1982, p. 52.

<sup>65</sup> *Judicial Command of a Landmark Case*, TIME, Jan. 2 1984, p. 53.

<sup>66</sup> see Killette.

<sup>67</sup> see Hoagland, p. 12.

Judge Greene temporarily prevented the Labor Department from changing the rules enforcing the Davis-Bacon Act, which established minimum wages for employees on hundreds of thousands of construction sites. Greene said the changes would have permitted contractors to lower worker's wages. If such a longstanding act were to be changed, Greene argued, the government would have to "show that the earlier understanding of the statute was wrong or that the experience has proved it to be defective."

Greene was praised for his handling of the litigation between the Reagan Administration and PATCO, the air traffic controllers union. Greene fined PATCO for violating the temporary restraining order against the strike, but he would not comply with the Reagan Administration's request to jail the union leaders or issue a permanent injunction against the strike.

#### *E. 1984*

In response to a Civil suit filed in his court, Judge Greene publicly criticized Attorney General William French Smith's refusal to appoint a special prosecutor under the 1978 Ethics in Government Act to look into the so called "Debategate" scandal. "Debategate" involved the unauthorized transfer of President Carter's debate briefing papers from the White House to Ronald Reagan's 1980 Presidential Campaign Committee. Calling Smith's handling of the matter 'arbitrary and unlawful' and drawing parallels to Watergate, Greene took the unprecedented step of ordering the attorney general to seek an independent counsel to investigate possible criminal behavior by top Reagan aides. Greene's action tested the issue of whether the attorney general's failure to comply with the Ethics Act was subject to judicial review. The U.S. Court of Appeals for D.C. unanimously reversed Greene's order in 1984.<sup>68</sup>

Greene ruled that the government had to pay women in civil service jobs the same amounts as men with the same duties and responsibilities.

#### *F. 1988*

Greene presided over the arraignment of six left-wing radicals charged with conspiring to bomb the Capitol and seven other buildings, and malicious destruction of the Capitol and three military buildings in 1983 and 1984. The blasts protested U.S. policy in the Middle East and Central America. No one was injured. The defendants, who are allegedly members of a secret Communist organization, claimed to be political prisoners, not terrorists.

Judge Greene granted a nationwide temporary restraining order preventing Housing and Urban Development (HUD) from selling foreclosed single family dwellings to the highest bidder. In a suit brought by the National Housing Law Project, Greene found that HUD had violated the Homeless Assistance Act of 1987 which requires HUD to inventory all federally-owned property to identify suitable housing for the homeless.

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<sup>68</sup> See Groner.

Greene granted a temporary injunction preventing the Navy from changing its procedure for awarding contracts for transporting military equipment between the U.S. and Iceland. The last American shipper on the route claimed that the Navy was bound by the competitive bidding procedure set out in the 1986 U.S.-Iceland treaty and that the new procedure would eliminate it from the market. The Navy argued that any such representations are non-binding and that it could alter its bidding procedure at will. Greene rejected this Navy reasoning stating that the Navy could not act, “in violation of...the language and purpose of a treaty, and of the solemn representations...” The case is expected to strongly influence attempts, based on a similar argument, to reinterpret the 1972 SALT I Treaty to allow outer space testing of SDI (“Star Wars”).

#### G. 1990

With the defense arguing National Security advisor John Poindexter had acted under direct order from President Reagan with lying to Congress about Iran-Contra dealing, Judge Greene ordered former President Reagan to provide a videotaped deposition in the Poindexter case, a ruling that produced eight hours of testimony in which Reagan described his role in the Iran-Contra affair for the first time in a public forum. This was the first time a President was compelled to testify on matters involving his own administration. John Poindexter was eventually found guilty and sentenced to six months in prison for lying to Congress about the Iran-Contra affair. Explaining his decision, Judge Greene said that incarcerating the retired Navy Admiral would deter other high public officials from misleading Congress. Greene added, “With all due respect to the distinguished military records of Adm. Poindexter, Col. North...and the others, they have no standing in a democratic society to invalidate the decisions made by elected officials.”<sup>69</sup> Greene also warned of the dangers of high government officials using national security concerns to mask deceit and wrongdoing. Greene said the government must maintain secrets, but “if members of the security apparatus could, with impunity, keep from those elected by the people that which they’re entitled to know - or worse, feed false information – those who control the classified data could be the real decision makers. That is exactly what happened here.”<sup>70</sup>

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<sup>69</sup> Joe Pichirallo, *Poindexter Gets 6 Months in Prison* WASHINGTON POST, 1990.

