wife, Anna, he would work with whom-
ever was willing to work for the public
interest. Anna survives him, and I am
confident she will continue to get things
done, although she has lost a very,
very potent partner.
Mr. President, no one, no commu-
nity, can lose a friend like Armand
Cocco without feeling sad, but the sad-
ness attending his passing has an espe-
cially melancholy quality for me and
many of his friends because we fear
that in losing him we are also losing
one of the last examples of American
value and of an American personality
that we can ill-afford to move on with-
out—the public-spirited private citizen
with a traditional sense of community
responsibility that has historically en-
abled us to deal with a range of social
problems that simply lie beyond the
capacity of government alone to re-
solve. The balance between public in-
terest and private interests, the ten-
sion between individualism and com-
munity, has been losing the equilibri-
urn that de Tocqueville identified over 150 years ago as the se-
cret to our American democracy.

That growing imbalance is perhaps
our greatest national problem today,
but it is not unique to Problem for Armand
Cocco. He was as strong a personality
with a keen sense of the individual as
anyone I have ever met. But he knew
how to strike a proper balance between
his personal aspirations and the needs
of his community. He was, and will al-
ways remain, one of the most dedicated
all those who knew him a model of good citizenship
in a democratic society, and an assur-
ance that our democracy will survive if
we take his lifelong example to heart.

Mr. President, a very personal note.
He was also a loyal friend to my de-
ceased wife. When she passed away, it
was Armand Cocco who went to the
citizens of that small community and
asked that the park be dedicated in her
name, the name of which it still car-
ries.

And lastly, I was on my way down
here to vote on Friday, but the funeral
was Friday. I thought it was important
to vote, but I decided—and I must say
it publicly to my constituents—it was
more important for me to go to the fu-
neral because of a public man like him,
who had contributed so much; so I did
not come down. I went and expressed
my sympathies to his wife, Anna, and
to his daughter, and all of the family.
I thank the Chair for its indulgence
and allowing me to speak.

THE TELECOMMUNICATIONS COM-
PETITION AND DEREGULATION ACT

The PRESIDING OFFICER. Under
the previous order, the Senate will now
resume consideration of S. 652, which
the clerk will report.

The legislative clerk read as follows:

The bill (S. 652) to provide for a pro-
competition, pro-competitive, national
policy framework designed to accelerate rapidly
private sector deployment of advanced tele-
communications and information tech-
nologies and services to all Americans by
opening all telecommunications markets to
competition, and for other purposes.

The Senate resumed consideration of
the bill.

Pending:

Dorgan modified amendment No. 1264, to
require Department of Justice approval for
regional Bell operating company entry into
long distance services, based on the VIII(c)
standard.

Thurmond modified amendment No. 1265
(to amendment No. 1264), to provide for the
Attorney General of the United States of the
entry of the Bell operating companies into
interexchange telecommunications and manufac-
turing markets.

Mr. PRESSLER. Mr. President, we
are returning to the telecommunications
bill. I urge all Senators to
come to the floor with their state-
ments and amendments.

We have made good progress on the
bill. We have many challenges ahead to
meet.

As I have said frequently, this bill
will allow all parts of the tele-
communications industry to get into
each other’s business and allow new
small businesses to get into the tele-
communications market, will open up
our local telephone markets for the
first time to competition. It will allow
our long distance companies to get into
global and vice versa.

It will move toward the deregulation of
cable systems, giving competition
from DBS, direct broadcast satellite
and by giving the regional
Bell’s video dial a chance. There will be
three or four competitors in each
market, which should and will make
cable prices much lower. It will mean
lower cost telephone services, lower
telephone rates and lower long distance
rates for the average American.

Many years ago, when I was in the
House, we had some great debates over
the deregulation of natural gas, and
people said if we deregulate natural
gas, prices will skyrocket. They did
not. They have come down and there is
competition and natural gas prices are
lower than they have ever been.

We can do our senior citizens and
others a favor by getting lower prices
through competition. That is what this
bill will do.

This bill will also lift some regula-
tion in the broadcast area. It will allow
some of our utilities to do things they
have not done before in telecommunications.
It covers a broad spectrum of
American life.

It is a very important bill. It is a bill
we need to pass. The bill we have
before us is not perfect in anyone’s eyes.
It is a good bill, and each Senator
would write it slightly differently. In-
deed, every Senator has had the oppor-
tunity to participate in the writing of
this bill. It has been a long process
that we held before the markup in the
Commerce, Science, and Transpor-
tation Committee.

We held meeting after meeting for
probably 90 days as well as meeting on
Saturdays and Sundays, with Senators
and staffs being invited who wished to participate. We came to the Commerce
Committee with this bill and received
all except two votes. We are very proud
of the bipartisan effort that we have
made and that will remain bipartisan.

I would like to pay my col-
league, Senator HOLLINGS, who has
done such an outstanding job, and to
all the Republicans and Democrats who
have worked hard on this bill.

This bill will provide a roadmap for
users of the wireless area and will provide
a roadmap for investors to invest in
creative and competitive enterprises.
It will also help consumers because it
will mean more services at lower
prices. If we look at what has happened in
the computer industry, every 18
months their equipment is virtually
obsolete, there is so much competition
and so much innovation. I would like
to see the same thing in the tele-
communications area, and I think we
can see that in the next 10 years if we
pass this bill.

We still have a long way to go. We
have to pass the bill in the Senate and
in the House, we have to have a con-
ference, and the President has to be
able to sign it. I hope the White House
will help us out.

I began this process by going to the
White House with a copy of the chair-
man’s discussion draft and talking to
Al Gore, trying to get his support. We
hope the White House will be support-
ive of this process because, if we can
pass this bill, I frequently say, it will
be like the Oklahoma land rush for the
American consumers. Right now, many
of our telecommunications areas are in
economic apartheid; they are limited
just to one group. If we could get them
deregulated and competing, there
would be an explosion of new invest-
ment, an explosion of new services, and
an explosion of opportunities and em-
ployment.

Presently, many of our largest tele-
communications companies have to in-
vest abroad if they want to manufac-
ture, for example, because the regional
Bells are prohibited. Others invest
abroad because they cannot get into
other areas. This will let everybody
move into everybody else’s business. It will
allow competition, as it should.

In the future, whether it is 5 or 10 or
15 years from now, we will be in the
wireless era. That may be the oppor-
tunity for even more competition
because presently you have to unbundle or interconnect with someone
else’s wires to get access to local tele-
phone service, for example. But we
hope that is changed and will be changed by this bill.

I know there are many amendments
pending, and I hope Senators will bring
their amendments to the floor this
afternoon. I plead with Senators to
allow us to have some time agreements
at some point so we can debate these
amendments on both sides. It is not my
intention to discourage any Senator
from offering an amendment. We are
working with staff, trying to get time
agreements on some of these amendments so we can move forward. I have asked Senator Dole and Senator Daschle for their cooperation in finishing this bill, and I think it is very, very important. As has been pointed out, this bill will affect every household in America. If we fail to act this year, it will fail over to 1997 because next year, being a Presidential year, such a controversial bill probably will not be able to pass.

This is the most controversial and complicated bills to come to the Senate floor. I think we are on the way to passing it. But we will need the cooperation of all Senators. I have frequently said this is not the sort of bill that any one Senator can take credit for, or the lead. It takes every Senator. We all have to be involved. Because in the telecommunications field, any one group can checkmate, almost, the progress of a bill. We hope that does not happen.

It is very important. It will affect a third of our economy. It will create jobs. As we read in the newspapers about some of our mature, aging industries, as they lay people off, we need to have new, creative areas to create jobs. We have seen that that in the computer industry. We have done it in some of our other growth industries. This will make us competitive internationally also. It will affect our exports and our balance of payments.

This bill also includes reciprocity for investors from abroad so we treat them as they treat us. The public interest review by the FCC is preserved.

So, I urge Senators, come to the floor and offer amendments. I ask respectfully that we be able to get some time agreements on some of these controversial amendments that will be coming. It is not our intention to shut anybody off. We want people to have their vote. But we must proceed.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. Frist). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. Dorgan. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1265, AS MODIFIED

Mr. President, the matter pending before the Senate is now a second-degree amendment by Senator Strom Thurmond to a first-degree amendment that I offered last week dealing with the issue of the role of the Justice Department in the telecommunications legislation.

I would like to describe where we are and how we reached this point, and why I think this set of amendments is an important discussion for the Senate.

First out the front of this bill from South Dakota, Senator Pressler, described a few moments ago the importance of this bill for virtually every American. There is no doubt about that. The issue of communications and telecommunications is one that will affect every single American. You cannot escape the impact of this legislation. We have seen an explosion of technology, an explosion in communications in this country in computers, telephones, and in the airwaves in signal receiving, and we are seeing this even in the capabilities in this country today for every American, no matter where they live, that were only dreamed of several years ago.

The question before the Senate is what kind of rules shall exist for the competition between various types of communication in our country? The last set of rules was a set of rules in 1934 established to try to govern the circumstances of operations in the communications industry in which we had a regulated monopoly. Phone service was a monopoly. Of course, we did not have computers then, we did not have cable television then, but we had phone service. Communications back then was actually a monopoly.

Now, in 1995, we are moving toward a deregulated set of circumstances in the telecommunications industry. The question is how do we structure the rules so that you get deregulation with competition? And when you have the buildup of the infrastructure so that communications is not something that exists only where you have affluent neighborhoods or high concentrations of people.

Many of us feel that the issue of communications is universal. It does not matter how big a town you live in or where you live in this country. Your ability to use a telephone or use a computer or access any number of devices in the telecommunications industry and be a part of the information superhighway—your interest and your need for that—is just as intense and important if you come from a town of 300 people in southwestern North Dakota as it is in downtown Manhattan in New York City.

So many of us feel as we deregulate we must make sure there are safeguards in this legislation so that the buildup of the infrastructure, so the building of the information superhighway, reaches, yes, even the rural areas of our country.

As we do that we understand that there is a fundamental tension between deregulation and the search for profits. It is the search for profits that will go to the densely populated areas of our country and the need to try to provide the same kind of service and the same capabilities in rural areas in our country. That is the purpose of this legislation, at least as far as I am concerned.

Some see this legislation simply as opening the door and unlocking the forces of competition. That is part of it. I understand that. I accept that. I think competition can provide enormous benefits for our country. I happen to think that the Bell operating companies are good companies. I met a couple of CEO’s of Bell operating companies in recent months who have come to my office. I am most impressed. They are good companies with good growth and plans for the future that are interesting and stimulating.

I also happen to think that we have long-distance carriers in this country that are doing a lot of interesting things. In the long-distance area, of course, we have had competition. As a result of that competition with hundreds of providers of long-distance services fighting for the consumer’s dollar, we have seen a substantial decrease in the rates for long-distance service.

We have not seen a similar circumstance in local service, and this bill will lead to a similar circumstance, some say, in local service, where we open local service to competition.

Well, when we do that, when we open local service exchanges to competition, then the Bell operating systems will want to go out and compete in the long distance market, and this piece of legislation sets the conditions under which that will be permitted.

Now, Senator Thurmond and I introduced amendments which said the question of when real competition exists and when the baby Bells or the Bell operating companies shall be permitted to go off and compete in the long distance arena, that is a very critical area in this bill because if the Bells are free to go compete in long distance before there is true competition in the rural areas, you have the makings of a real mess and the makings not of deregulation and not of unleashing the forces of competition for the benefit of the consumer, but instead you have the prospect of once again establishing monopoly forces in the marketplace.

It is very important to have the right kind of ingredient in this legislation that serves the interests of competition, when you are opening the door to have the Bell operating companies move into the long distance service.

Both Senator Thurmond and I have offered amendments that describe a role for the Justice Department in those determinations. The legislation that came out of the Commerce Committee had a role for the Justice Department that was simply consultative. In other words, the FCC, the Federal Communications Commission, would essentially make the determinations of the public interest standards with their checklist about when certain conditions were met and when the Bells would be moving into long distance service and when there was real competition in the local exchanges. And the Justice Department was simply consultative.

We have had some experience on deregulation with respect to consulting the Justice Department. I do remember that we deregulated the airline industry and what we had in the airline industry was with respect to mergers and
acquisitions the Department of Transportation would provide its approval and the Justice Department would be consulted.

Well, what has happened since the deregulation of the airline industry is pretty much what happened. We now have five or six very large airline carriers in this country that have bought up their competition and they are getting bigger. Why? Because that is the way the market system works if it is not checked with respect to competition and what we will have is competition among four or five or six behemoths in this country in the airline industry.

Now, the Department of Justice on a number of occasions said, well, we do not think this acquisition makes sense. That is our judgment. The Department of Transportation says it does not matter; we are going to allow it to proceed anyway.

So, we have seen some experience with having the Department of Justice in a consultative state, and frankly I think it does not work in this area of deregulation. I want the Department of Justice to have a full role with respect to its potential activities and the ability to evaluate whether these kinds of activities are in the public interest. I do not want the Department of Justice to become a set of human brake pads so that you have a bunch of lawyers down there who simply put their foot in the door say we are not going to make any decisions; we are not going to let anything happen. I do not want the Department of Justice to be a brake, but I do want the Department of Justice to be a full participant and a full partner in this judgment about what is in the public interest; when does competition really exist? When do you potentially threaten a new competitive set of circumstances with the potential for concentration that diminishes competition?

So that was the point of my amendment. My amendment used a standard, the VIII(c) standard it is called, and would give the Justice Department a role in those circumstances with a time requirement by which they must act. And Senator Thurmond, feeling I think the same way, that the Justice Department should have a role, introduced an amendment but his amendment uses a different standard, the Clay Standard.

We have worked over the weekend, Senator Thurmond and I understand, will be coming to the floor in the next half-hour or hour. I believe he is at the White House for a meeting. But we have worked over the weekend with Senator Thurmond and we have reached an agreement on a modification of his amendment which provides some language that I have suggested and retains the core standard in his amendment, and that is an appropriate, think both of us think, advancement of the interests that we are attempting to advance with our amendments, and I hope when Senator Thurmond comes to the floor and modifies his amendment and discusses it, we would be able to move forward.

It will be a common amendment that both of us will support. We have been working since late last week and worked through the weekend on it, and I think we have both of us attempted or wanted to advance with respect to the role of the Department of Justice.

When Senator Thurmond does come to the floor and offers such a modification, I know the managers want to proceed to set a modification of this type, and I have no objection to that at all. I know the majority leader has indicated that we would not have record votes today before 5 o'clock. On the question of whether a vote is set on this amendment or first thing tomorrow morning, I would be happy to work with Senator Thurmond and with the chairman of the Commerce Committee, the majority leader, the ranking member, and others. It seems to me that is something we can work out in the coming hours. It is really not much need to spend a great deal more time.

There are a number of others who want to discuss this subject this afternoon, and we certainly need to allow time for that. The Senator from Nebraska, Senator Kerrey, who has been intensely interested in this subject and been active and involved in the discussions about it know also will be interested in the conditions under which a vote is held.

I think this is one of the most important amendments we will be voting on dealing with this legislation. Frankly, there are not many people who even understand it very much. I understand that this is not a very sexy issue; it does not generate a lot of public interest. It is not something, the impact of which will be readily known even as we vote on this legislation, but I am convinced that as we tackle the changing of the rules for an industry that is one of the largest industries in this country and as we talk about where we move in the future with that industry, if we do not provide for the public interest by establishing more than a consultative role for the Department of Justice to assure that the forces of competition exist, then I think we will not have done a service with this legislation.

I know this will likely be a close vote, but I do hope that those who study this issue and who really want to try to preserve as well as we regulate the safeguards of making certain that competition exists in real form and that the American people have the benefits and bear the fruit of that competition, I think they will want to vote with Senator Thurmond, myself, Senator Kerrey, and many others who feel very strongly about the role of the Department of Justice in providing us those guarantees.

Mr. President, with that I yield the floor.

Mr. Kerrey addressed the Chair. The PRESIDING OFFICER. The Senator from Nebraska.

Mr. Kerrey. Mr. President, I rise again to discuss this bill and to discuss the amendment offered by the Senator from North Dakota, as well as the amendment offered by the senior Senator from South Carolina, to give the Department of Justice a role in what is essentially an amendment of the 1934 Communications Act which will again move us in the direction, further in the direction of competition, further in the direction of deregulation than the modified consent decree which was filed in August 1982 has done over the past 13 years.

The central question I think for colleagues as they consider this amendment ought to be whether or not the Department of Justice can perform a role in promoting competition. Indeed, I believe that the Department of Justice is the only agency in Washington, DC, with any experience or any demonstrable success at moving us from a monopoly situation, in this case in the communications industry, to a competitive arena.

Let me point out, I appreciate very much what the chairman and the ranking member have done thus far. I believe there had been a number of signals that the department stood far thus far in the debate important to identify because we have taken a bit more time than was originally anticipated, but I think it has been time well spent.

First, we were successful in defeating an effort to strike the language that the chairman and the ranking member made certain was in the bill that gives preferential rates to education, libraries, and to health care facilities. It is very important, particularly in the area of K–12 education, that we provide those preferential rates.

I know some will argue it runs at odds with what we are trying to do. Indeed, I must confess, it essentially does run, in many ways, at odds. The problem is, our schools, particularly in the K–12 environment, are not market operations, they are government operations. If we do not carve out and provide a special opportunity for them to get access, it is highly unlikely they are going to be a beneficiary of the communications revolution that I think this legislation is apt to set off, at least accelerate. And if they do not take advantage of it, our test scores are not going to be affected by technology. The capability that these students do well and prepare themselves either for the work force or college will be significantly diminished. That was a big victory in beating back an effort to strike that language, essentially what would amount to the new section 264 under the 1992 Commerce Act.

Second, there was an effort to strike what has been described as the public interest, necessity, and convenience
Mr. President, this is a very difficult test. This is a longstanding test that has been applied by the Federal Communications Commission to determine how it is that we regulate. It seems like it is a relatively small effort, but it is a very large victory for American consumers, and I appreciate my colleagues' support in keeping that language in here.

In the managers' amendment offered earlier, the managers changed the regulations as it affects in-area acquisition of one local service by another, which I think is going to be terribly important to maintain a competitive environment. Personally, I believe strongly, at least in the short term, unless households have two lines coming in—a telephone line and a cable line—it is not likely that you are going to get that kind of competitive situation. This in-area acquisition amendment was an extremely important amendment to get attached.