<sup>70</sup> *Id.*

## VI. JUDICIAL PHILOSOPHY

Judge Greene had a commanding courtroom presence despite his relatively short stature. His moral authority came from a keen intellect and knowledge of law. “When the law is on my side, he’s the first judge I’d want, and when the law is against me, he’s the last I’d want,” says a D.C. litigator. “You can not fool him. He gets to your point before you do.”<sup>71</sup> Perhaps because of his legal brilliance Greene may have intimidated some lawyers. “That’s a grave misjudgment,” says one litigator who knows him well. “He can be convinced by a good argument. He’s not inflexible.”<sup>72</sup> Greene was known to use his humor to break the forbidding mood of the courtroom. “People are intimidated in court, and I try to make them more comfortable,” says Greene.<sup>73</sup> An affable and soft-spoken man, he was also known for his sharp sarcasm when dealing with incompetence in the courtroom.

When the elite prosecutors on the independent counsel and numerous representatives of the government trooped into Greene’s courtroom for the first hearing on the Poindexter – Iran-Contra case, Judge Greene taught them a lesson by making them wait until he was finished listening to arguments on a mundane accident case. A lawyer in the case stated, “It was just his way of showing us he was not going to do things differently. This is the kind of case he (Greene) lives for. There are all sorts of complicated issues no one had decided before. He wakes up in the middle of the night pondering them and he really loves it.”<sup>74</sup>

Lawyers’ evaluations of Judge Greene stated he was courteous, accommodated emergency requests, tended to award high attorney’s fees, ruled on motions promptly and knowledgeably, pushed very hard for settlement, remained neutral in criminal cases, some say he tended to side with the plaintiff in civil rights cases, imposed average to heavy sentences, and tolerated numerous objections but strictly controlled a lawyer’s questioning of and general behavior towards witnesses. Fellow judges report Greene as scrupulously diligent, often volunteering to relieve their caseloads.<sup>75</sup>

Greene was a pathmaker in many ways. He wrote the first decision striking down the Federal Sentencing Guidelines on Constitutional grounds; an issue ultimately decided by the Supreme Court.<sup>76</sup> He strongly opposed sentencing guidelines saying they were unconstitutional because they forced judges to order prison time for defendants who did not deserve it. Greene was a liberal in the sense that he is interested in the political ramifications of his decisions. Greene was well read and sought to understand the big picture surrounding the circumstances of each case. Greene decisions displayed knowledge of the latest legal developments and a deep understanding of the issues in both

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<sup>71</sup> see Groner.

<sup>72</sup> see Groner.

<sup>73</sup> see Groner.

<sup>74</sup> David Lauter, *Personality in the News; Judge Greene: Pragmatist with a Bent for Shaping Law* LOS ANGELES TIMES, Mar. 9 1990, p. A25.

<sup>75</sup> see Hershey,

<sup>76</sup> see Groner.

ordinary and complex cases. Greene's first commitment was to the fair working of the legal system itself, not to some scattered agenda of issues.

Above all, Judge Greene believed strongly in due process and in the strict preservation of constitutional rights. A deep desire to implement the theoretical concept of justice in practical situations was a major motivation for Greene during the AT&T case. Greene believed, for example, that if it hadn't been for the federal courts, the Civil Rights Movement in which he participated might not have gotten off the ground.<sup>77</sup> "You can't just lecture the poor that they shouldn't riot or go to extremes. You have to make the means of legal redress available... It's most important that we keep alive the means of civilized redress."<sup>78</sup> "I think it does work," Judge Greene said of the rule of law. "The fact that the law is there and injustices can be rectified, I think has a lot to do with the fact that the people in this country aren't as frustrated as they are in some of these places in Eastern Europe and don't resort to violent revolution."<sup>79</sup> Greene expressed that the power of the law, and its fair enforcement through the courts could mitigate society's worst tendencies whether it would be the Nazis or the Ku Klux Klan (Greene has had personal experience with each). "...you really don't have protection from arbitrary conduct because the police and everybody else are in cahoots. You need some outside force to make sure this doesn't prevail."<sup>80</sup>

Unlike conservatives, Greene believed that a strong, independent judiciary is an important check on the excesses of Congress and the White House:

The real difference between the United States and other nations lies not in the words of the preamble to the Constitution, but in the fact that the substantive clauses of that Constitution are enforced by individuals independent of and not beholden to the elected branches.<sup>81</sup> ... Thus, I am seeking simply to legitimize judicial activism when I say that the repeated attempts to foreclose the courts' consideration of matters which they have historically considered are ill-advised and dangerous to our way of life.<sup>82</sup>

The essence of Greene's judicial philosophy was that the American system of law and government is a great one in theory and that it is the first duty of a judge to improve the

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<sup>77</sup> see Coll, p. 126.

<sup>78</sup> see McLaughlin.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> "Former President Reagan said that the crucial difference between the U.S. Constitution and that of other nations is that the U.S. Constitution begins with the words, 'We the People'. With all due respect to our former president, this statement bears no relation to the realities of popular governance. Every one of the world's dictatorships can and does claim to be acting in the name of the people. Such nations as the People's Republic of Kampuchea, the People's Democratic Republic of South Yemen, both barbaric dictatorships, are proof of that. In fact, the most widely extremist and antidemocratic organizations almost invariably identify themselves by such high flown labels as the Democratic Center for the Constitutional Rights of the People or the Organization for Peace and Justice. If further proof were needed, let us recall that Stalin's dictatorship operated in the name of democratic centralism, and the full name of the Nazi Part was the National Socialist German Workers Party - quite an appealing label for so murderous and outfit." Excerpted from Greene, *Natural Monopoly, Consumers, and Government*.

<sup>82</sup> Id.

way the legal system operates, particularly within his/her own courtroom. Lawyers unequivocally praised Greene's ability to run a well-focused, expeditious trial and his willingness to carefully consider lawyer's opinions.

In his own words, Judge Greene described himself as a disciple of Earl Warren, the Chief Justice of the Supreme Court in the 1950s and 1960s: "The impression I have of Justice Warren is that he was looking for the just result in a case regardless of fixed dogma or principles and I like to think that I'm in that mold."<sup>83</sup> In 1968, Judge Greene sentenced the Rev. Ralph Abernathy, the civil rights leader, to 20 days in jail for violating federal assembly laws after a march on Capitol Hill. In sentencing Mr. Abernathy, Greene wrote, "The enforcement of the law cannot depend on the justice of a cause or one man's conscience." Later, Judge Greene said that this earlier opinion sounded too simplistic. He revised himself, "If I've learned anything since then, it has been that frequently you have a clash between the more sterile letter of the law and the justice that underlies it, and I think one of the things I've been trying more or less, where it was possible, is to go with the justice rather than the letter of the law."<sup>84</sup>

## VII. CONCLUSION

Judge Harold H. Greene was consistently cited as the best judge in every circuit he served. Many attorneys describe the AT&T case as the most significant act of judicial statesmanship since desegregation. It is ironic to consider that these same attorneys must not have known that Greene was also a pivotal figure in the desegregation and the civil rights movement of the 1960s. Early in his judicial career Judge Greene, a liberal Democrat, was often mentioned as a potential Supreme Court nominee. At some point in his 60's his friends say that Greene became satisfied with the idea of spending the rest of his working life as a trial court judge.<sup>85</sup>

Many considered that AT&T was too complex, too powerful (in a legal and financial sense), and too influential to prosecute in an antitrust case. A commission appointed by then-President Carter reported that large complex antitrust legislation cases were being hopelessly mismanaged by the federal courts and that unless judges developed new, innovative methods to expedite such cases, the danger existed that large companies would ignore antitrust laws as unenforceable. Greene was determined to push the AT&T case to trial and to use new, expeditious methods. Greene staked his reputation on the AT&T case, his first case as a federal judge.<sup>86</sup> Never again could anybody say that certain cases are too big to be tried.

The legacy of Judge Greene is extremely relevant now with two major technology policy issues pending. The current Microsoft antitrust trial may never have been attempted if not for Judge Greene's example and many economists and lawyers are advocating a Microsoft breakup into "Baby Bills". The main issue of an operating

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<sup>83</sup> see Johnston.

<sup>84</sup> see Johnston, p. 10.

<sup>85</sup> see Lauter.

<sup>86</sup> see Coll p. 129.

system “essential facility” providing opportunity for anti-competitive behavior is a direct analogy to the local loop bottleneck. The other issue is “open access” to broadband cable television systems – rules that, in effect, would introduce consent decree style regulation when cable networks are used for Internet access.<sup>87</sup> The dynamics of the AT&T antitrust case set the stage for a 70% drop in long distance rates, further telecommunications deregulation, remarkable business opportunities for tens of thousands of entrepreneurs, and the Internet – fueling the greatest economic boom in recent history. To the author, it is a little troubling that during his lifetime Harold H. Greene never received the accolades he so richly deserved. In today’s dot.com world of youthful exuberance, fast track growth, and focus on the future there is little regard for how this environment in which industry flourishes was created.