There was a joint marketing provision for small companies that was added and this was very much what I was looking for. I believe that promotes competition and allows the smaller entities—I say again for emphasis, that is likely to be where the jobs are going to be created subsequent to this legislation—faster competition and joint marketing. It is a very important procompetitive change that was made in the bill.

The legislation has very strong language making sure the system is interconnected. I believe that does not establish, as I think it should establish, the Government's role in setting de jure—which is, legal standards. The markets should be in a de facto way establishing those standards. Nonetheless, the legislation directs the FCC to put interoperability very high on the agenda and has a mechanism for making sure we have interoperability in the system. It is a very important procompetitive step and a very significant victory, a great victory.

The bill already had very good rural provisions in it. The managers' amendment, as well as Senator Dole's and Senator Daschle's amendment, strengthened the protection for rural communities, and we have thus far been successful at preserving the universal service fund.

The distinguished Senator from Alaska—I believe it was the first amendment placed on the bill—made certain there was a budget, in order by placing an amendment on here that provided the money that CBO says we are going to need to pay for this universal service fund. Even though the bill results in a $3 billion reduction in the cost of the universal fund, CBO, in their own budget, does not establish, with the $7 billion mark, and the Senator from Alaska changed the bill to provide the money to get that done.

Mr. President, this is a very difficult piece of legislation, because it is so difficult to try to assess what the impact is going to be, what will it do for the households, the voters, the consumers in your district and your State. It is undoubtedly a question that more and more Members, I hope, are beginning to ask and attempt to answer. It is not an easy question to answer.

The chairman and the ranking member of the committee have attempted to move this very carefully from a monopoly situation to a competitive situation. The question, though, is, Will competition produce something that makes my consumers happier? Will my taxpayers have to pay for years and years that what I say, as I believe they do in a number of other areas, including the watershed divestiture that occurred starting in 1982. This has been good for me. I have gotten a reduction in price, I have gotten an increase in quality coming as a consequence. Senator Kerrey, of a piece of legislation you voted for way back there in 1995.

The bill is divided up into three sections. It attempts to describe in general terms what it is that we are trying to do. If I think, for all of us to try to examine each one of these little words inside of 146 pages, now a bit longer as a consequence of amendments that have been attached, because each one of them could potentially sets off an explosion at home. Each one of them could at the same time add unnecessary regulation, for all we know. We are attempting to balance the need to move to a competitive environment with the need to preserve some regulation in order to make certain that this transition is smooth.

The first section is one that will have an impact immediately. What will happen is you will see companies—I guess mostly long distance companies, although it could be any number of other companies—coming into the local area asking permission to interconnect, asking permission from the local telephone company to interconnect and begin to provide local telephone service.

The company basically controls that. There is a checklist in here, but the company basically controls the flow of that decision. There is no Department of Justice role there. The FCC is involved in that decision. There are enforcement mechanisms in there. That is where the universal service description is maintained. There are separate subsidiary requirements to protect in every other marketplace, not just in telecommunications but in every other area of economic life. The larger a business gets and the more of the market a business controls, the more likely it is, the more chances and opportunities there are for that business to set prices and rate structures that the consumer wants, we do not really care what the consumer wants because, frankly, we control so much now of the market that we do not really have to discover what the consumer is willing to pay. We will tell the consumer what they are going to have to pay because we control such a large share of the marketplace. There really is no competitive choice.

Well, that is the way it is for most local telephone companies. There is some local competition but not significant local competition. It is also true for many cable companies. They have been given a monopoly franchise, and...
there is not much competitive choice. That is why we are suggesting with this language—whether it is the Thurmond language or the Dorgan language—a stronger role for the Department of Justice in making certain that we do not provide these environments before that permission is granted to get into long-distance service.

That is the carrot that is being offered. We say to the local company you can either negotiate to provide interconnection or you can provide the interconnection requirements that are in 251. Or if you want to present that you have done all of that, we have a separate section that says you come and present that to the FCC, but the Department of Justice is engaged in a consultative way. We are saying with this amendment—and again whether it is the VIII(c) test of Senator Dorgan or the Clayton test of Senator Thurmond, it is very important to describe the roles of both of these regulatory agencies as to certain kinds of approval so you do not get into the problem of unnecessary delay and duplicative bureaucratic oversight.

Mr. President, the Department of Justice was instrumental in shattering the Bell system's monopoly in the long-distance and equipment manufacturing markets in bringing competition to those markets. Colleagues, again, are wondering why the Department of Justice should be given a role. The reason is that there are those with the most experience, the ones who have the capacity to make this thing happen. Competition has resulted as a consequence of the MFJ that was filed in August 1982, and that competition has made possible the communications revolution that is changing the lives of all Americans.

The telecommunications legislation should take advantage of the Department of Justice's profound expertise in telecommunications in order to further competition to ensure that deregulation leads to real competition, not unfettered monopoly. Again, the potential for monopoly is already there. Since we are beginning with a monopoly situation, the potential for a monopoly situation adverse to the consumer would produce a very unhappy consumer, taxpayer, and citizen out there. And we are, with our amendment, suggesting that the best way to ensure that that does not happen is the Department of Justice with what fairly, I think, is described as a limited role in assisting the Federal Communications Commission in making a decision about whether or not to allow a local company to get into long-distance, and whether or not the company has demonstrated that it has provided a competitive opportunity at the local level—because that is the question.

The question is whether or not to grant long-distance competitive opportunity, and that question is answered by determining whether or not there is competition at the local level. The bill, as I said, has two sets of tests, one in section 251, that could occur almost immediately, and 255, which is the question at hand, when a company is trying to prove that they have local competition by providing the 14-point checklist, as required by this legislation.

The Department of Justice has effectively enforced the antitrust laws in the telecommunications industry on a completely bipartisan and nonpartisan basis throughout this century. It sued the Bell system in 1940. Both times the Department of Justice succeeded in obtaining consent decrees and sought to protect competition. But that allowed AT&T to continue participating in local, long-distance, and equipment manufacturing markets.

In the mid-1960s, Mr. President, it filed comments with the FCC arguing that the Bell system should not be allowed to use its local telephone monopoly to force consumers to buy their telephone sets from it. Although the Bell system went to court to defend the right to choose among competitors, the Bell system succeeded in using its local monopoly bottleneck to impose such onerous conditions on the interconnection of competitors' equipment to the Bell system that evidence of those conditions was an important part of the monopolization case that the Justice Department then presented in 1981. Open competition in so-called customer premises equipment did not become a reality until after the breakup of the Bell system in 1984.

The Department of Justice, Mr. President, initiated its third major investigation of the Bell system in 1969 during the Nixon administration. In 1974, during the Ford administration, the Department filed its historic suit against AT&T charging that the vertically integrated Bell system illegally used its monopoly control over local telephone service to thwart competition in long-distance and equipment manufacturing. Over the course of the next 7 years, through the end of the Ford administration and into the Carter administration, the Department litigated the case vigorously, filing and organizing the complex evidence that showed how the Bell system used the local monopoly to hurt competition in other markets. In January 1981, at the beginning of the Reagan administration, trial of the case began.

The case was finally offered in court almost 100 witnesses and thousands of documents as it systematically laid out the facts that demonstrated how the Bell system unlawfully used the local monopoly bottleneck to hurt competition in other markets.

In negotiations to settle the case, President Reagan's Assistant Attorney General, E. William Baxter, insisted that the only way to protect competition in long-distance and equipment manufacturing was to separate those markets structurally from the local telephone bottleneck. Unless the local monopolist was prevented from participating in other markets, it would always have the incentive and ability to hurt competition in those markets. At first, the Bell system refused even to consider such a settlement. After hearing the Government's case, and precluding about 90 percent of its own business, 250 witnesses, and tens of thousands of pages of documents, the Bell system relented and agreed to settle the case based on a consent decree that dismantled the vertical monopoly. After it was approved by Judge Harold Greene, the modification of the final judgment—which is referred to often as the MFJ—required the Bell systems to split itself into AT&T and the seven regional Bell operating companies now called the Bell companies. AT&T retained the long-distance and manufacturing operations. The Bell companies, independent of each other and of AT&T, retained monopolies over local telephone service in vast geographic expanses, subject to the requirement that AT&T, along with competitors, have equal nondiscriminatory access to customers through the local networks.

The key point of the MFJ was that it removed the Bell companies' incentive to use the local monopoly to hurt competition in long-distance and equipment manufacturing by prohibiting them from entering those markets. By the same token, AT&T no longer had the ability to hurt its competitors in those markets because it no longer controlled the local monopoly. The restrictions on the Bell company grew directly out of the finding by Judge Greene that "the key to the Bell system's power to impede competition has been its control of local telephone markets."

Section VIII(c) of the MFJ—modified final judgment—the language that is in the Dorgan amendment provides that the line of business restrictions can be waived if a regional Bell operating company shows that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

Removing the restrictions under any other circumstances would give the local telephone company the incentive and ability to recreate the vertical monopoly that the Department of Justice and many others worked so long and hard to dismantle.

Since the entry of the MFJ in 1982, the Department has assisted Judge Greene in administering its terms—in Republican and Democratic administrations alike. It has been dedicated to ensuring that the line of business restrictions hinder the RBOC's only to the extent necessary for protecting competition in other markets.

The Department has supported waiver of the restrictions when it has concluded that Bell companies’ entry into those markets would increase competition and increase the possibility of impeding competition in those markets. The Department now has over 50 professionals—lawyers, economists, and paralegals—who are
dedicated and experienced in telecommunications competition issues, and who understand the complex markets and technologies involved.

The Department, therefore, is uniquely positioned to assess what is actually happening in the market and whether there is a danger that entry by the Bell companies could impede competition. That is exactly the task that has been performed since the entry of the MFJ over a decade ago.

Mr. President, the competition long-distance and equipment manufacturing unleashed by the MFJ has benefited the United States of America and its citizens and consumers enormously. MCI, Sprint, and hundreds of smaller carriers buy from AT&T to provide long-distance service.

Prices have dropped and quality has improved, with the result that Americans are talking to each other via long-distance. The competition before you is not one that has not been shy about exercising the right to choose that the MFJ guaranteed.


Similarly, businesses and consumers enjoy lower prices, more choice, better quality, and communications equipment competition has eroded AT&T's monopoly that market and forced it to compete for customers.

Mr. President, that is at the heart of what this legislation is attempting to do: Force existing monopolies to compete for customers. If that competition occurs, the Department must be able to ensure that the companies are functioning as a customer—just like a customer—will force the company to pay more attention to quality, giving just not the quality that you want but give you competitive price. A price that if either the quality or the price are not what you like, you will see a competitive alternative.

These benefits stem directly from the strict separation of the local monopoly from other markets. Although it now appears possible that the local markets can be opened up to competition, they are not natural monopolies any longer.

Removing the separation between the local markets and other markets without evidence that the Bell companies cannot use the local monopoly to hurt competition and long-distance could squander the gains of the past decade.

The expense of the Bell system in the years before the MFJ, when it frustrated consumer choice and actual competition, long after competition and long-distance service and communications equipment became technologically and economically feasible, couched as it was in the fear lest the Bell companies into other markets before determining, based on actual marketplace facts, the effect it will have on the market.

Again, there are two places in this legislation that I call to my colleagues' attention who are trying to figure out what to do with this legislation, whether to support this amendment. There are two sections in this legislation that talk about interconnection.

There are two sections in this legislation that talk about interconnection. One is 255 of the 1934 Communications Act, and the second, one we are talking about now, the interconnection requirements prior to getting into long-distance that are described in the new section 255. The fundamental question all should be to allow the Bell companies into any market they choose to enter as soon as such entry does not threaten to impede competition in the other markets.

That is the success that we have had to date, Mr. President. By ensuring that there is competition, the consumer has benefited, and it has been the Justice Department that has managed that effort.

The simple fact, however, is that telecommunications networks are so complex that the RBOC's ability to frustrate viable competition exceeds the ability of legislators and regulators to specify the steps necessary for opening local markets.

As was the integrated Bell system before the MFJ, the Bell companies today are in a position to ensure that every step forward is accomplished by a step backward, preserving their local monopoly as they race into long-distance with the advantage of the monopoly still intact.

The way to overcome this ability of the RBOC to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition. The RBOC's will have such incentives when the specified steps for opening the local markets are supplemented by a process that ensures analysis of actual marketplace facts before the RBOC's are allowed to enter long-distance competition. That is the Dorgan amendment and the Thurmond amendment attempt to do.

As I said, Mr. President, we have been through this bill a number of times, and there are places in this bill where I believe the Bell companies make a good case. We may have regulatory requirements that are unnecessary that may, in part, impede the development of competition.

I am prepared to entertain discussion of regulation that is still required in this bill that may, in fact, impede competition, that may provide an unnecessary burden for the regional Bell operating companies unnecessarily, at least that they cannot be defeated in what they provide for the American consumers.

Both the chairman and the ranking member of the committee, as they have said on many occasions on this floor, are attempting to create a structure that will, in all, begin the process of competition, initiate competition at the local level, then move to end many of the barriers that currently exist to entry into these markets and finally, in section 3, come to an era of substantial deregulation where price will be determined by competition, not by regulatory fiat.

The Department of Justice role in promoting competition has been historically not only bipartisan but also nonpartisan. As was the antitrust investigation against the Bell system was initiated in the Nixon administration.

The antitrust case against the Bell system was filed in 1974 in the Ford administration. Litigation continued through the Carter administration, into the Reagan administration. The case was settled by requiring divestiture during the Reagan administration. The Department of Justice assisted Judge Greene administering the consent decree throughout the Bush and the Clinton administrations.

The decisionmaking process of the Department of Justice has not been a partisan issue. It was approved last year by the House, with over 420 votes. It was approved last year by the Senate Committee by an 8-to-2 vote and supported by President Reagan's Assistant Attorney General for antitrust, Prof. William Bater, Judge Robert Bork, a letter from a bipartisan group, and a former member of the House of Representatives, Vin Weber, in a piece he wrote in the Washington Times.

The role for the Department of Justice is not being suggested as a consequence of concern for one sector of the economy or the other. It is the suggestion—recommended change in this law—based both upon what politicians themselves have concluded in the past was necessary, as well, mostly based upon evidence at hand of the Justice Department's capacity to manage what was an unprecedented transition from a regulated monopoly situation to a competitive environment.

It seems to me, Mr. President, quite appropriate to be calling upon the Justice Department to once again do more than be a consultant in this matter, a much more than just in the 90-day period during which the FCC will make its determination.

It is better to have a parallel process going on with the Justice Department, where they will be making determinations as to whether or not competition exists; again, whether it is the VIII(c) test of no substantial standard possible, or the Clayton test, which I will get to later.

The Justice Department is the agency that understands the markets, that knows whether or not there is competition, and it is the agency that I believe we need to turn to if we are concerned about what kind of response it is going to be from our consumers, our taxpayers, and voters.

The departure for the Bell operating company's entry into long-distance over the Dorgan or Thurmond amendment does not represent unnecessary duplication. The idea that we will get a
lengthy process, in fact, is just the opposite of what will occur without this amendment.

What happens is the Bell operating company would file an application for entry into long-distance. The Justice Department review would occur at the same time, and proceed simultaneously. The Bell operating company would have an answer within 90 days after application, in accordance with a date certain, established by Congress. This procedure is fast. It takes 90 days.

The Thurmond amendment requires that the Justice Department review will be clear, again, whether it is Clayton or VIII(c). The test has been litigated many, many times in the past. It is not a difficult standard for the Justice Department to apply in either case. In either the Dorgan or the Thurmond case, the procedure will reduce litigation, will reduce the likelihood of subsequent antitrust suits.

Mr. President, I will get into that later, but one of the things, if Senators are concerned about what this will do after a person votes "aye," what final passage will do, what changing the law will do, one question to answer is, is this process going to take a long time? Is it going to be fast? Can the existing companies in here sort of drag this thing out for a long period of time?

One of the reasons we need a Department of Justice role is to reduce the possibility of litigation, to reduce the opportunity to drag this thing out in the courts, and to increase the date when real competition will begin to produce benefits for the consumer.

Mr. President, the VIII(c) test is pretty well established. I want to talk now about what the language of the Thurmond amendment does. I believe that it is likely to be that test which we will be deliberating, that Members will have to decide whether or not they approve or want the Clayton standard. First of all, the Clayton Act was passed in 1914 and it was passed to prevent mergers that may substantially lessen competition or create a monopoly. That standard has been applied to every industry, not just to telecommunications. It is applied to mergers with critical national importance such as defense industry mergers like Martin Marietta and Lockheed, applied to mergers in other high-technology industries, software industries, the recent Xerox and Microsoft and Intuit, applied to mergers in long-distance mergers in the telecommunications industry like AT&T-McCaw and British Telecom-MCI mergers.

The standard is a known quantity. It is a known quantity and it has been developed through 80 years of litigation under that standard.

If the Bell operating companies want to enter into long distance by buying a long distance company, this is the standard that would be applied. It is logical to apply the same standard if they want to enter long distance in other ways under the unique circumstances of this bill superseding an antitrust consent decree with the intention of creating competition.

The Thurmond amendment, the Clayton language, makes entry dependent on passing the Clayton Act test. This test is normally applied to mergers that would be applied to the RBOC's, even in the absence of this amendment, if they propose to acquire a long distance company. The Clayton Act test would apply to RBOC entry unless the effect of such entry may be substantially to lessen competition or to tend to create a monopoly. That is fast. It takes 90 days.

This is exactly what we want. We want an agency that is experienced in the process of saying to the American people, if you pass that test, there is no substantial possibility to lessen competition or create a monopoly. We see a competitive marketplace there, and we give permission and a date certain. That should remove any doubt whether or not this thing is going to be dragged on for a long period of time.

Under such standard, the Department of Justice would consider whether allowing an RBOC, that is a local telephone company, to provide long distance service would give it the ability and incentive to use its monopoly power in local exchange services substantially to lessen competition in the long distance market and raise prices for consumers.

At the end of the game, that is what we are talking about. If you have a monopoly, you have the possibility of raising prices regardless of what the consumers want. You can ignore the consumer if you control a large enough portion of the market share. What we want to make sure is you have competition. Without that competition, whether it is coming from below or coming from above, regardless of where it is coming from, give that consumer choice in the household and the consumer will benefit as a consequence of lower prices and higher quality.

The RBOC's could meet such a test and be allowed to enter the long distance market in any one of three ways.

First, if competition has developed in local exchange services so there is no longer a local monopoly that could be used substantially to lessen competition in long distance, or second, if, even after the rule-of-reason safeguards or other constraints would prevent the RBOC's from using their local monopoly to substantially lessen competition in long distance. A very important point, Mr. President. It may be that local competition does not develop immediately. We should not say to a RBOC, you cannot get into long distance under that circumstance. The Department of Justice has experience in making sure that the negative impact of lack of competition do not occur at the local level. And, thus actually saying to a Bell operating company, here is a way for you to get into long distance interLATA businesses even faster than what might otherwise be possible.

Third, if some one combination of alternatives to the telephone company local exchange services, safeguards, and other factors should prevent the Bell operating company from substantially lessening competition in long distance. More competition would require fewer safeguards, and obviously the opposite is the case as well. Fewer safeguards will be likely. As we get competition in these local markets, we are going to need to reduce the safeguards.

In several acts in the telecommunications industry, the Department of Justice has carefully considered the competitive risk of allowing firms that dominate a market to enter into a closely related market through mergers and joint ventures. Based on the facts of those particular cases, the Department of Justice concluded that under certain market conditions it is not necessary to prohibit entry by a number of local exchange companies into long distance services. But the Department of Justice has required structural separation and other safeguards in the anticompetitive areas to protect the public interest in competition, for example, in the GTE's acquisition of Sprint; again the AT&T-McCaw merger and the British Telecom-MCI joint venture.

Mr. President, I would like to now try to give Members—I see the distinguished Senator from Vermont is here. Mr. LEAHY. Mr. President, I would like to speak on the amendment, but I do not want to interrupt the distinguished Senator from Nebraska. I enjoyed listening to him, but if he did want to take a break, I would be happy to express some views on this.

Mr. KERREY. Mr. President, let me shorten this by a couple of sections here and then regain the floor at a later time since this debate probably will take more than one day. We need to vote on this. We actually vote.

One of the questions, again, I know I have asked myself that I think it is important to answer is whether or not giving the Department of Justice a decisionmaking role in this is going to cost the taxpayers more money. Many have argued against this and implied it is going to increase taxpayer requirements, it is going to result in more and more litigation. The ominous thought of antitrust litigation and the taxpayer cost sort of hangs over the amendment.

But a Department of Justice role would avoid complex and expensive antitrust suits in the future by making sure that competition is safeguarded in the first instance. These suits would consume resources better spent on competing to offer American businesses and consumers lower prices and higher quality. I can, and will at a later time, go through many examples where that in fact is the case.

At the situation prior to the filing of the MFJ by the Department of Justice, that is exactly what was happening. It has also
happened since that time during the years that these suits would be litigated. The American economy would suffer from the effects of lesser competition and higher prices. Before the MFJ broke up the Bell system, there were just antitrust suits against the system ongoing in courts across the country at any given time. AT&T's 1977 annual report said that some 40 such private suits were then pending against it. Asking for more of those suits would be a giant step backward.

Mr. President, I say with respect that without either the Thurmond or Dorgan language here, that is precisely what we are doing. We are inviting suits in the absence of the Department of Justice moving at the same pace, the same 90-day period. It is not an additional 90 days, not an additional 180 days. During the same 90-day period during which the FCC is examining the merits of the application, determining whether or not the antitrust section requirements of section 25(a) have been satisfied, during that same 90 day period the Department of Justice would be doing an analysis of whether or not competition exists at the local level or whether the negative impacts of monopoly were not likely to risk higher prices for the consumer at the local level.

At the end of the 90-day period, just as would occur at the Federal Communications Commission, the Department of Justice would have to make its ruling. You have a simultaneous process. I say to my colleagues, if you are trying to reduce bureaucracy, if you are trying to reduce the potential for law-suit, then either the Dorgan or the Thurmond amendment is something you must be for.

The opponents of the Thurmond and Dorgan amendments argue that all we need to do is allow the Department of Justice to use its expertise, to play a more significant role, not just consulting, in deciding whether a Bell company entry into long distance or manufacturing threatens competition in those markets.

Go back to the 1982 consent decree that authorized the Bell companies from AT&T. That took 10 years to litigate and conclude. The decree, the modified final judgment, took all these years of antitrust litigation, required a restructuring of the market, and led to significant consumer benefits.

Rather than relegate the Justice Department to a consulting role, if we design a proper role for that expert agency up front, we can avoid this kind of costly and time-consuming litigation from happening again. Let us handle it right from the start and not come in after the fact when the cure can sometimes create a new set of problems.

What this bill does, unless amended, is say, "We hope the checklist of antitrust section requirements works to unlock the local loop to competition." We all hope that. But what if it does not work? What if the checklist is not long enough to ensure that the local monopoly power of the Bell company is broken and competition can develop?

If the checklist does not work, under the bill the Justice Department has to clean up the mess. They have to clean it up after the fact, instead of having the Department of Justice restructure the Bell company has already gotten into long distance and used its monopoly power to stifle potential competitors who need the Bell companies' pipeline to our homes and businesses.

The cleanup after the fact could take years of litigation, just as the prior case that ended with the MFJ took years. The cleanup may require a restructuring of companies, just as the prior case against Ma Bell resulted in the breakup and divestiture of the Bell companies. Then, of course, the cleanup could well confuse consumers. I well recall the press and the outrage in the public when they questioned the wisdom that the Bell companies claim that they can do this. We have the opportunity to avoid the mess.

As former appellate judge, Robert Bork, recently pointed out, without a checklist, "You would be applying a standard with teeth," allowing the Bell companies into long-distance service and equipment manufacturing, taking the course envisioned by this bill "would result in even more litigation and regulatory disputes as disputants discover that they have no options." We are sometimes accused of passing a lawyers relief act in some of these pieces of legislation which we consider. This bill, if passed without the amendment, would certainly be a bonanza for lawyers and regulatory disputes proliferated before State and Federal agencies and lawsuits were filed charging discrimination, theft of intellectual property and predation in violation of section 2 of the Sherman Act. I think Judge Bork is right on this.

We should minimize this litigation quagmire by having the Justice Department, with its expertise, look at the competitive impact of Bell company entry into the long-distance and manufacturing markets.

The MFJ left the Bell companies with local exchange monopolies, which remain today. To customers, those Bell company monopolies are regulated. Line-of-business restrictions were imposed on the Bell companies. This was to make sure they did not use their controlling monopoly over the local phone service and the pipeline to the home to harm consumers or to gain unfair advantage over the competitors in the long-distance, manufacturing, and information services markets. Any of those regulations could be removed upon a showing by the Bell company that there is no substantial possibility that it could use its monopoly power to impede competition in the particular market it is seeking to enter. This is the so-called VIII(c) test.

The test has been tried, and it actually works. The Bell companies, of course, have their own reasons to believe VIII(c) is overregulatory. But they have been able to satisfy the test in the past and get into information and other services, and do so without having this kind of requirement.

The MFJ's VIII(c) test is not even as strong as another test to which one Bell company agreed in March of this year. Ameritech reached a landmark agreement with the Justice Department, and they agreed to an actual competition test. We ought to look at that. Ameritech thought this was an appropriate test for a temporary trial waiver of the long-distance restriction. We are not talking about anything temporary here in this bill, but legislation with a far greater degree of permanence.

In discussions in which I have been involved, our colleagues are working out the differences so the Thurmond-Dorgan amendment can protect competition. I think that is important because the amendment provides a certainty that the Bell companies claim they want.

Having the Justice Department apply the Antitrust Act test that is going to be outlined in the amendment, I believe, would complement the competitive checklist in the bill. The Justice Department would make sure that, in addition to the checklist being met and the Bell companies having taken the basic steps necessary to permit local competition to develop, in fact, those steps are working.

The bottom line is that with the existing monopoly hold that the Bells have today, the Department of Justice should review the competitive impact of Bell company entry into long distance. Otherwise, the choices that consumers have in
services provided over their telephone may go down, but the prices they pay for those services may go up. We should make sure that this legislation does not produce that kind of result.

Let us have a competitive environment even in telecommunications and take steps to deregulate.

Mr. President, we have had remarkable changes in telecommunications just in the years that I have been here in the Senate. I have seen changes from complex telephones that brought down prices of long distance.

We have witnessed competition that we did not use to see, which now allows anyone who wants to go and buy equipment off the shelf—equipment for everything from teleconferencing to video conferencing, that were told by the telephone companies, when they had a complete monopoly, was not available—to do so. It was available in every other country. It just was not available in the United States. Once we started to get real competition, all of a sudden it started showing up here.

We do conference calls from home. We have automatic dialing in our equipment. We have speaker phones. We own our equipment. We do not have to go to one telephone company to buy it or rent it month by month anymore. It was competition that did that.

Rather than encouraging monopolies, we should encourage the competition that will help all of us.

I use the Internet all the time. I will be speaking about an aspect of that a little later on. But I use the Internet all the time. I do town meetings on the Internet. I have a home page. My State uses it. I have one petition that involves legislation of mine which got 10,000 or 20,000 names and electronic letters from all over the country in a matter of days.

These are the things that we did not have just a few years ago. They are extremely important to all of us. I know the distinguished Presiding Officer uses the Internet. We have various services now that provide access to it. We should be encouraging that kind of thing.

Can you imagine, Mr. President, had the Internet, for example, been controlled by just one source, one company, one gatekeeper? Does anybody believe it would have advanced as far as it has? That is its problems? Some parts of it have worked very well, and some parts do not work very well. It would not have happened, had we not had openness and competition.

By the same token, do you think any one of us who have in-the-home telephones and can program numbers into it and have automatic dialing or speaker phones or call forwarding built into our phones would have them without competition? That is what this is all about.

I commend the Senator from North Dakota and the senior Senator from South Carolina and all others who have worked on this important amendment.
going to do. We are going to put a consent decree together establishing separation together with nondiscrimination safeguards so that public disclosure of rates, public disclosure of terms and conditions under which MCI and the joint venture gain access to BT’s network is required.

Second, British Telecom is barred from providing the joint venture with proprietary information about their American competitor.

Again, Mr. President, I do not expect my colleagues, I do expect myself, to understand exactly what all this means but what it establishes is that the Department of Justice has experience in making certain there is a competitive environment so that neither the providers nor the consumers who are out there trying either to sell or to buy are affected in an adverse way as a consequence of mergers, as a consequence of new lines of business that are developed as we lower the barriers to entry, as we decrease the regulatory burden and increase the extent to which competition is going to be used to determine our prices and quality of our goods.

Now, as to the question of whether or not the Department of Justice has failed to fulfill its obligation to review the need for continuing the MFJ’s line of business restriction—that is a statement made relatively frequently—I think this criticism is not terribly valid. There was a triennial review that was done in 1987, 3 years after the breakup of the Bell system, but the suggestion that because there has been only one triennial review, there has not been a constant review, I think that suggestion does not stand up in the face of the evidence of what Judge Greene has been instructing the Department of Justice to do, it does not stand up in the face of the numerous waiver applications that have been coming up and what has been effectively a de facto situation of constant reviewing of the line of business restrictions, and it does not stand up in the face of the current review and the recommendations on line of business restrictions.

Experience demonstrated that triennial reviews by the Department of Justice were not necessary to achieve the intended goal of ensuring review of the required MFJ’s line of business restrictions. Judge Greene himself explained why DOJ should have complete discretion as to whether or when to file additional triennial reviews. In his language:

The Court and the Department envisioned a comprehensive review every 3 years interspersed with occasional waiver requests. What has occurred, however, is the process of almost constant reviewing, generated by an incessant stream of regional company motions and requests dealing with all aspects of the line of business restrictions.

Let me repeat, for emphasis, Mr. President, because those who very often criticize the Department of Justice for not doing a sufficient amount of review are the very companies that have created a constant review as a result of their application for waiver and the motions that they are filing in Judge Greene’s court.

The original intent was for triennial review. Mr. President, because the Department of Justice has envisioned a comprehensive review every 3 years, kind of quiet period of time, interspersed with an occasional waiver request.

So when the consent decree was filed originally breaking up AT&T, the idea was, “Well, we will get a few waiver requests here and an occasional motion, but it will not be very often. Because there are not very many waivers or motions, we will do a triennial review.”

The situation was just the opposite: Constant motions, constant waiver applications and, thus, no need for a triennial review and, thus, it does not stand up to criticize the Department of Justice and say, “See, don’t give them a role in the law because they didn’t do what they were originally supposed to do.”

They did not do what they were originally supposed to do because circumstances developed precisely the opposite. The Department of Justice and the Department expected to have happened in 1981 and 1982 when this decree was being negotiated between AT&T and the U.S. people through the U.S. Department of Justice.

Judge Greene further explained why he did not require further triennial reviews. He said, with the stream of waiver requests, he “repeatedly considered broad issues regarding information services, manufacturing and even long distance.”

Mr. President, basically he is saying that though this thing did not develop as was expected—long periods of quiet time interrupted by triennial reviews—the waivers and the motions have enabled us to constantly review the line of business restrictions and determine whether modifications need to be made.

The judge also explained that “as soon as there is a change, real or imaginary in the industry or other markets, motions are filed and all aspects of the issue are reviewed in dozens of briefs.”

These observations are still valid. In the life of the MFJ, Bell companies have filed an average of one waiver every 2 years. Many others are added. A triennial review is underway right now as the Justice Department investigates a motion to vacate the entire decree pursued by three Bell operating companies. This investigation will culminate with a report to Judge Greene in the next few months, and that report will be a comprehensive review of the need for continuing the line of business restrictions. It is likely the recommendations that are going to be made will support most, if not all, of the changes that are being recommended in this legislation.

Let me talk about this purported delay. You hear, “Well, the Department of Justice takes a long time; this waiver process takes a long time.” Typically what is done is a statistical analysis is used of the average age of pending MFJ waivers; that is, to say, the request for waiver of the consent decree. There was a consent decree filed in the court. The court is administering that consent degree on behalf of American consumers who benefited enormously as a result of that Department of Justice action and what Judge Greene has done. The statistical analysis, in my judgment, is a red herring. This argument that is used against DOJ decision making is that you will see an unnecessary delay as a consequence of this statistical analysis, to back up the assertion this analysis purports to show that a Department of Justice role will cause a long period of time for decisions to be made.

Again, two things argue against that. One is, first, as I get here in a minute. The other is in the language of the amendment, either as modified by the Senator from South Carolina or as originally contained in Senator Dorgan’s amendment. It is a review process that takes place simultaneously in the Department of Justice and in the Federal Communications Commission. Both have a date certain of 90 days. Only with the Department of Justice role, in my judgment, are you going to limit it to 90 days.

Under that situation, you want the Department of Justice to make this determination by a date certain. It is as simple as that. That is what the amendment does. That is what either one of these amendments, in fact, would accomplish.

The amendments guarantee the Bell companies will get an answer on long distance entry by a date certain. The legislation will replace the waiver procedures with specific deadlines. You eliminate the waiver procedures included in the 214 waiver procedures that are in current law under the 1934 Communications Act. The Department of Justice review cannot possibly slow Bell company entry into long distance unless such entry would be harmful to competition and, thus, undesirable for American consumers and American businesses.

Under that situation, you want the Department of Justice to slow it down if, in their reasoned judgment, based upon the experience that they have had, it is going to restrict competition. They are the ones with the experience. You do not want this process to end if the Department of Justice, before granting permission, interprets a proposal to mean less choice, less competition, because in a monopoly situation, with the extensive competition that are going with this legislation, you are unquestionably going to get increased prices and marginal, if any, improvement in quality.
Mr. President, that examination, that figure of 95 percent does not tell all the story. A typical pattern is for one or more of the Bell companies to file an overbroad waiver request seeking relief that could not possibly be consistent with section VIII(c) of the MFJ. The unreasonable requests evoke extensive public concern and comment. The Department of Justice then has two choices: Recommend denial when the request is made, which would be relatively quick, or work with the Bell companies to fashion an appropriate entry test that would satisfy the request so that it satisfies the requirements for approval.

Fixing the request is harder and takes much longer than just saying no. But the Department of Justice has committed itself to this harder course because it believes that the cause of competition is better served by taking the time to negotiate a reasonable request than by merely opposing an unreasonable request itself.

Of the waivers approved by the courts in 1993-1994 that were not mere copies of other waivers, fully 60 percent were the product of negotiations between the Department of Justice and the Bell companies that resulted in a modification of the original waiver request. Thus, the approval rate to which opponents refer is, in large part, a testament to DOJ success in preserving competition while working to minimize the burden of MFJ’s line of business restrictions.

Another argument that is very often thrown up in this debate is that you are seeing an increase in the age of pending waiver applications. The time tables for waivers under the present court-administered consent decree is irrelevant. The Thurmond and Dorgan amendments require that the Department of Justice render its determination no later than 90 days after receiving an application for long distance entry.

So, to refer to the current delays and say, here is the problem and this is going to be perpetuated by either the Thurmond or the Dorgan amendment is wrong, Mr. President. These amendments specify 90 days of parallel processing during which both the FCC and the Department of Justice will consider an application by a local telephone company to get into long distance service.

Mr. President, there is, by the way, some reasons why these waiver requests are pending with the Department of Justice and why they have increased since the early years of the MFJ. I would like to go through one or two of them. But, again, I am actually offering some examples of why the Department of Justice is more competent than they might appear, if this is your only method of evaluation. I am not offering these to try to persuade any colleagues that this is why you should trust that the process is not going to take very long. The amendment itself says 90 days. There is a date certain in the amendment. Do not worry about this dragging on forever, the law demands that they do not.

Well, again, opponents have compared and taken to resolve waiver requests in the early years of the modified final judgment and the time taken more recently and asserted from the Department of Justice fails to deal with the requests in a timely manner. But this comparison is simplistic and ignores fundamental changes in the character of waiver requests. It is worth noting that when you compare the age of waivers in 1984 to the age of waivers in 1994, it does not surprise that the average age of waivers in 1984 would be low, since they could not even be requested before that year. Why would they not be low then? A filed waiver application in 1984 is a year old. It is understandable and logical and indeed would be surprising if the opposite were the case if these waivers would not age the longer the consent decree is in place.