I would hate my obituary to say Judge Harold H. Greene broke up AT&T and that’s all he ever did and then he rested.<sup>88</sup>

Beyond an exemplary judicial history that coincided with many of the important legal questions of our age (desegregation, civil rights, voting rights, due process, separation of powers, executive privilege), Judge Greene is much more. Most notably in the AT&T case but also in many others, Judge Greene withstood pressure and criticism to remain steady in his interpretation of the “public interest” independent of other branches of government. In many ways, it was Judge Greene who created and nurtured the growth industry of the next century, “the information age”. In conclusion, it is not too simplistic to state that Judge Greene is a true American hero with international impact. He served his adopted country for more than 40 years and made a profound and positive impact on the way people around the world live.

## X. ACKNOWLEDGMENTS

There are many people who have made this paper possible. I need to first posthumously thank Harold H. Greene for being so open and flexible in our meetings and correspondences. I believe there was an unspoken covenant between us that I should “get it right” and he trusted me to investigate the facts whatever they might be. In a personal sense, I feel obligated to publish this material so that lawyers of future generations can read about Judge Greene’s professionalism under fire. I leave it to the reader to evaluate the media campaign orchestrated by public relation departments within large corporations to personally discredit Judge Greene, ironically the same corporations which have reaped a financial windfall from telecommunications deregulation. Secondly, I would like to thank Sharon Treichel who afforded me special access to Judge Greene even when there were many pressing “official matters” queued before the court. In retrospect, her wisdom that our interaction was important has enabled unique insights that may never have been shared to now be available for history. Specifically I thank the following members of the GWU Telecom community: Gerald Brock for inspiring my interest in antitrust, Jack Ousland for supporting me (especially in my initial presentation of this paper), Deborah Workman for her leadership, Kym Watkin for her dedication in

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<sup>87</sup> Tim Race, *Judge Greene’s Legacy*, THE INDUSTRY STANDARD, Feb. 21, 2000, p. 121.

<sup>88</sup> see Cauley.

recording events, and Kathleen Kilette Franklin for her interviewing talent. Lastly I thank all the initial members of GWU's Alumnet circa 1992-93 who helped organize the alumni/student meeting reminiscing with Judge Greene, something we all now realize was a once-in-a-lifetime event.

## IX. APPENDIX A

Biographical Data Provided Directly by Judge Harold H. Greene (1990)

### HAROLD H. GREENE

United States District Judge for the District of Columbia, appointed by President Carter, since 1978

Chief Judge, Superior Court of the District of Columbia, 1966-1978, appointed by President Johnson

Graduated with honors, George Washington University Law School 1952

Chief of the Appeals Section of Civil Rights Division, U.S. Department of Justice

Honorary Doctor of Laws, George Washington University 1985, Bridgeport University 1983

Chairman, World Association of Trial Judges 1975-1977

Runner-up, Time Magazine Man of the Year 1984

Washingtonian of the Year, Washington Magazine 1971

Isaiah Award for the Pursuit of Justice, American Jewish Committee 1971

Lecturer on antitrust, complex litigation, judicial and attorney ethics; extraterritorial effect of U.S. laws

## X. APPENDIX B

### *Reminiscences of a Career: An Informal Exchange with Judge Harold H. Greene*

September 14, 1993, George Washington University, Marvin Center, 800 21<sup>st</sup> Street, Room 402, 3-6pm.

After providing a brief sketch of Judge Greene's impressive career, Kathleen Kilette Franklin, asked Judge Greene a series of questions on his legal career (recorded by Kym Watkin), spanning from his involvement in major civil rights laws to the famous AT&T case:

Q1: What made you decide to become a lawyer?

A1: After serving in the Army, I was given the opportunity to go to school. I liked discussion and debate and thought these skills fit well with law. I also had an interest in justice – and later learned that sometimes law and justice actually agree!

Q2: Was or is there a stigma attached to going to law school at night instead of full-time?

A2: I haven't heard of or experienced any, but lawyers have so low self-esteem anyway!

Q3: Why did you accept the problem-plagued General Sessions court for President Johnson?

A3: After the voting rights act was passed, I thought that would be the end civil rights issues and that it would be a good time to do something else. Now the Civil Rights Division of the Department of Justice is 10 times bigger than when I was there!

Q4: You have won praise for your administrative and legal skills. Which do you prefer most, hearing cases or cleaning up the process?

A4: I enjoyed the administrative work because it involved working with Congress, city council, and the mayor. I had never been a politician so it was fun – learning political maneuvering. After 8-10 years of reorganizing the courts, however, I can now appreciate analysis and writing. If I had to choose between one child or another, I choose cases.

Q5: How has the practice of law changed since the 1950s?