More recent waiver requests require more time, as well, to evaluate for several additional reasons. I think it needs to be understood. They are not illegitimate reasons. If they are not legitimate fines, that is fine. But do not come and say merely that we have one statistic that shows in 1984 here is the age of the waiver application, and in 1994, here is the age of the waiver application and say, see, that justifies the conclusion that the Department of Justice should not be given a role.

Again, there are two reasons why that argument does not stand up. One is a fact I will isolate it in a minute. The other is that both the Thurmond and Dorgan amendment say a 90-day time certain. The recent waiver requests, however, deal almost entirely with lifting the MFJ’s core business restrictions—that is, inter-exchange, information services—while early request waivers were primarily the review of new company entry into the nontelecommunications business—a much easier waiver to grant. When you get into the core business application, the waivers are more difficult to grant and assess and thus take more time to either approve or to deny. They also evoke more public concern and comments. It is a tough deal when a person comes up and says, “A company has applied for a waiver, and I do not like it.”

One of the reasons the Department of Justice has taken longer is that you have had an increase in the number of public comments and expressions of concern. For example, of waivers filed with the Department of Justice in 1993 and 1994, the Department receives nearly six times as many comments per waiver as it did in the 1984 to 1992 period. So just in the last 2 years, there have been a substantial increase in the number of public concerns and comments which are made on the waiver applications that are put to the Department of Justice. The recent waiver applications pressure you are looking fan facts as to how well they are doing, I urge my colleagues to look at the progress they have made since 1993 to 1994. Look at the complexity of the cases, and look beyond merely an examination that says from 1984 to 1994 the cases the age of the waivers applications has increased. For all kinds of reasons, it is understandable, and it does not indicate that the Department of Justice is incompetent or unqualified. If that does not persuade you, look at the language of the Thurmond amendment and the Thurmond amendment, because they remove all possibility of this thing being delayed for a long period of time by putting a 90-day time certain, a date certain in the law.

Mr. President, the Department of Justice is the agency with the expertise, the competence and the Thurmond telecommunications markets. The Department of Justice has had an unwavering focus on the protection and promotion of competition. All facts support that conclusion. No facts that I have heard support the conclusion that the Department of Justice does not have the capacity to assist the people of the United States of America, as we the Congress attempt to move this local
mony into a competitive environment. They have promoted competition in telecommunications on a non-partisan and bipartisan basis throughout this entire century.

The Department of Justice has deepened its role in telecommunications competition over the past quarter century by investigating the Bell system's monopoly, suing to break up the monopoly, and allowing competition in long-distance and equipment markets to flourish, and in assisting the Federal Court at different stages of the modification of final judgment, the consent decree that dismantled AT&T. The benefits to the Nation from the Department's role in promoting competition have been more jobs, more exports, greater innovation, and more products available to businesses and consumers at lower prices than at any time in our history.

I see that the Senator from South Carolina is here. I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. THURMOND. Mr. President, I have a modification at the desk.

The PRESIDING OFFICER. The Senator has the right to modify his amendment.

The amendment is so modified.

The amendment (No. 1265), as further modified, is agreed to.

Strike all after the first word of the pending amendment and insert the following:

(2) Section 304(d) (47 U.S.C. 304(d)) is amended by inserting "(for subsection (k) in the case of renewal of any broadcast station license") after "with subsection (a)") each place it appears.

Title B—Termination of Modification of Final Judgment

SEC. 221. REMOVAL OF LONG DISTANCE RESTRICTIONS.

(a) In General.—Part II of title II (47 U.S.C. 201 et seq.) as added by this Act, is amended by inserting after section 254 the following new section:

"SEC. 255. INTEREXCHANGE TELECOMMUNICATION SERVICES.

(a) In General.—Notwithstanding any restriction or obligation imposed before the date of enactment of the Telecommunications Act of 1996 under section II(D) of the Modification of Final Judgment, a Bell operating company, or any subsidiary or affiliate of a Bell operating company, that meets the requirements for expertise as hereinafter set forth may provide—

"(1) interLATA telecommunications services originating in any area in which it is the dominant provider of wireline telephone exchange services, exchange access services, and point-to-point services, as determined by the Commission, and the Attorney General of the United States, in accordance with the provisions of subsection (c);

"(2) interLATA telecommunications services originating in any area where that company is the dominant provider of wireless telephone exchange services, exchange access services, or exchange access services in accordance with the provisions of subsection (d); and

"(3) interLATA telecommunications services that are incidental services in accordance with the provisions of subsection (e).

(b) Specific InterLATA Interconnection Requirements

"(1) In General.—A Bell operating company may provide interLATA services in accordance with this section only if that company has reached an interconnection agreement under section 251 and that agreement provides, at a minimum, for interconnection that meets the interLATA service checklist requirements of paragraph (2).

"(2) Competitive Checklist.—Interconnection provided by a Bell operating company to other telecommunications carriers under section 251 shall include:

"(A) nondiscriminatory access on an unbundled basis to telecommunications functions and services of the Bell operating company's telecommunications network that is at least equal in type, quality, and price to the access the Bell operating company affords to itself or any other carrier.

"(B) the capability to exchange telecommunications between customers of the Bell operating company and the telecommunications carrier seeking interconnection.

"(C) nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates where it has the legal authority to permit such access.

"(D) local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

"(E) local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

"(F) Local transport, local loop transmission, or other services.

"(G) nondiscriminatory access to—

"(i) 911 and 911 services;

"(ii) directory assistance services to allow the other carrier's customers to obtain telephone numbers and information; and

"(iii) operator call completion services.

"(H) white pages directory listings for customers of the other carrier's telephone exchange service.

"(I) until the date by which neutral telephone number administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules is required.

"(J) nondiscriminatory access to databases and associated signaling, including signaling links, signaling control operations, transfer points, and signaling service transfer points, necessary for call routing and completion.

"(K) until the date by which the Commission determines that final telecommunications number portability is technically feasible and must be made available, interim telecommunications number portability shall be available.

"(L) nondiscriminatory access to whatever services or information may be necessary to allow the requesting carrier to implement local dialing parity in a manner that permits consumers to be able to dial the same number of digits when using any telecommunications carrier providing telephone exchange service or exchange access service.

"(M) reciprocal compensation arrangements are required for the origination and termination of telecommunications.

"(N) telecommunications services and network functions provided on a nondiscriminatory basis without any conditions or restrictions on the resale or sharing of those services or functions, including both origination and termination of telecommunications services, other than reasonable conditions required by the Commission or a State. For purposes of this paragraph, it shall not be a reasonable condition for the Commission or a State to limit the resale—

"(i) of universal service to a telecommunications carrier who intends to resell that service to a category of customers different from the category of customers receiving universal service by such carrier if the Commission or State orders a carrier to provide the same service to different categories of customers that is reasonably necessary to promote universal service; or

"(ii) of subsidized universal service in a manner that allows companies to charge one another carrier rates that reflect the actual cost of providing those services to that carrier, exclusive of any universal service support for that carrier in accordance with section 214(d)(5).

"(3) Joint Marketing of Local and Long Distance Services.—Until a Bell operating company has authority to provide telecommunications services in a telephone exchange area where that company is the dominant provider of wireline telephone exchange service or exchange access service, the telecommunications carrier may not jointly market in such telephone exchange area telephone exchange service purchased from such company with wireLATA services provided by that telecommunications carrier.

"(4) Commission May Not Expand Competitive Checklist.—The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist.

"(5) In-Region Services.—Any application submitted under the Telecommunications Act of 1996 for authorization to provide interLATA telecommunications services originating in any area where such Bell operating company is the dominant provider of wireline telephone exchange service or exchange access service shall be decided by the Commission on a case-by-case basis.

"(6) Determination by Commission and Attorney General.—

"(A) Determination.—Not later than 90 days after receiving an application under paragraph (1), the Commission and the Attorney General shall each issue a written determination, on the record after a hearing and opportunity for comment, granting or denying the application in whole or in part.

"(B) Application Submitted.—The Commission may only approve the authorization requested by an application submitted under paragraph (1) if it—

"(i) finds that the petitioning Bell operating company has fully satisfied the competitive checklist found in subsection (b)(2); and

"(ii) finds that the requested authority will be carried out in accordance with the requirements of section 252; and

"(iii) determines that the requested authority is consistent with the public interest, convenience, and necessity, and making its determination whether the requested authorization is consistent with the public interest, convenience, and necessity, the telecommunication carrier shall not be required to pay the antitrust costs of such authorization in any market for which authorization is sought. Nothing in this subsection shall limit the authority of the Commission under section 252.

If the Commission does not approve an application under this subparagraph, it shall...
state the basis for its denial of the application.

"(C) APPROVAL BY ATTORNEY GENERAL.—

The Attorney General may only approve the authorizations described in its application under paragraph (1) if the Attorney General finds that the effect of such authorization will not substantially lessen competition, create a monopoly in any line of commerce in any section of the country, or tend to create a monopoly in any line of commerce in any section of the country. The Attorney General may approve all or part of the request. If the Attorney General does not approve an application under this subparagraph, the Attorney General shall state the basis for the denial of the application.

(3) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (2), the Commission and the Attorney General shall publish in the Federal Register a brief description of the determination.

"(4) JUDICIAL REVIEW.—

(A) COMMENCEMENT OF ACTION—Not later than 45 days after a determination by the Commission or the Attorney General is published under paragraph (3), the Bell operating company or its subsidiary or affiliate that applied to the Commission and the Attorney General under paragraph (1), or any person who would be threatened with loss or damage by the effect of the determination regarding such company's engaging in the activity described in its application, may commence an action in any United States Court of Appeals for the District of Columbia Circuit or the United States Court of Appeals for the District of Columbia Circuit for judicial review of the determination regarding the application.

(B) JUDGMENT—

(i) The Court shall enter a judgment after reviewing the determination in accordance with section 706 of title 5 of the United States Code.

(ii) A judgment—

(I) affirming any part of the determination that approves granting all or part of the requested authorization, or

(ii) reversing any part of the determination that denies all or part of the requested authorization, shall describe with particularity the nature and scope of the activity, and of each product market or service market, and each geographic market, to which the affirmation or reversal applies.

"(5) REQUIREMENTS RELATING TO SEPARATE AFFILIATE; SAFEGUARDS; AND INTRALATA TOLL DIALING PARITY—

(A) SEPARATE AFFILIATE; SAFEGUARDS.—

Other than interLATA services au”.

Mr. THURMOND. Mr. President, I rise today in support of the Thurmond-D’Amato-DeWine-Inhofe amendment which will protect competition and consumers by providing that antitrust principles will be applied by the Department of Justice in determining when the Bell operating companies should be allowed to enter long distance services.

I wish to explain a modification which I have made to this amendment. With this modification, which clarifies the separate roles of the FCC and the Department of Justice, Senator DORGAN and I have agreed to support my second degree amendment and not to seek a vote on the Dorgan first-degree amendment. I have appreciated working with Senator DORGAN, Senator LEAHY, and their staffs, and wish to thank them for their support and assistance in this important matter.

The second degree amendment that I introduced last Thursday contained language to ensure that there is no duplication of functions between the Department of Justice and the FCC. This was accomplished in the amendment by limiting the public interest analysis of the FCC so that the Commission shall not consider the antitrust effects of Bell company entry into long distance. This clarifies the FCC public interest in a way that is entirely consistent with the original goals and purposes of my amendment and ensures that there is no duplication of functions. Although the FCC may appropriately consider competition in other aspects of its analysis, this specialized antitrust analysis of Bell company entry is to be conducted solely by the Department of Justice.

Under my modified amendment, the antitrust standard applied by the Justice Department remains the Clayton Act Section 7 standard. The standard is whether Bell company entry would substantially lessen competition or tend to create a monopoly. This is the standard applied to every merger and acquisition in order to determine whether certain activities will expand or move into new lines of business. That is the issue that requires analysis before Bell companies enter long distance markets.

One issue I wish to emphasize is that my amendment is necessary to reduce duplication in the telecommunications legislation. Currently, S. 652 provides that the FCC will conduct a public interest analysis of Bell entry into long distance, with consultation by the Department of Justice. The standard is whether Bell company entry would substantially lessen competition or tend to create a monopoly. This is the standard applied to every merger and acquisition in order to determine whether certain activities will expand or move into new lines of business. That is the issue that requires analysis before Bell companies enter long distance markets.

I would also note that the language we are using from section 7 of the Clayton Act also appears in section 2 and section 3 of the Clayton Act. These sections deal with price discrimination and antitrust analysis, dealing with arrangements which may harm consumers by inhibiting competition in the marketplace. Thus, not only is this standard familiar because of the experience and case law under section 7 of the Clayton Act, but also because of sections 2 and 3.

We all strongly support competition. We all support competition replacing regulation. The question is how to make sure competition exists, and whether competition is achieved by fixed line rules or by flexible antitrust analysis.

Mr. President, the bottom line is whether we believe the antitrust laws are the means by which we protect competition or not. It is that simple. If we believe in the antitrust laws—which have protected free enterprise for over 100 years—then we should pass the Thurmond-D’Amato-DeWine-Inhofe amendment.

For all of these reasons, I urge my colleagues to support this amendment. Mr. President, I ask unanimous consent to add Senator DORGAN as a co-sponsor of my second-degree amendment, as modified. Additionally, I ask unanimous consent to add Senator KOHL as a co-sponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KERrey. Mr. President, I ask unanimous consent that I be added as a co-sponsor to the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HOLLINGS. Mr. President, I ask unanimous consent that Laura Phillips, a fellow in the office of Senator LIEBERMAN, be permitted privilege of the floor during consideration of the bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PRESSLER. Mr. President, I would like to respond to some of the remarks made here today, in part, to indicate that we already have antitrust laws that will continue to exist.

I have the Sherman Antitrust, the Clayton Act, and the Hart-Scott-Rodino Act, which will remain in full application.

I would like to go through the regulatory safeguards that already exist in S. 652, to break up local Bell monopolies without a new Department of Justice bottleneck.

It is my strongest feeling that having the Department involved as a decisionmaker here is a mistake. The Department is already involved. The Department can be a party to any case on appeal from the FCC. Under the Hart-Scott-Rodino Act, it involved the Department as an independent party in all FCC appeals.

The point is, the Department has an antitrust role. It has a role as an independent party in all FCC appeals. It can use the Sherman antitrust standard or it can use the Clayton Act, or indeed the Hart-Scott-Rodino can be used when there is an application for a merger.

Now, we already have several safeguards in the process. We do not need bureaucracy. Having the Department do the same thing, basically, that the FCC is already doing is a mistake. I might say that even if they do it, it will take them a long time.

My friends have said we will put a time certain. The legislation already requires the Department to try to act within 30 days. That is a requirement that is already on them.

Presently, the appeals last up to 3 or 4 years. I have a chart. I will show how long the appeals last. They already have a 30-day requirement that they have not been meeting.
I want to go through some of the regulatory safeguards in this bill. First of all, the State certifies compliance with market requirements. The State has to act on this. That is a safeguard. That is a check.

Second, the FCC affirms public interest. That is also public interest, convenience, and necessity. That means that the FCC can look at this from the traditional public interest, convenience, and necessity standpoint. We had a discussion about that here on the floor of the Senate. There was an effort to repeal that by some Members of the Senate who feel that the public interest gives the FCC too much latitude, too much power.

Next, the FCC certifies compliance and requests a 14-point checklist. The FCC has to go through a 14-point checklist to certify that the regional Bells have acted. I have the 14 points on another chart. I will go through that.

The Bell companies comply with separate subsidiary requirement. They must have a separate subsidiary in a certain period of time in many areas. Nondiscrimination requirement. They cannot give all the business to one long distance subsidiary. They have to act in a nondiscriminatory way.

There is a cross-subsidization ban.

Fifth, FCC allows the Department full participation in all its proceedings. The Department of Justice will be there as the FCC proceeds. Indeed, the bill, as written, gives the Justice Department a role.

Next, the Bells must comply with existing FCC rules in rigorous annual audits; elaborate cost accounting; computer-assisted reporting, and special pricing rules.

Seventh, there will remain the full application of the Sherman Antitrust, the Clayton Act, and the Hart-Scott-Rodino Act. This is very important.

It is true, if we defeat the Dorgan-Thurmond amendments, that the Justice Department will have no role. They will have a very active role as they have had in the past. I think that that is something to remember. Again, the Hobbs Civil Appeals Act lets the Justice Department participate as an independent party in all FCC appeals.

Let me go over here to the competitive checklist, if I may. This is S. 652's measure on the pressure breakup of local Bell monopolies.

First, access to network functions and services. The interconnect requirement is on the checklist. I think everybody in the Chamber has been in on drawing up this checklist. It is a checklist that the FCC will have to go through before a Bell company is certified that it has met the requirements. This is a definite checklist. It is something that we have worked on around here since January in meetings every night on Saturdays and Sundays.

Next, capability to exchange telecommunication between Bell customers and competitors' customers;

Third, access to poles, ducts, conduits, and rights of way;

Fourth, local loop transmission unbundled from switching;

Fifth, local transport from trunk side unbundled from switch;

Sixth, long distance unbundled.

These are the so-called unbundling portions of it, whereby a company will have to open up and unbundle its codes so that competitors can come in. It is only once they form a small telephone company that they will have interconnection and unbundling available.

Next, access to 911 and enhanced 911, directory assistance and operator call completion service;

Next is the white pages directory listing;

Next is access to telephone number assignment;

Tenth, access to data bases and network signaling;

Eleventh, interim number portability;

Twelfth, local dialing parity;

Thirteenth, reciprocal compensation;

Fourteenth, resale of local service to competitors.

Mr. President, this is the competitive checklist; the 14 points that must be met first of all to be certified by the FCC. Then we also have the so-called public interest requirement. We also have State certification.

What I am saying is, here we have a careful, careful checklist that already requires much review, and what is being proposed in the Thurmond and Dorgan amendments is that, when we finish all this with the State and the FCC, then we go over to the Justice Department and start all over again with another decisionmaker.

The Justice Department is not supposed to be a decisionmaker in this sense. The Justice Department is not a regulatory agency. It has become one under Judge Greene's rules, but those at the Department of Justice are essentially regulators. As, for example, in the Ameritech case, they are even approving phone books and things of that sort over at the Department of Justice.

The Department of Justice is supposed to deal with antitrust issues and the Sherman Act and the Clayton Act and to act as an independent party under the Hobbs Civil Appeals Act. They are supposed to be lawyers bringing cases and lawyers giving interpretations and antitrust rulings and so forth.

What the Justice Department, like so many departments in Washington, wants to do is become a regulator, to have a permanent staff of people who regulate and make decisions. That is supposed to be done over at the FCC.

So I say to my friends who propose this change that, if they want another standard of regulation, let us do it at the FCC where it is supposed to be. Why go over here to the Department of Justice—which has its role, which has its traditional role, and a good role, let me say.

We have read a lot in the paper about the Hart-Scott-Rodino rulings of this year and the Clayton Act standard, which is in the proposal of Senator Dorgan. And, of course, the Sherman Antitrust Act, which started all this, in Judge Greene's decision. The point is the Department of Justice already has a role and will have a role without adding another layer of bureaucracy. The Dorgan-Thurmond amendment or variations thereof, is the opposite of proconsumer legislation. Consumers want wide open competition. They want lower costs. They want more and better services, and they want these without delay.

The Department of Justice, in carrying out the MFJ, is now averaging nearly 3 years. I believe I have here a list of small charts which show the average time, "Average Age of Waivers Pending Before the District Court," that is through the Justice Department, has declined in 1993. It reached a height in 1996 but they are doing less, even slower, even more slowly.

The average age of waivers pending before the Department of Justice year-end is 1,200 days. This is in a Department that in present law says it will endeavor to get these done within 30 days. They have completely ignored that.

Next we come to "Waivers Disposed Of By DOJ." It has dropped to an all-time low in 1993 for some reason.

The point I am making—requests filed with the DOJ hit an all time low in 1992 again in 1993—is people have gotten less. If they have to wait 3 years or more, it is too frustrating, too futile. I think that is something we should think about very carefully before we add another layer of bureaucracy.

I know my colleagues have the best intentions here, but I have a chart showing the "Average Age of Waivers Pending Before the District Court Year-end." It started in 1985. They were supposed to get theirs, in the law, done within 30 days. They were supposed to get the work done within 30 days. In 1985 it took them an average of about 100 days to get the waivers issued. In 1985 it was up to about 200 days.

Anyway, to make a long story short, if you file a waiver before the Department of Justice today you will wait, on the average, nearly 1,500 days, about 4 years. That is why they dropped so much.

I say to my colleagues, do we want this extra year, of bureaucracy? Or do we really want to open up competition? I would say it is a great mistake. We are doing all these checklists. We are doing public interest. We are having
but the bureaucracy works around that. That is, you start right now, in terms of competition. We would let everybody compete. There are some problems of unbundling or interconnecting with that, but there are Members of this body, indeed we had two members in the Commerce Committee who voted against this bill who felt strongly about an immediate start. There is much merit to that.

But the bill we came up with is a balancing between those two. The bill we came up will allow States to certify, then the FCC to go through a 14-point checklist, then the FCC to go through the public interest test, then competition would begin under our bill.

But under the proposal of my colleagues here today on the Senate floor, the Dorgan-Thurmond proposal, after we finished all that process and went through all those approvals and went through that checklist, then we would go over to the J justice Department and start all over again with some more regulation, and they would go through yet more tests. It would take more time.

What we have here is a lawyer’s paradise, a lawyer’s dream.

Mr. KERREY. Will the Senator from South Dakota yield on that?

Mr. PRESSLER. I will, just as soon as I am finished. I am almost finished.

What we have here is a lawyer’s paradise if this passes. It will mean the piece of regulation we have before us, which the Department of Justice will become in part regulatory. We are trying to simplify, to have less Government making approvals. This amendment would mean we would need a whole other layer of people making the same approvals. It is more regulation, in my judgment.

Let me also say that we had quite a debate in the Commerce Committee and here on the floor on this matter of public interest, convenience, and necessity. There are many in the think tanks in town who would be described as on the conservative side of things who think we should not have the standard of public interest, convenience, and necessity, because, they said, that is more bureaucracy, it lets the FCC have too much power.

This Chamber and the Commerce Committee had votes on that and it was determined to leave it in, but a lot of people think that is too much regulation. The Senate has been asked to go through all that checklist, the public interest test, State approval, they are going to have to go through all that. Then my friends want them to go on over to the Justice Department with their lawyers and start all over again. We should not allow that. That is my point.

Mr. KERREY. Will the Senator from South Dakota yield?

Mr. PRESSLER. Yes, I will yield.

Mr. KERREY. The Senator twice has said an applicant must go to the FCC, go through all that, and then they have to go to the Department of J justice. Will the Senator from South Dakota support the amendment that calls for simultaneous application? It does not call for consecutive application, where you go to one and then have to go to another. You do not get approval at FCC and then get approval at the Department of J justice.

The Senator twice said that you get your approval at the FCC. Then you have to go to another agency. Does the Senator allow that the Thurmond-Dorgan amendment calls for a simultaneous process?

Mr. PRESSLER. If my friend will allow me, the Senators’ amendment would require that they go to two places, first of all, for sure. There is no debate about that. You have to go to two places.

Mr. KERREY. The question I am asking—

Mr. PRESSLER. Let me answer the question.

Mr. KERREY. The question is, is there simultaneous application?

Mr. PRESSLER. I do not yield the floor.

Mr. PRESSLER. I will answer the question.

Mr. PRESSLER. If my friend will allow me, the Senators’ amendment would require that they go to two places; actually more than that. You have to go to the State, to the FCC, and the Justice Department. It is true that the Senators’ amendment calls for a simultaneous process?

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posed by Senator T HURMOND in his second degree amendment includes some additional language that was agreed to this weekend so that we retain the standard proposed by Senator T HURMOND in his second degree. We add some additional language that we wanted to be included in it, representing the Justice Department and the antitrust activity that they felt threatened the free market system. Any merger was just fine. Any hostile takeover was terrible. They became more like cheetahs than the marketplace. They were the guardians of public interest with respect to competition and those who were fighting against antitrust activities.

If you care about the marketplace, then you care about what is called a free market, and a free market in which competition is a robust, dynamic force that serves the interests of the consumers. A free market requires a little care and attention on our part. You can have your pockets picked in an environment like ours if you do not have free markets. How do people pick your pockets? The influence that can pick your pockets in a marketplace like ours is when you have concentric possibilities. When prices can actually fix their prices, represent anticompetitive behavior, do things in a way to extract money from the consumers in a manner that protects themselves protects the enterprises themselves. Those things are not healthy. We have been through periods in our country where there was no trust busters that had to break up the cartels and trusts. Free market systems work only when there is competition. Our whole point about this legislation is we want there to be competition. We believe competition is good. Ancillary to that is what is called a free market, only when there is competition.

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and hearings. It does not have to have ex parte rules. Your rights over there are less than they are when you are before an agency that has the Administrative Procedures Act.

I think this goes to the heart of the debate over the South Dakota floor. The Justice Department is a different sort of an agency. It is a cabinet agency that does not have to be under the Administrative Procedures Act. It can prosecute people. It interprets the antitrust laws. It enforces the Sherman Act and the Clayton Act and the Hart-Scott-Rodino Act, and it does a good job in those areas.

I might say that the present Assistant Attorney General, a fine woman, has done a great job, in my opinion, on the Hart-Scott-Rodino, and she has done a great job in administering this huge group of lawyers over there who are regulators presently under the MFJ.

And I suppose that somebody fears they are going to have to let all their lawyers go if they are not under the Administrative Procedures Act. And that is a problem. When you get over to the Justice Department—first of all, under the Dorgan amendment, you go to the FCC and you have openness. An open hearing. If one of the commissioners talks to somebody even at a reception about this case, he has to file a report of it and give equal time to somebody else. But you go over here to the Justice Department, you are not under the Administrative Procedures Act. They can operate in secret if they want to. They are a prosecutorial agency. They can operate without the ex parte rules.

I think that is a very important thing to consider. I do not think you should be able to apply all of the aspects of the Administrative Procedures Act to the Justice Department. They have a different role in the nature of our Government. They have a different mission to carry out. Now, every agency would like to have several rooms full of lawyers who are regulators. And, indeed, if you look in the present Ameritech case, the Department of Justice had regulators checking on the validity of telephone books, to see if they fit into the guides. They have regulators checking into the validity of Yellow Pages. This is in the Department of Justice, where we hold up the hand of the balance of justice.

This has nothing to do with the balance of justice. This belongs in the regulatory agency that we spend so much money on, the FCC. So that is why I think a very core point here in the nature of this debate.

I am not going to yield any further time. I will just conclude by saying, because we have to get this debate moving, I challenge my friend from North Dakota to name another area of commerce where the Department of Justice has a decisionmaking role. This is trying to give the Department of Justice a decisionmaking role. And the answer to that question, which I will get, is none, not another regulatory area except for transportation, not financial services or any other area. Why telecom, which is an important area? Why are they putting them over in the Department of Justice? It is going to take a thousand regulators to do that. Put the Dorgan amendment. And we have this job done twice already, once at the State level and once at the FCC. I hope when we get into the wireless age I will still be around here offering a bill to eliminate the regulation that we have, but that may be 10 years down the road.

In any event, this is a bad concept, from the Administrative Procedures Act to the decisionmaking role.

Mr. DORGAN. Mr. President, I just disagree with the Senator from South Dakota. We are not talking about a regulatory role for the Department of Justice. We are talking about a couple different pieces of legislation. We are not talking about putting Justice into a regulatory environment, the Justice Department, although I would admit that the term "Justice" itself is a useful term for us to use as we discuss this because this is not about some mom and pop businesses having to confront the Justice Department. The real pawns in this debate are the American people, the consumers who are going to have to pay the bill for whatever communications services they purchase.

We would hope, all of us in this Chamber would hope they can go to a marketplace that is a free, open, competitive marketplace and purchase those services, even in the local exchanges. And the question for the Justice Department is the question of when is there competition and under what conditions this competition exists in the exchanges, because then the regional Bell operating companies will be able to go out and compete in long distance service.

However, we are not suggesting the role of the Justice Department be a regulatory role. I think somehow the Senator and others are mistaken about that. I do think, though, that when one makes the point we have crafted an amendment that attempts to set up competing forces here that represent substantial competition for an incumbent is just wrong. It is not the way it is written. It is not what the amendment is about.

And it is not what we are trying to do. We are saying the absence of a substantial Justice role in this telecommunications think has the potential of cheating the American people.

Mr. KERREY. Will the Senator from North Dakota yield?

Mr. DORGAN. Let me yield the floor.

Mr. KERREY. Just for a question.

Mr. DORGAN. I will be happy to yield.

Mr. KERREY. The Senator from South Dakota asked and then raised in the following series of arguments against, after having asserted that the Department of Justice has a different role and function, which it unquestionably does—it has been managing the antitrust laws in transportation, not a competitive environment. Why should it not be different? Of course, it is different. As to the Yellow Pages case, it is a very important anticompetitive case, very important anticompetitive case.

Mr. DORGAN. Let me yield the floor to the Senator from Nebraska, if that is sufficient.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. KERREY. Mr. President, I thank the Senator. I am sorry for the long warmup to the question. I appreciate the yielding of the floor.

As to the question the Senator from South Dakota is asking, the language of 652 on page 89 appears to be—and I ask my colleague if he reads it the same way—on line 7, it says:

"The commission shall issue a written determination . . ."

And here is the language that triggers the administrative procedures that the Senator was asking whether or not would exist. As I understand it, case law says this is the language that you need in order to trigger the very administrative review that the Senator is for. The language is:

"on the record after a hearing and opportunity for comment."

I think it is a legitimate concern. I think the question that is being raised by the Senator from South Dakota is quite legitimate.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The senior Senator from Nebraska.

Mr. PRESSLER. Mr. President, if I could just answer that question.

The PRESIDING OFFICER. Will the Senator from Nebraska yield?

Mr. EXON. I yield.

Mr. PRESSLER. On page 89, "determination by the Commission," that is the Administrative Procedures Act applied to the Federal Communications Commission. My point is that it does not apply in Department of Justice proceedings.

The PRESIDING OFFICER. The Senator from Nebraska has the floor.

Mr. EXON. I think that is a fair point. Mr. President, I stand by the committee-reported bill's compromise on the role of the U.S. Department of Justice. As one of the architects of the Justice Department's advisory role compromise, I believe that this compromise delicately balances provisions that hold together very well even under the most dedicated scrutiny. The survival of the Federal Communications Commission public interest standard is a testament to that fact.

As a long-time art of compromise, the role of the Department of Justice is an example of how Congress should work together. Chairman PRESSLER
presented a draft on behalf of his Republican colleagues which embraced a day certain for Bell entry into long distance, no role for the Department of Justice in the long distance decision-making, and no savings clause to preserve the status quo.

Our ranking member, Senator Hollings, presented a draft on behalf of the Democrats who held equally firm to the position of no date certain, a separate decisionmaking role for the Department of Justice, and a full preservation of antitrust authority over the telecommunications issue.

What I am explaining is that a lot of thought and compromise and discussions and "cussions" have taken place with regard to this very important matter. I happen to feel that the Commerce Committee, on which I have served for 17 years, since I have been here, has done itself proud on this particular issue. We have, I think, by compromise, by understanding, by persuasion of what that the Department of Justice, indeed, has a role to play.

What we are talking about and debating today—and I think the debate is very worthwhile—is how much authority, how far can the Justice Department go in this area. I happen to believe that while this, like most other bills and most other amendments that we adopt from time to time, is not perfect, we are not certain how it is going to work out. But we are certain in that this issue has been debated very, very thoroughly, and I believe that we have something that makes a great deal of sense. I hope we will hold to the committee position.

Following months of consultation, negotiations, and bipartisan compromise, the committee recommended to the full Senate a bill which preserves an advisory role for the Department and certainly, without any question, preserves what I think was a necessary and required assurance that the antitrust authority is maintained in the Department of Justice where I think it rightfully belongs.

The compromise did not include a day certain for Bell entry into long distance, but it did include a certain procedure for entry that I think is important. It is a compromise, and I think it will work. It is a compromise which is balanced. It is a compromise which presented a win-win proposition as best we could. I certainly agree with the panel that Chairman Pressler and ranking Democratic member Hollings should be complimented for reaching out to each other and the Democratic and Republican sides of the aisle to come up with something that I think is something that has been described as providing a lot of wisdom.

I have been somewhat proud in the role of breaking the logjam between Democrats and Republicans on this particular critical issue and certainly I appreciate the fact that there are others in this debate, including my friend and colleague from Nebraska, who have made some excellent points with regard to the debate that has taken place on this vital issue.

At the heart of this debate is the appropriate role for independent regulatory agencies, of which the Federal Communications Commission is an important one. I trust that these agencies are a half-step among the legislative, judicial and executive branches of Government. We should keep it that way, I suggest. It has not been my experience that the Justice Department has always been the half-step. The question of coordinating the needs of the public at large. The Senate Commerce Committee has a unique relationship with all of the entities involved in these decisions. I have found over the years that Congress has a much easier time working to implement policy with the independent regulatory agencies than it often does with the executive branch and, specifically, in many instances, with the judicial branch.

The purpose of this telecommunications reform bill is for the Congress, the representatives of the people, to regain control of telecommunications policy. It is ironic that the Justice Department and I judge the central policy and communications policy from the congressional domain, and now here is a move to shift that control back to the world of the unelected, which I think the suggested amendment would do.

I make this point because the Department of Justice will have a key role in telecommunications policy. Its expertise will not be wasted, and there is a great amount of expertise within the Justice Department on this and other things with regard to communications. Nothing in this legislation repeals the antitrust statutes, and I debated and cited instances of that on Friday last. This legislation specifically requires that the Department consult with the Federal Communications Commission.

The bottom line should be one rule book and one referee. The preservation of the public interest test assures that the Federal Communications Commission will give the Department’s advice the most serious of consideration, as I think, by and large, history will prove they have done in the past.

At this time of reinventing Government, there is added merit to avoiding duplication, to avoiding loophole hunting around, looking to different agencies of Government to get relief.

To my colleagues who have expressed shock at the recent attacks on the Federal Communications Commission and the irresponsible suggestion that the Federal Communications Commission should be abolished, I suggest now is an appropriate time to stand up and show confidence in the independent judgment of that important agency.

Mr. President, I hope the Senate will follow the wind-thought-out and, I think, well-compromised and well-done effort on the measure that we have been debating now for some time.
Congress have really not substantially written a telecommunications bill for the 1990's. The telecommunications bill that we operate under was written in 1934. Does anyone doubt the technology increases we have had since 1934? We have had technological developments, and we are still being guided by an act written in 1934. You wonder why we have problems in this industry and you wonder why the Department of Justice has had to use not a telecommunications statute but an antitrust statute to help set telecommunications policy for the 1990's. The reason why it is not being handled very well in many cases is the fact that the law they are applying has nothing to do with telecommunications. It has to do with antitrust. The breakup of the Bell companies was not based on telecommunications policy set by this Congress. It was based on antitrust laws that were concerned about the size and monopolistic practices in this industry. Therefore, all of that was achieved in a haphazard fashion. We have a Federal J judge, who, to his undying credit, has done a heroic job in trying to set policy for the telecommunications industry. Judge Greene here in Washington. He has had to do all of that because we have not done our jobs. We have never tried to come up with policy that makes sense for the nineties and the years thereafter. I congratulate the chairman, Senator Pressler, and the ranking member, Senator Hollings, for their long contribution in trying to come up with a bill that balances those interests, that says to the billion-dollar companies on this side and the billion-dollar companies on that side that we, for the first time, are going to create an atmosphere in this country that allows the marketplace to work and fashion what is good for the consumers and good for technology development and good for the companies that provide telecommunications services. That is what this bill tries to do.