A5: In the 1950s, there were only a few large law firms in D.C. with 20-30 partners. Now there are hundreds of firms with as many as 300 partners, which are now engaged as much in the practice of business as in the practice of law! The emphasis on getting business and billing goes far beyond the professionalism of law and does the profession injustice.

Q6: What is the most upsetting judicial trend in the past few years?

A6: The number of judges involved in a case. Before you would have only one judge to talk to. The process has become too complicated and bureaucratic. The judge who listens should also be the judge who decides the case. Also, mandatory sentencing guidelines have become as complicated and detailed as the IRS code! Defendants are being evaluated based on numerical grid without any aggravating circumstances being considered. The effect has been to transfer the disparity from the judge to the prosecutor allowing for a great deal of leeway on indictments. The same disparity exists now with 30-year-old prosecutors making decisions over 50-60 year old judges.

Q7: Moving on to telecommunications... Do you read or could you recommend good books on telecommunications?

A7: I don't want to be influenced by outside opinion and when I do find time to read, I read for pleasure!

Q8: How do you and your staff handle or validate claims that telecommunications competition is here?

A8: Whatever input I have is supplied by the parties to the case. I do not go outside to find technical or other factors. The parties to the case are the experts and they usually present their technical information in a way I can understand.

Q9: Pretend you are a consumer and not Judge Greene in the phone book.

A9: First of all, I'm not in the phone book! I don't need any fancy gear – I did get call waiting and repeat call but POTS is good enough for me. Once I was standing in line to buy a telephone and Senator Wirth was in line with me. The next day the New York Times reported that we'd both purchased telephones and what price we'd paid!

Q10: Does it take the Government too long to respond to technical changes?

A10: No, because important philosophical, privacy, policy, and competitive issues are involved. If not, the FCC could do it all. We can't let a huge corporation do whatever they want – it needs to be approved. The AT&T case may have biased me with antitrust issues but the issue of allowing a monopoly to have a stranglehold on information is still a concern.

Q11: Can you discuss the recent AT&T and McCaw merger?

A11: Sorry, can't say anything – it may well come before my court.

Kathleen Killete Franklin: We now open to questions from the audience....

Q12: In hindsight, did the AT&T consent decree decision benefit consumers or businesses?

A12: Both! As a result, we have more services and gadgets to choose from. With competition everyone has to try harder. I used to get horrible letters from AT&T stockholders who claimed I had ruined them dividing their stock into seven baby bells! Now the baby bells are worth 10 times more!

Q13: Do you have any opinions on President Clinton's Department of Justice? And any differences with the Bush administration?

A13: The Bush administration changed the view of the consent decree and cut it back. I have no idea on the Clinton administration's broader views but expect a different view of competition.

Q14: Would competition domestically support the U.S. telecommunications industry's ability to compete internationally?

A14: The U.S. has a decentralized system because of antitrust laws unlike Japan. Should we get rid of our competitive system that has served for 150 years?

Q15: Please comment on telecommunications policymaking in the U.S. Should we have a telecommunications Czar? A Department of Telecommunications? Do we have a national telecom policy? What is it and how do we improve it? Eliminate the FCC?

A15: During the AT&T case, a Senator felt the FCC should regulate everything and that antitrust was not very important. He felt the FCC could do it with the right people. I didn't agree with him then but....

Q16: How did you get the AT&T case? Should a judge be making decisions that impact the future of the telecommunications industry?

A16: Under the Sherman Antitrust Act, Attorney General Saxbe brought the law suit in our court. I inherited it from a judge who became ill and later died. There were many opportunities for Congress or the Executive Office of the President to take it over and many bills to oust me. President Reagan even thought about dropping the lawsuit but decided not to.

Q17: Do you see the Sherman Antitrust Law as a major inhibitor of industrial policy?

A17: Competition is good and has served us well.

Q18: What would have to happen to free the RBOCs under the MFJ?

A18: First, they are Regional Bell Operating Companies not RBOCs and the term is consent decree not MFJ. The Appeals Court or Congress could overturn the consent decree or determine that the conditions of the decree have been met.

Q19: Did you realize the tremendous impact your decree would have?

A19: In the beginning, I felt the regional companies were the poor orphans and they turned out to do very well. I did feel that costs would be lower and that a greater number of services would be offered.

Q20: What part of your career would make the best movie?

A20: Is Robert Redford available? **I hope they don't say that all I did was break up AT&T! Some of the civil rights legal decisions were more interesting and important than the AT&T case.** And reorganizing the courts was the greatest thing at the time because the local courts were in a mess and needed to be brought to a higher standard.

Q21: What are your favorite books?

A21: Biographies, histories, detective/spy stories. I just returned from a cruise to Alaska during which I read Kissinger's biography and Mitchner's Alaska.