There are those who are going to argue that we cannot change the way we have been doing business because that is the way we have been doing business. We are not going to make any changes in the roles of the various agencies in Government because, well, that is what they have been doing since 1934. I think we have to understand that, with this legislation, we are calling for fundamental changes in the telecommunications business. We are going back to allowing people to be able to compete, and there will be losers and there will be winners among the companies. But I think that the competition that we will provide will make sure that consumers are the ultimate winners in what we do with this legislation, very important, very important. The role of the Department of Justice—and I have a great deal of respect for the junior Senator from Nebraska, Senator Kerrey, for his comments. I understand the points they make, saying that the Department of Justice needs to be involved in order to protect consumers and make sure nobody does things to other people and other companies that they should not. It is not appropriate when the old system existed, I suggest that that is not appropriate under the new system.

Let me give examples of why I think the Department of Justice—which is sort of the policeman or the cop when it comes to looking at various industries in this country—should not be, in this case, the policeman, cop, judge, jury, and everything rolled into one. It will still have a role under the chair- man's legislation. Their role will be to enforce the antitrust laws of this country. Nothing changes in that. No one can say that this bill somehow guts the Department of Justice's role in enforcing antitrust laws, because it makes no changes in that. They will still look at the trucking industry, the airlines, telecommunications companies and apply the antitrust laws of this country to make sure that they are being held up to the standard that the Department of Justice says they should be held to. But what is different is that they will not be the agency that regulates telecommunications in their day-to-day activity. They will enforce antitrust laws, yes, but they will not have to be an agency that sits back and says to all companies, you come to us and ask if you can provide telecommunications service. Please come to the Department of Justice building and file some more applications which may take 2, 3 years to get filled out because fundamentally the system is being changed. That is the big point that I think needs to be understood by all of our colleagues who are not on the committee—that this legislation of Senator Pressler and Senator Hollings fundamentally changes the way the Department of Justice building and file some more applications which may take 2, 3 years to get filled out because fundamentally the system is being changed. That is the big point that I think needs to be understood by all of our colleagues who are not on the committee—that this legislation fundamentally changes the way telecommunications policy is going to be carried out.

Therefore, under the old system when you needed the Department of Justice to enforce the law using antitrust laws, it is no longer necessary, because we have a new document, a new set of rules and regulations, as to how this industry is going to work in this country. The old way was defective. It was not the way it should have been. You had to go back and find antitrust laws to come in and protect the interests of consumers because we did not have the plan, a bill, a document that made sense. This bill makes sense, and this is the new rule book. It says that the Department of Justice's role will be to make sure that antitrust laws are not violated.

Let me give some examples. When you have competition and when you have deregulation, then you do not have to do the role for the Department of Justice, and that is what we are following in this legislation here today. I will give you an example with regard to the airline industry. The airline industry is regulated by the Federal Aviation Administration. They look at questions about safety and make sure that airlines are doing what they are supposed to do to make sure that they are safe. They also have economic regulation. They come in and start servicing a particular area. When they do that, they do it in a manner that is safe to the consuming public. There is competition and there are prices, and what have you. When you want to start an airline, you do not have to get permission of the Department of Justice and ask, “Can I do it?” You do not go to them for a permit to run an airline in a particular area. Now, if they become involved in antitrust violations, then the Department of Justice can get in right away and say, “Shut this down; it is in violation of the antitrust laws of this country.”

The airline industry, however, does not have to go and beg to the Department, “Please approve and give us a permit to serve a particular area.” That has changed.

Why has it changed? Because they have been deregulated. Now competition is how they operate. As long as they do it within the boundaries of antitrust laws, DOJ is not involved in that endeavor, the FAA is, the Federal Aviation Administration.

Let me give another example; that is, the trucking industry. When I was in the other body for 14 years, I was on the Transportation Committee. We worked the Department of Transportation, dealing with the trucking industry. I was there during decontrol and deregulation of the trucking industry. A carrier today, when they want to operate, goes not to the Department of Justice to get approval. They go to the Interstate Commerce Commission and get a new license to serve a particular area.

They look at the financial condition of the company. Can they operate? They look at the soundness of that company. In terms of its equipment, can they operate safely? Do they have enough equipment to do what they are supposed to do? And then they are granted permission to go out and serve areas—by the Interstate Commerce Commission.

They do not go to the Department to say “Please let us be a trucking company.” The Department still has the enforcement rights of the Sherman Antitrust Act. Of course, if they violate that act, the Department of Justice can come in and shut them down.

Now, the two examples I gave, I think, are apropos to the situation we have with the telecommunications industry. We have fundamentally changed how, with this legislation, how they will operate.

We are going to allow long distance companies, which in the past have been prevented from providing local service, to provide local service. There will be more people providing local service. It just will not be the regional Bells. There can be MCI, Sprint, AT&T, and
whole array of new companies providing local service.

Guess what? In return, we will allow local companies, principally the regional Bells, to be able to provide long distance service. There is going to be competition both in long distance and there will be competition in local service.

Therefore, it is the committee's opinion, and I think, wisely reached, that we have a different set of procedures and rules to be going to work.

That is why the committee said there is a different role for some of the agencies in Government, that they are not needed to do what they used to do because there is a different setup in the competition of providing telecommunications service.

What some of the Federal agencies want, we have new players, a whole new system, but we still want to play by the old rules. We have sort of a paternalistic attitude by some of the Federal agencies that say, 'Well, you got it, come on in, you can use it, provide local service, talk to our customers, use our networks, because we want you to have access to our business. In addition, they say that local loop transmission from the central office to the customer's premises, unbundled from local switching or other services; and next, local transport from the trunk side of local exchange carrier switch, unbundled from switching or other services.

Finally, local switching unbundled from transport, local loop transmission, or other services.

All that is very complicated, but what it essentially says is that Bell operating companies have to do all of these things, give permission to all your competitors to come in and use your equipment, use all of these things so you can compete for local customers, but in return for that we are going to start providing Inter-LATA service or long distance services.

Legislation says the Commission shall consult with the Attorney General regarding that application. The Attorney General may apply any appropriate approval or any appropriate standard that they desire under their rules and regulations.

The Commission must find that the requested authorization is consistent with the public interest, convenience, and necessity.

Mr. PRESSLER. Mr. President, I recognize that the leadership would like this matter to be voted on at about 6 o'clock, for the notification of all Senators. That would give Members 2 hours.

I shall have more remarks, but I will yield to other Senators. Those Senators wishing to speak on the Dorgan amendment should bring their speeches to the floor.

The PRESIDING OFFICER (Mr. Grams). The Senator from Nebraska is recognized.

Mr. KERREY. Mr. President, I inform the Senate from South Dakota, I object to the time of 6 o'clock. We should talk about it.

Mr. PRESSLER. Why would my friend object? We debated Friday afternoon and today. We are trying to move this process along.

Mr. KERREY. Mr. President, I understand we are trying to move the process along. It is not so much that I have an interest in debating this all night long. It is that there have been requests from a number of people who indicated they prefer to stack votes and vote tomorrow morning. I am obliged to tell you I think that is an unreasonable request.

Mr. PRESSLER. I am a great admirer of my friend and I plead with the Senator, we must move forward. I received word that there are many who would like to vote at 6. We will have to move forward, perhaps in a private conversation. But for purposes of other Senators in their offices, it is our intention to try to put this to a vote at 6 this evening.
The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. HOLLINGS. Mr. President, let me join in the desire of our chairman here to get a vote this evening. When we broke on Friday the understanding was we would vote at 5 o'clock, perhaps. Not specifically on this amendment. We would have votes. This is the amendment that is up. We discussed it some, actually, on Thursday; all day Friday. This has been a crucial amendment.

I guess the world is not going to end if we put it over to tomorrow morning for this particular Senator. But you could not call a vote at 6 o'clock, or 7 o'clock, or this evening at all, unreasonable. Because we have debated. We look for the Members to come and join in.

In fact, it has been debated on the telephone all weekend long. Because the pressure has been on. As a result, now, the Senator from North Dakota and the Senator from South Carolina have gotten together on the one amendment to get the best vote, I take it, possible on this particular issue.

With respect to the issue, Mr. President, I hear back to the hearings we had over a year ago. We commenced with the Secretary of Commerce, Secretary Ron Brown. The reason I refer to this is we are constantly being admonished: Wait a minute, you voted for this last year. Wait a minute, you voted for this last year.

I wish I could be as charming as the distinguished Senator from Illinois, the former minority leader—momentarily I think he may have been majority leader but he was mostly minority leader, Senator Everett Dirksen. And he said—I think he was quoting Emerson, "Consistency is the hobgoblin of little minds."

So, yes, the Senator from South Carolina voted for this last year. However, the Senator from South Carolina, and referring to Secretary Brown's appearance in February of last year—I refer on page 40:

Secretary Brown, Well, I certainly respect that view, Senator Danforth, and the one expressed by the Chairman. It is our view that VIII(c), administered by the Department of Justice, which has a good deal of experience, as the Chairman points out, would achieve the purposes of the committee and achieve the purposes of S. 1822. That is the only difference we have. We have the same goal.

Mind you me, S. 1822 did not have the Department of Justice as a checkoff at the bottom of page 4 of the bill, if you follow now, on page 7 of the bill down at the bottom on section 7.

Effect On Other Law. . . nothing in this Act shall be construed to modify, impair, or supersede the applicability of any antitrust law.

Mr. President, you cannot say it more clearly than that. I elaborated on it in the committee report and I turn to page 43 wherein:

The FCC is required to consult with the Attorney General regarding the application during that 90 day period. The Attorney General may analyze a Bell operating company antitrust application under Section 402(g)(2) (including the Clayton Act, Sherman Act, other antitrust laws, section VIII(c) the [modified final judgment], the Robinson-Patman Act, or any other law).

You see, that had not changed and is not changed by S. 652. So what we were trying to do, and as I pointed out as we started out on S. 1822, was to cut out the duplication, and certainly not give Attorney General authority to go down the road of the Department of Justice. The Department of Justice is a law enforcement department. In fact, under Sherman, Section 2 of the Sherman Antitrust Act, are civil and criminal penalties. I said when we started on this last week the telephone companies were not a bunch of criminals and there was not any reason to start getting them—yes, there is a difference. My distinguished colleague from Nebraska says get a different lawyer. You bet your boots you are going before antitrust, I can tell you now as I have had to face antitrust lawyers and this particular attorney, it is just like going to a doctor for a broken arm, on the one hand, and going to a doctor, on the other hand, for diabetes. They do not know anything in broken arms about diabetes, and diabetes cannot set any broken arms.

Similarly, in the legal profession, if you are going before antitrust, I can tell you now as I have had to face antitrust lawyers and this particular attorney was not expert, I had to go up to VanSeiss, in Chicago, for a solid week seminar, because we did not have any particular antitrust lawyers in Charleston, SC, at the time that were willing to take this case. I told the prospective client, I said, "Wait a minute I am not only to trust lawyer. I am not steeped in that particular discipline."

I had met VanSeiss and he had a seminar, and we buddied off, my law partner and myself, for a week's seminar and came back and figured we learned enough not only to trust but to prevail. But that is another story.

But I can tell you from hard experience, the answer is "yes." You do not get the same lawyers before the FCC, necessarily, and the same lawyers before the Justice and the Criminal Division of section 2 of the Sherman Antitrust Act.

The Clayton Act, in all fairness to the amendment of the Senator from South Carolina, Senator Thurmond, that deals strictly with civil penalties, with the matter of measuring whether there is excessive competition that could lead to excessive—not competition but monopolistic practices.

But in any event, let me refer back to page 43 of the hearing committee record so everybody who is interested about how we change—you are going to tell how change comes about. The chairman, which was Senator Hollings, said, and I quote:

Well, let me just comment on the matter about antitrust because I did discuss with Anne Bingaman this particular bill before it was introduced. And I made it known to her that, and she well knows I recommended her for the position of Assistant Attorney General out of charge of the Antitrust Division. She is a breath of fresh air. I am the appropriate chairman of the Antitrust Division of the Justice Department. I have been dealing with the moneys for this Antitrust Division of the Justice Department for numerous years, and I can tell you categorically we are way behind the curve in this particular field.

And she has got more. The FCC has its responsibility. On that basis, trying to eliminate law, trying to eliminate the delays, trying to simplify the procedure, which really do not need much effort for the Department of Justice other than consultation. Well, there is an egregious situation of monopolization... they do consult, and we put that in there. But that is once. The White House did not want to get into Justice and get into the Judiciary Committee and get bogged down.

That is exactly where we had intended, as I said at the very beginning, the one-stop shopping. But the White House disagreed, and the Justice Department disagreed, and numerous Senators disagreed, and the task of a chairman of a committee is to get the product you want. We do not long out of this procedure as you do not do injury to the overall goal of deregulation and fostering competition.

So I went on in the bill S. 1822. But those who continually say, "Well, you voted, you voted—last year. You should be admonished." Rather than admonishing me, my original intent as the chairman of the committee was to do just as Senator Pressler has provided in S. 652. So in S. 652 we provided the one-stop shopping at the Federal Communications Commission. The Department of Justice is totally unhindered and unaffected with respect to their antitrust responsibilities and authority. There is no question about that. No one has raised that question. They are seeking the amendment additional authority and responsibility, which I think very positively confuses the situation and constitutes a bad amendment.

Why do I say that? I say that for this language here in the Thurmond-Dorgan amendment. It says the "FCC, in making its determination whether the requested authorization is consistent
I am your lawyer. You have a communications company. You come to the lawyer and say, “Lawyer, tell me. What about this thing?” I say, “Well, it says it should not have any authority and the FCC over any antitrust section of marketing, in any market for which authorization is sought. However, we know marketing forces and we know forces of competition. And we know measuring market competition. You have an affirmative action responsibility empowered in the FCC by S. 652.” I say, “It is the present law.” or the law as my client would come to me. And I say, “They have to do all of this unbundling, dialing parity, interconnection number portability.” And I list all of these particular things. “You have the public interest section in here about marketing. Yet, you have a section in there that says you cannot touch the marketing thing if they reflect antitrust. Well, marketing competition is marketing competition. And marketing competition could be, as we lawyers say, the mime shows, or the same thing.”

I can tell you here and now you have a bad amendment where they are jockeying the Justice Antitrust Division and mess it up. I can tell you, leave the Justice Department Antitrust Division, leave section 2 of Sherman antitrust, leave section 7 of the Clayton Act, leave all of those things as they are. S. 652 does. But do not come wandering down the road with dual committee jurisdiction, dual jurisdiction, two types of attorneys, and everything else. And about the time, if you were going at the same time and think you are making progress now with respect to the Federal Communications Commission, after, say, two or three hearings, some antitrust lawyer gives out a release, saying, “Well, we are concerned about the XYZ communications company getting into this section 2 of the Antitrust Division.” It will stop. Boom. It goes right straight on down because you have the criminal department of the Justice Department, the law enforcement department, it is not regulatory, the public is confused, the market is confused, and it is confused. It is a bad, bad amendment. And let us not talk about where the expertise is.

I want to relate to the function now of the Federal Communications Commission. The Federal Communications Commission for year on end was to maintain a monopoly. They were there to protect AT&T and its monopolistic Bell companies. Today, we are supposed to protect the RBOC’s in a general sense. That has been the primary function in the Federal Communications Commission. But getting in the 1960’s, due to the pressure of Congress, the market and the evolving technology, in 1969 the Federal Communications Commission separated out the equipment from services somewhat as was later done with the modified final judgment in AT&T. We began to sort of measure competition and market forces.

Then in 1971, the Federal Communications Commission allowed competition for long distance services. Then in 1980, for the computer industry to get in, they provided competition for information services. That is the marketplace for information. Then in 1990, the Federal Communications Commission approved video dial tone in competition for the cable companies, which, in short, allowed the telephone companies to get into the cable business.

Most recently, last week—I will get that decision because we have it all lined out here—I think this is powerfully interesting, the Federal Communications Commission was taken to the circuit court for the District of Columbia in the case of the Warner Entertainment Co., petitioners, versus the Federal Communications Commission.

I wish you could read the lawyers. They are talking about lawyers. This is what we are trying to do. Look. They have three pages of lawyers in this thing; three, four pages, lawyers upon lawyers upon lawyers. I could interest the U.S. Senate no end about the lawyers for Warner Entertainment Co., for Warner Entertainment Co., for the Cable Television Association, Inc., for petitioners from the city of Austin and Dayton and King County, WA; Miami Valley Cable; Montgomery County, MD; St. Louis, MO, and the lawyers for the Cable Telecommunications Co.; Larry Tribe, and everybody else for Bell Atlantic, and on and on.

You talk about not getting lawyers in the Justice Department. There are lawyers coming out of my ears in one decision. Guess who’s what the court said in this decision.

With respect to rate regulation, Congress determined that local governments should be permitted to regulate only the basic service rates of those cable systems that are not subject to effective competition.

Yes. Measuring market forces, measuring market competition. You have heard all afternoon, “Wait a minute now. The Department of Justice is the market expert.” The Commerce is the market expert. The FCC over here is with megaertz, some kind of radio technicians and TV aerial boys. They do not know anything about measuring competition.” That is absolute nonsense.

Here is the most recent decision on measuring market competition saying that they did an outstanding job. The Federal Communications Commission struck an appropriate balance between the competing interests of the cable companies and their subscribers in violation neither of the 1992 Cable Act nor of the Administrative Procedures Act. It is listed as one of the FCC’s most significant legal victories because it is stated here—and it is the best wording I thought—that not only the Government—I will have to read that part. I wanted to refer to it. But they did an outstanding job in substance, take my word, and we will put the decision in the Record.

The Federal Communications Commission did an outstanding job in measuring competition—that is everybody in the world about measuring market competition.

I think it is highly significant that we do not start dividing the roles in your mind. The role of the Justice Department and the Antitrust Division is law enforcement, antitrust law enforcement, under 2 of Sherman, civil and criminal, civil and criminal penalties. I can tell you here and now that is the fundamental basis of the modified final judgment. That is untouched by S. 652.

What is suggested by the amendment is: we want to start posining a whole new series of hearings. About the time you think you can get through the FCC, here is the Congress that has come to town and said we are going to reregulate, we are going to let market forces operate but, oh, by the way, we are going to enforce into the regulatory and have two regulatory bodies. Here we are getting rid of the ICC because other than railroad mergers it has become deregulated—and the trucking industry. Here we are giving the Justice Department power with the Civil Aeronautics Board. Mergers, that is under the Justice Department, but under regular routes and approvals and gates and slots and safety we have the Department of Transportation and the Federal Aviation Administration. In communications, we have the Federal Communications Commission and they have talent coming out of their ears over there on measuring market competition.

Section 7 of Clayton under the Thurmond amendment of trying to determine substantially lessening competition is another market measure that the FCC has to make. That is why we wrote this bill this way. We are trying to get market competition. And we certainly do not want another division of government coming in. At one time they had it written so you had the Federal Trade Commission because under section 7 of Clayton you have both the Federal Communications Commission and the Justice Department.

And for a while, reading this thing, they had the Federal Trade Commission, the Justice Department, and the Federal Communications Commission, and then refer it to Congress and let them have a hearing and the Congress will say let us get a commission and study like we have done with Medicare. Come on.

Let us kill this amendment here once and for all. It is like it is anything other than what it is. We have not affected the fundamental responsibility and authority of the Department of Justice. The amendment is a
Jerry-built amendment of two interested Senators trying to get the Judiciary Committee on the Senate and House side with a say-so. They had a similar move over there. They have not reconciled it over on the House side. But let us get its one-stop shopping and say come in and here is what you have to prove and here is the entity that has the expertise and they will have it. And we will have the money for them. They made 7 billion bucks the other day in an auction. So have plenty of money at the Federal Communications Commission to do this unbundling, dial parity, nonportability, interconnection, public interest standard, measuring market forces and its competitive nature.

We have all that and let us put it in one place. Let the lawyers get this in one place. Let them get a more formative decision. And if at any time the Justice Department files in, as they did against AT&T in the 1970s, and they went with and they went with the antitrust procedures and everything else of that kind on law enforcement enforcing the antitrust laws, fine business.

I admire the Justice Department, particularly the Antitrust Division, particularly Assistant Attorney General, Ms. Bingaman, who has been in charge. She has done wonderful things with Microsoft and many of the other cases. She has plenty of work to do without adding more on now to have another regulatory commission or body resolved into the Antitrust Division of the Department of Justice and come in, walking down the same street, measuring market forces and everything else. There is no separation, as they say, where we have the technology and the technicians and the experts with respect to megahertz and TV towers and radio frequencies and all of these other things, whereas they measure the market.

On the contrary, the FCC has not only measured the market but measured it most successfully according to the circuit court of appeals just last week. I think we ought not to come in particularly with this phrase in here, where we have the FCC with responsibility and they come in with the phrase that is devastating. It says here—people do not study these amendments that you have to read.

Look at that amendment. I hope they can get a picture of that thing. You need a civil engineer and a compass, not just a lawyer. But it says here:

In making its determination whether the request for authorization is consistent with the public interest, convenience and necessity, the Federal Communications Commission shall not consider the antitrust effects of such request for authorization in any market for which authorization...

Well, the antitrust affects all within the marketing measurements that we have in here with the unbundling and the checklist and everything else, plus the public interest. So how in the world can they do half a haircut at one department and another half a haircut at another department and call this good law? It is a terrible amendment and it is abnormally so in the Attorney General.

Mr. ASHCROFT addressed the Chair. The PRESIDING OFFICER. The Senator from Missouri.

Mr. ASHCROFT. Mr. President, I rise in strong opposition to this amendment.

I recommend that my colleagues in the Senate carefully consider the implications of this effort to grant an unprecedented role to the Department of Justice. I happen to have the privilege of serving in the U.S. Senate now, but I once had the responsibility of being attorney general for the State of Missouri. I hope that my comments as an enforcement officer of an antitrust unit carry extra weight as we examine these very important issues.

We have heard the word "power" used often in this debate. On Thursday morning in summarizing this bill, S. 652, one Senator said, "It is about power. Mr. President, power to do what they want to do." I see it differently, Mr. President. Let us make no mistake about it, this bill is about change. This is a bill which allows us to look at the future and embrace it. This bill will allow us to look at the technology and opportunity and creativity of the future and take advantage of it. This amendment is about power, and this amendment would layer bureaucracies in the face of change.

Those individuals who want to set another layer of bureaucracy on the communications industry and upon the technology, creativity and innovation, those who would sponsor this kind of amendment, that would place lawyer of the Justice Department in this mix, are individuals who have gone to the precipice of the future. They have looked into the future, and they are running back in fear, running for the old ways of saying that we need government to protect us from the system of competition.

The truth of the matter is, nothing could be further from the truth. For what we have seen not only in the cellular area, where we have had competition, but in the whole local telephone market, is that we do not need protection from the competition. Certainly not multiple governmental bureaucracy protection. We need to let competition help us to have the lower rates in local telephones which we have found in the long distance area. We need competition to provide for us the benefits, as in the area of cellular phones, which competition has been very valuable to us in improving our opportunity for service. We need competition to help us, and competition in the context of regulation under the Federal Communications Commission, but not with the needless layering of bureaucratic regulation by the Justice Department.

George Gilder is an individual whose name has already been mentioned in several of the conversations in the debate, particularly by the Senator from Alaska. Before publishing his book, we had a lot of experience rings through their testimony. This is no ordinary bill. The stakes are higher than any of us can
Senator, and that Senator has advised this body to proceed with caution on such a monumental piece of legislation. We should instead have caution before putting the Justice Department and its lawyers into a historic role of replacing Congress as the Nation’s policymaker.

The transition from monopoly to competition requires great care. Indeed, it requires clearly defined parameters. For this reason, we have developed a substantial checklist. It is in the details that we find a specific debate. The checklist requires safeguards, so we put safeguards into the bill. Some have suggested that it requires experienced counsel, so we provide for an advisory role by the antitrust experts at the Department of Justice.

Let me emphasize this final point about the advisory role. We provide for an advisory role by antitrust experts, as the Department of Justice. Contrast this to what the others are saying. I think it is important for us to resist the idea that Congress should somehow choose the winners, choose the losers; that the pollution of politics would possibly infect those who would succeed and those who would fail. Let us have a level playing field, let us have a clear competition. Let us let the marketplace make those decisions.

The purpose of this amendment is to stand between the marketplace and the people. It is to play gatekeeper. The purpose of the amendment is to hand to the Department of Justice unprecedented power in shaping the future of the telecommunications of America. This is not a light matter. This is not a matter of consequence. This is an unprecedented power that Congress has never before granted to anyone.

Supporters of this amendment have been asked to give us a precedent for their proposal, but they have not provided one. As we have learned from the debate last week, the precedent is not to be found in the MFJ decree. Justice only has an advisory role in the court action of Judge Greene, the same role that is reserved and preserved in this bill in its current form.

It is in the best interest to elevate or escalate that role. I will not get into the entire argument here; however, it is worth mentioning that a very insightful colloquy took place on this floor last Thursday night. I encourage all Senators to read the outstanding arguments presented by the two managers, the Senator from South Dakota and the Senator from South Carolina. This issue should have been put to rest that evening. But proponents of the amendment press ahead, ignoring the experience of those Senators most able to judge whether or not balance has been reached in this bill.

Senator Hollings stood up and admitted he is a good witness to settle this case. I wish the other Senators would accept this.

I do wish to briefly comment on a specific argument that was suggested Thursday night that handing the Justice Department and its lawyers this unprecedentedly unprecedented legislation. Throughout this debate, that particular argument has been advanced by a
Please note, Mr. President, that the GTE consent decree was lifted by Congress—or will be lifted by Congress, not by 800 of the so-called I-am-here-to-help-you-friendly lawyers at the Justice Department.

In a case similar to the GTE case, a company called AirTouch has been relieved of its restrictions by this bill. This was a cellular carrier, once a subsidiary of PacTel. It has been an independent, publicly traded company since April 1994. Again, Justice would not remove the MFJ restrictions that were reserved for Bell companies. Again, Congress lifts the restrictions in this bill.

It might be interesting to add here that after AirTouch submitted an opinion at Justice stating its position that it was no longer bound by the MFJ, a competitor in the long distance market filed a letter opposing MFJ relief for the cellular carrier. We cannot say for certain whether pressure from a long distance provider involved any role in Justice's inaction—Justice's failure to relieve AirTouch of the restrictions. We can say for certain that this is the exact type of legal and political pressure that will be finding its way into an increasingly productive marketplace. The competitiveness of the telecommunications industry if we lay bureaucracy upon bureaucracy, meddling, and seeking to micromanage what the marketplace can properly regulate. We can say for certain that we do not want this type of legal and political pressure, which would be intensified to a degree beyond comprehension if Justice is put in the position of deciding MFJ relief for all Bell companies.

I am not saying, by any means, that 800 friendly attorneys at Justice do not know what they are doing. I am sure that they are experts in antitrust matters. Again, this amendment does not ask them to investigate antitrust violations; it authorizes them to implement congressional policy.

The question is whether this is the proper role of Justice. I think the answer is simple. I think it is time for the Congress to make that answer unmistakable. The answer is no. Let Justice continue its role as a prosecutor of the Sherman and Clayton Acts.

Let us consider another example in the cellular telephone industry. As we all know, several years ago in every city and town, two licenses were granted for providers of cellular phone service. In each of the seven Bell service areas, the incumbent Bell company was granted one of the two licenses. But the playing field was not even. One of the great advantages of cellular is its independence of the traditional landline and wire infrastructure. Cellular operators are not subject to the limits of the U.S. wire transmission company. They are, definition, mobile phone systems. This allows some cellular companies to offer creative price discounts to their customers.

The Department did not act to change this policy. A combination of court decisions and the Department's inaction has left Bell cellular affiliates unnecessarily restricted to its wireline boundaries, while non-Bell competitors enjoy all the costs and flexibility that the wireless world presents.

In fact, an interesting case developed that led to an incredible situation in Arizona. The non-Bell cellular carrier could offer the entire State in Arizona as a local call. The Bell affiliate could not. The Bell affiliate could not be bound by the rules that govern wire transmissions. When the non-Bell operator sold its license to another Bell affiliate, that Bell affiliate, having purchased the cellular company, could not even operate in the State as a local carrier even in one part of the state. Even though it was not even operating as a cellular carrier in its own landline region, the Bell affiliate operating in another part of the country had to respond to criterion that the Department itself designed. The Department could have easily defined the marketplace and the consumer.

So on one day, the cellular customer in Arizona was charged long distance rates. The next day they were charged local long distance rates. The customers in Arizona were denied substantial savings because of the Department policy. It is that simple. This is an example of the sort of officious meddling, micromanagement that is counterproductive, distorting competition rather than promoting competition, and costs consumers benefits.

The Department did not move aggressively against this industry. It is still undecided now on how to proceed. Making the decision is one of the tough things. The marketplace makes decisions efficiently and effectively. I believe competition also rewards those who make the right decision in the marketplace.

The Department is not the group which, in the words of one Senator, ‘is out there fighting to make sure that the marketplace really works.’ In that case, we are the best in the country and other cases like we just mentioned really stood between the benefits and the marketplace and the consumer. The Department denied Americans the opportunity to benefit from competition that we all believe brings out the best in each of us and the best in industry.

Mr. President, once again, Congress must act to correct this senseless policy. Purity has to be reinstated, and Congress must choose. We cannot lift all restrictions on cellular carriers so that there be a level playing field, allowing cellular phone operators and proprietors of cellular companies, saying any call you make is just a local call. Or we could extend the artificial restrictions to all carriers.

Now, the bill that we have here lifts those restrictions. This bill lifts all restrictions on the cellular industry and the next step is to say: Go ahead, make a long distance call for the same price a local call.

Congress acts in its proper role, and the FCC is instructed to implement that policy.

The interests of this bill have expected the delicate balance contained in the bill to be severely tested. The first test was on the definition of public interest. There are many who think that 14 criteria are enough, and that should do it.

There was a balance struck in the development of this bill. That balance was that we would protect the public interest by adding a definition including the public interest.

I must admit, Mr. President, I find myself in agreement with the arguments of the Senator from Arizona, Mr. McCain, among the cosponsors of the amendment that sought to take that public interest out of the bill.

I am uncomfortable with the breadth of the term ‘public interest,’ and I think it is time to have a less entrepreneurial view of what is considered as little room for subjective analysis as possible; that the Congress, representatives of the people, actually specify the policy, and that policy be carried out by the FCC.

But the managers called for a balance and they vowed to defend the balance. They are to be commended for defending that balance. I cannot think of two Senators who would better understand this matter than the two Senators who bring this bill to the floor.

They may have brought it here kicking and screaming. This has been a hard bill to put together. They deserve our support in maintaining this balance.

This amendment is one of the most serious assaults on the bill’s balance. A vote in favor of this amendment would not only destroy the balance of the bill, it would destroy the reason for having the bill, and that is to promote more competition and to extricate from this arena the heavy hand of Government.

The idea that when we look into the face of the future, we are so gripped with fear, we not only have to have regulation, but we have to have layered regulation, is an idea that we need to reject.

Let me leave a few final observations. The committee has heard from over 30 entities with a direct involvement in this legislation. Senator Hollosy, to his credit, went through the entire list last week.

Sure, it involved some big companies engaged in big battles. We even have present monopolies battling against former monopolies. The Baby Bells are being battled against Mamma Bell. But the American people know who has the biggest monopoly of all. The biggest monopoly of all is the monopoly of Government. The biggest battle
of this bill is not between the Baby Bells and Mama Bell, and the long distance companies and the local exchange carriers; the biggest battle is found right here in this amendment. It is between the Congress and the Department of Justice over who sets policy in this country.

I received a copy of a letter sent to Chairman Pressler by Henry Geller, former communications policy advisor under President Reagan, who also happened to be one of the late Senator's late nighter hearings. If the chairman has not already done so, and if the Senator from South Dakota does not mind, I would like to submit the entire letter for the RECORD. I ask unanimous consent to have the letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:


Mr. CHAIRMAN: We are a disinterested parties who have participated in the legislative process leading to S. 652. We address here the question of the appropriate role for the Department of Justice on the issue of entry by the divested Bell Operating Companies (BOCs) into the interconnected (IX) long distance and many local markets. We argue that it would be an inappropriate and seriously flawed process to give Justice a decisional role.

The Department and the antitrust court were necessary to effect the break-up of AT&T. But that court, using the Department as its "staff", is now engaged in essentially regulatory activity—namely, the terms and timing of full entry by the BOCs into all sectors of telecommunications. The FCC, as the expert agency with centralized authority in the telecom sphere, is engaged in the same area, but under an antiquated law.

A main thrust of the pending legislative effort is to move the antitrust court from the regulatory policy making process and to have the important policy guidelines set by the Congress and implemented by the established congressional delegates in this field, the FCC and the State commissions (with the FCC steering the States rowing). That is the sound approach of S. 652.

Justice, however, argues strongly that it should continue to have a decisional role on the two remaining MFJ issues—IX and manufacturing— and should apply an antitrust standard to these issues. But that makes no sense at all. If these matters are to be settled under antitrust law, there is no reason to remand court or the appellate court—to, in effect, leave the "staff" as the decisional point in the antitrust field. The whole point of the legislative exercise is to end the antitrust chapter and in its place to substitute Congressional guidelines implemented by the traditional regulatory scheme. Stated differently, with the antitrust court removed, what is left is a regulatory scheme. Justice's role is to prosecute antitrust cases—not to be a regulatory agency duplicating the FCC, so that there will now be two regulatory agencies.

This is not a new position for us. In a 1989 Report to the Benton Foundation on the Federal regulatory structure for telecom, the same conclusion—that this is a "cockamamie policy arrangement"—are set out in the context of the then conten-
of the committee he is prepared to stay here all night if necessary. So I urge my colleagues on both sides, I looked down the list. There are Democrats and Republicans who have amendments. We are open for business. We will have votes on amendments I think most everybody has been able to return from their States, and I hope we can dispose of some of these amendments tonight.

I notice an amendment by Senators Exon, Leahy, and Coats, a bipartisan amendment. I do not know what it is; some people think monopolies, some people think competition. Senator Leahy has another amendment. Senator Feinstein has three amendments.

So there are a number of amendments on each side. If I could just ask my colleagues to cooperate with both Senator Hollings and Senator Pressler.

As soon as we get clearance, then, I will ask consent that at noontime tomorrow there be a recess, Senator from South Dakota be recognized to table the Dorgan-Thurmond amendment.

Several Senators addressed the Chair.

Mr. Kerrey. I know the Senator from Montana is on the floor, and I will be here for a while longer. I just want to respond. There were actually three speakers this afternoon who opposed the amendment and said many things. The distinguished Senator from Missouri did not cite me by name, but he quoted me generously during his own presentation, and every quote he opposed.

Let me begin. One of the strongest arguments the distinguished Senator from Missouri and others have made is that you cannot trust the Department of Justice. You should not involve them with this. They do not have a role.

I, last week, made a mistake in assessing the Department of Justice. I said they have approximately 800 lawyers because I was informed that in 1982, when the consent decree was filed, that is approximately how many people were down there. That is true, 800—about 800 actually, in 1982. But today there are 323 lawyers and 666 total employees, total staff at the Antitrust Division at the Department of Justice. It is a very small agency.

This bill is about power. I do not walk, as the Senator from Missouri implied, to the precipice of change and be afraid of change. I am not afraid of this bill other than what it might do if we do not have the agency that has not only current responsibility but experience in managing what this bill describes we are going to do. This bill says we are going to move from a monopoly to a competitive environment. That is what it attempts to do. We are going to move from a monopoly to a competitive environment.

If the people of the United States of America are trying to figure out who do I trust in this deal, it was not the peoples’ Congress in 1982 that bused up the monopoly to competition. A Reagan appointee goes to the court and files a consent decree with AT&T, and that is what this is all about.

To set this thing up as “you are either for the devil or for the angels” sort of an argument does not, it seems to me, lead to a very constructive argument. The question really is how are we going to manage this? How are we going to manage this transition now? We have decided there is very little argument. I do not think there is a single Member of this body, maybe there is, maybe there is somebody who believes we ought to preserve the monopoly at the local level. I do not. The Senator from Missouri acts like that is the argument here: Choose the market or choose a regulatory environment. Have the Government tell you what to do or let the market tell you. That is nonsense, baloney. That is not the argument. It is not the question that needs to be answered.

If you believe you want to preserve the local monopoly and keep it the way it is, fine. I do not hear anybody or have not heard anybody yet argue that is what ought to occur. I caution Members that when we move from that monopoly to a competitive environment, there is going to be trauma, there is going to be real trauma, and we better make sure we get things right because it is not the demand for change we are talking about. I am an advocate for. The demand for change is not coming from town hall meetings. It is not coming from citizens in Missouri or citizens in Nebraska or citizens in Ohio who are saying, “I am unhappy with local telephone service, I am unhappy with my cable service, I am unhappy with broadcast, except for some of the things having been raised having to do with obscenity and violence and that sort of thing from some of the town hall meetings. But as far as, “Do I want a monopoly or do I want to deregulate?” That is hardly a debate going on there on Main Street.

We have made a reasoned judgment based upon input from a variety of different people that we can go to a competitive marketplace in local service. These arguments have a way of turning it around every now and then. In 1986, a couple of years after the consent decree was filed, we have seen that a divestiture had occurred. I supported legislation in the Nebraska Legislature to deregulate the telephone companies on the question of pricing. I tried to get them to change the law. The legislature changed the law to allow competition at the local level and was told—indeed I was rolled at the time, not told—I was rolled and we were not going to do that. Technology would not allow it. I have walked to the precipice and am fearful of embracing change, as was suggested earlier, in 1986 I asked and was given the authority to be the lead Governor for telecommunications for the National Governors’ Association. We reached a conclusion—I had a little task force—that we ought to, in an expeditious fashion, eliminate the restrictions that were currently in place in the modified final judgment. I thought we had the votes. I was sure you had all the votes, did all the calling and everything. We had a meeting, annual meeting, in South Carolina in 1986. I was sure I had that thing won. That year I got rolled by AT&T. They came and—Mr. DeWine—and said: Oh, no, if you loosen the restrictions and you have competition, all these things—they did, like many of the speakers have said—here are the horrible, terrible things that are going to happen. Here are the jobs are going to go down the toilet, things are going to explode and be bad. And we lost. We got rolled in 1986 trying to change that policy.

So I understand that there is a lot of active interest in whether or not the Department of Justice should have a role. Earlier, the Senator from Missouri said, “I am a former Attorney General and I have experience doing this.” And he said “I hope I am listened to.”

Mr. President, I ask unanimous consent a letter from 24 State attorneys general be printed as part of the Record at this point. There being no objection, the letter was ordered to be printed in the Record, as follows:


Dear Member of Congress:

The undersigned state attorneys general would like to address several telecommunications bills that are pending in Congress. One of the objectives in any such legislation must be the promotion of deregulation that fosters competition while at the same time protects consumers from anti-competitive practices.

In our opinion, our citizens will be able to look forward to an advanced, efficient, and innovative information network only if such legislation incorporates basic antitrust principles and recognizes the essential role of the states in ensuring that citizens have universal, affordable and accessible to the telecommunications network. The antitrust laws ensure competition and promote efficiency, innovation, low prices, better management, and greater choice. If telecommunications reform legislation includes a strong commitment to antitrust
principles, then the legislation can help preserve existing competition and prevent parties from using market power to tilt the playing field to the detriment of competition and consumers.

Each of the bills pending in Congress would lift the court-ordered restrictions that are currently in place on the Regional Bell Operating Companies (RBOCs). After sufficient competition exists in their local service areas, the bills would allow RBOCs to enter the fields of long distance services and equipment manufacturing. These provisions raise a number of antitrust concerns. Therefore, telecommunications deregulation legislation should include the following features:

First, the United States Department of Justice should have a meaningful role in determining, in advance, whether competition at the local level is sufficient to allow an RBOC to enter the long distance services and equipment manufacturing markets for a particular region. The Department of Justice has unmatched experience and expertise in evaluating competition in the telecommunications field. Such a role is vital regardless of whether Congress adopts a "competitive checklist" or "modified final judgment safeguard" approach to evaluating competition in local markets.

Second, legislation should continue to prohibit mergers between telephone companies in the same service area. Such a prohibition is essential because local cable companies are the likely competitors of telephone companies and such mergers raise the possibility of a "one-wire world," with only successful antitrust litigation to prevent it. Congress should narrowly draft any exceptions to this general prohibition.

Third, Congress should not preempt the states from ordering 1+intraLATA dialing parity in appropriate cases, including cases where the incumbent RBOC has yet to receive permission to enter the interLATA long distance market. With a mere flip of a switch, the RBOCs can immediately offer "one-stop shopping" (both local and long distance services). New entrants, however, may take some time before they can offer such services, and only after they incur significant capital expenses will they be able to develop such capabilities.

In conclusion, we urge you to support telecommunication reform legislation that incorporates provisions that would maintain an important decision-making role for the Department of Justice; preserve the existing prohibition on mergers of telephone companies and cable television companies located in the same service areas; and protect the states' ability to order 1+intraLATA dialing parity in appropriate cases.

Thank you for considering our views.

Very truly yours,


Mr. KERREY. Mr. President, with some assist from my drugstore eye glasses, let me read one paragraph from it. It says, "The United States Department of Justice should have a meaningful role in determining, in advance, whether competition at the local level is sufficient to allow an RBOC to enter the long distance services and equipment manufacturing markets for a particular region."

Understand we are not just talking about the intraLATA long distance. We are also talking about removing the restrictions on manufacturing.

So the question is: Do you have some competition at the local level? If you have it, it will allow you to get into previously restricted areas.

The Department of Justice has unmatched experience and expertise in evaluating competition in the telecommunications field. Such a role is vital regardless of whether Congress adopts a "competitive checklist" or "modified final judgment safeguard" approach to evaluating competition in local markets.

Mr. President, I really do believe this is one of those amendments that ought to be characterized as a choice between two adversaries. It talks about the Government regulators who are going to micromanage everything in your life or choosing the market. But what we are attempting to do in good faith is answer the question, "How do we manage this thing?" This is an unprecedented change, unprecedented that Congress is going to attempt to manage. We have reached the decision, I believe a majority of us have, that we should use competition in the local market, competition in manufacturing, competition in services, competition in switching, not to regulate but to determine what is the best service, what is the best piece of equipment, what is the best switching offered out there. Let competition determine that. We have been successful in long distance. We grow confidence based upon success. We can do it at the local level and in manufacturing. We are about at the edge of enacting legislation to do that.

The question before us is, "Should we give the Department of Justice more than a consultative role?"

I would like to offer a couple of things. Earlier the Senator from South Dakota I believe had a question having to do with administrative law with the Department of Justice, a very good question. I will try to restate the question—I do not know if I will get it right. The question was with the Federal Communications Commission, we have an open process. You have an administrative law that governs hearings and so forth. It has to be open. Then the Senator from South Dakota asked—at that time it was the Senator from North Dakota on the floor—would the Department of Justice have that same kind of law apply to it? The amendment specifically inserts on the page that the Senator from South Dakota referenced on page 89, and it refers to the determination by the Commission and the Attorney General. They would issue a written determination on the record—after hearings and the opportunity for a commitment. So the language that we discussed earlier, I say to the distinguished chairman of the committee, does not just refer to the Commission. It also refers to the Department of Justice.

Second, I say it again for emphasis, we are not talking lawyeering or a new bureaucracy. It is a parallel process. You apply specifically what one does, and what the other one does. You ask the guy that has the experience. We are trying to figure out. Do we have the competitive market, perhaps in a perfect fashion? You are looking for the person that got the job done before this, the person you ought to call on in the agency, a very small agency I point out, again to attempt to manage this transition again.

Then one of the questions that comes up says, "Well, we did not do this with airlines, we did not do this with trucking, we should not do this with telecommunications." Telecommunications is by many people's estimate one-half of the U.S. economy directly or indirectly. It is a big part of the economy, probably two or three times the size of the entire health care industry which was of great concern to us during our debate in 1993-1994. At least that is what has been represented to me. It leads directly to the manufacturing and the production of goods and services, or indirectly the information industry is now roughly half the U.S. economy. Not all of these are regulated. Many of these are unregulated businesses. We are talking about in any event managing a substantial amount of the U.S. economy; that is to say, not managing it. We are managing from a monopoly situation trying to transfer the control of the decisions from regulators so that the marketplace is making those decisions. The reference earlier was that airline and trucking
would be a good example to use and based upon the success of airline and trucking deregulation we should not have a DOJ role.

However, Mr. President, I look at a couple of incidents.

From 1985 to 1989, during the transition from airline regulation to competition, the Department of Transportation had the authority to approve airline mergers, subject to advice from DOJ. In 1986, DOT approved two mergers over DOJ's vigorous objections: Northwest Airlines' deal with its main rival in Minneapolis, Republic, and TWA's acquisition of Ozark. DOJ advised DOT that each transaction would sharply reduce competition for air travel into and out of the affected city. DOT rejected this advice, concluding that the deals would not result in a substantial reduction of competition in any market.

Unfortunately, DOT—without expertise in assessing competition—was wrong. Just as DOJ predicted, the transactions resulted in higher air fares and less choice for travelers at the Minneapolis and St. Louis hubs. In fact, an antitrust expert at the General Accounting Office found that TWA's air fares at St. Louis shot up at two to three times the rate of all other air fares in the wake of the merger. The Department of Transportation now concedes that assigning the job of making competitive assessments to it, instead of DOJ, was a mistake.

Mr. President, we are not talking about an assignment of responsibility here that is heavily bureaucratized. We are talking about a question that we ought to be able to assess, particularly when the fact that I believe it is the case is that there is a lot of uncertainty about how to be held accountable for this vote. Those of us who are advocates of deregulation are attempting to answer the question, “How do we do this in a fashion so that our consumers get the benefits of lower prices and higher quality that comes at a competitive environment?” We want to make sure that, as you move from a monopoly to a competitive environment, the consumers indeed benefit from that transition. DOJ still has the role. It is not enough. DOJ has the role after the fact, not prior to the decision being made. The Antitrust Division is not doing the same thing as the FCC. It is not duplication, as has been alleged.

As to the delays, I can go through that argument. I have gone through it once before. If you examine the detail of why there has been delay, I think the presentation of the charts going up to the right, in fact, fall on their face.

The Department of Justice is an independent

Mr. President, I yield the floor. I now ask

Mr. PRESSLER. Mr. President, I now ask

from 11 to 12 noon, unless there is objection, will be an hour equally divided on that amendment.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I might review these checklists here.

Mr. President, today, I pointed out the system that we have set up that really explains this bill, how you get into other people's business under this bill, how we really do not need a Justice Department review.

Next, the Antitrust Division is not doing the same thing as the FCC. It is not duplication, as has been alleged.

Mr. DOLE. I thank the Senator from Nebraska. I think this will work. He is not putting into it is not being of some use to the only time before noon for final argument, maybe from 11 to 12 to be equally divided between—so you would have 1 hour of debate before the motion to table. So
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computer assisted reporting, and special pricing rules.

Meanwhile, when all this is going on, you still have the full application of the Sherman Antitrust Act, the Clayton Act, and the Hart-Scott-Rodino Act. The Justice Department is involved. There is sort of an implication here that if we do not give the Department of Justice an administrative decisionmaking role they are not involved. They are very much involved. They are very involved in antitrust laws, and they are still involved in full participation in all the proceedings, and they are involved in the Hobbs Civil Appeals Act. The Department of Justice can be an independent party in all FCC appeals.

In addition to all this, the FCC must confer with the Attorney General and the Attorney General can recommend an VIII(c) test or a Clayton standard or a public interest standard, those three things.

So I would like to point out that we already have a lot of conditions. By the time you go through all of this, it is going to cost a company and the taxpayers a lot of money, and it is going to require a lot of tests—14 tests. The Justice Department, the separate subsidiaries. It goes on and on and on. So there is plenty of regulation and plenty of review in the proper regulatory agency.

Now part of this is the so-called competitive checklist. This is the heart of the compromise that was reached. Some of the conservative magazines and some of the Senators wanted a so-called LeMans start where you can compete. But this bill will not have any of that. What we have in this separate is a competitive checklist. This replaces the market test, the Justice Department's test. It is the product of all 100 Senators' work, even my good friend A. L. Gore, talks about deregulating and privatizing. Here it is. Here is our chance.

The Justice Department got into regulation the first time with Judge Greene's consent in 1982. They have several lawyers over there who carry out the Justice Department's role. It is a regulatory role at this time. There is talk of abolishing the ICC. There is talk of deregulating and deregulation the last stages of the wired telecommunications era.

We are told this will only take 90 days; we are going to put a 90-day requirement on it. Even taking 90 days is another delay. Some say you can do this simultaneously. As a practical matter, you cannot. You have to get through your State, you have to get through the FCC, and then, if you win here at the Justice Department. We do not need this additional review. That is more regulation. That is what we are trying to avoid.

It is true, in the past, there have been suggestions for VIII(c), but we have come up with a way to replace it, which is quicker and covers all the subjects and has been agreed to by everybody. So we have a bill that finally has crafted a balance between the long distances and the Bells. We are now ready to go into business, but if the Dorgan-Thurmond amendment is not adopted, no, wait a minute, we have another layer of bureaucracy.

What is wrong with giving the Justice Department this authority? There are a number of things wrong with it. First of all, the Justice Department's enabling statute does not say that it is a regulatory agency. The Antitrust Division's enabling statute does not say that it is a regulatory agency.

The Justice Department got into regulation the first time with Judge Greene's consent in 1982. They have several lawyers over there who carry out the Justice Department's role. It is a regulatory role at this time. There is talk of abolishing the ICC. There is talk of deregulating and deregulation the last stages of the wired telecommunications era.

But our friends would have us make the Justice Department for the first time in history by law a regulatory agency. There is no other area in commerce that is true. It is not true in aviation, it is not true in transportation, it is not true in railroads. Originally, the ICC was created in about 1934. Both agencies were intended to be the regulatory agencies. There is talk of abolishing the ICC. There is talk when we get into the wireless age of substantially reducing FCC, or that perhaps we will not need the FCC. I do not know about that. That is another debate for a later time.

But this bill will take us into transition from the wired age to the wireless. We are in the last stages of the wired telecommunications age. I think it will last 10 years. Some people think 15; others think it will last about 5. But this bill will provide us with competition and deregulation in the last stages of the wired telecommunications era.

But to give the Justice Department a regulatory role at this time would be a step backward. That is regulation. That is another layer of regulation. Even if you win here, even my good friend A. L. Gore, talks about deregulating and privatizing. Here it is. Here is our chance.
So I think that debating whether or not to have a Justice role on this particular part of this bill is very important.

Let me say that in all aspects of this bill, we are trying to deregulate, whether it be in the utilities into the telecommunications with safeguards, moving toward deregulation of cable with safeguards, getting the Bell companies manufacturing and letting them get into other areas, such as cable, letting the long distance people into the local market, de-regulating the broadcasters — this is a vast bill. It deregulates almost everything.

But if we adopt this amendment, we are going back to a major layer of regulation regarding the Bell companies in long distance. I cannot conceive of why we would do that. Our consumers have an interest in deregulation and competition. They are protected by the FCC with the public interest necessity and convenience standard. They are also protected at 251 by other safeguards. If the FCC appeals, the Justice Department can join independently on that appeal. So there is already heavy Justice Department involvement.

So I say to my friends that we really need to decide if we are deregulating or if we are shuffling along with more regulation. If we allow the Dorgan-Thurmond amendment to be adopted, we would be delaying competition at least 2 or 3 years. My friends say, “Oh, it will only take the Justice Department 90 days to get this done.” That is not true. They already have a 30-day requirement on them, and they are taking as much as 3 years to get something done over there.

I see some other Senators on the floor. If anybody else would like to speak, because I am going to be here all night, if necessary, I will yield the floor to anyone who wishes to speak.

Mr. DOLE. I would like to speak in response.

Mr. KERREY. Can I just change the consent?

The PRESIDING OFFICER. The majority leader.

MODIFICATION OF UNANIMOUS-CONSENT AGREEMENT

Mr. DOLE. Mr. President, earlier I asked that the Senator from South Dakota be recognized at 12 o’clock to move to table. I modify that part of the agreement and ask unanimous consent that he be re-recognized at 12:30 tomorrow to make a motion to table the Dorgan-Thurmond amendment, and that the hour for debate be from 11:30 to 12:30 instead of 11 to 12.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. DOLE. I might indicate, this is made to accommodate a number of Senators, Vietnam veterans, who have a special interest that does not end until about 12:35, as I understand.

Before the Senator from Nebraska speaks, let me say that it is my understanding that there will be a vote fairly soon, as soon as Senator Feinstein comes to the floor. She has an amendment with Senator Lott. It should not take much debate.

So I tell my colleagues, or members of their staff, there probably will be a vote in the next 45 minutes. I am now advised she cannot be here until about 6:30. Let me think about that, and I will say something after the Senator from Nebraska speaks.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, we have been debating this particular amendment, although in its current incarnation just about 4 or 5 hours, but we have been debating the overall role of the Justice Department for a couple of days now.

I am beginning to learn that in debate—I had not noticed it used quite so often—but one of the devices that one uses in debate is you set up a straw man and you say, “Do you want that strawman?” And you say, “No, I don’t want that strawman,” and then you knock it down with your argument.

The strawman in this argument is to say that Justice will require the poor old phone company, little old mom-and-pop phone company, to go through all this burdensome procedure before the Federal Communications Commission and then go over to the Department of Justice and that we are setting up a whole new level of bureaucracy.

It is not true. That is not what is going on. It is a simultaneous process. The idea that somehow it is not going to occur simultaneously is an idea that is sold, but I do not believe is an effective sale. The question is not do you want the Department of Justice to regulate—we are not asking for regulatory authority—the question before the body is, do you want, as you proceed to deregulate any one of 800 of the long distance companies—when you get right down to the application, the FCC will be making a judgment, just as the Department of Transportation did, as referenced earlier, when TWA tries to acquire Ozark, or when Republic is the target of Northwest Airlines. In the deregulation of the airline industry, we did not give the Department of Justice the authority to say we do not approve of it. We do not think there is competition. We do not think there will be competitive choice. We think this will decrease that.

That is the question before us is not do you want the Department of Justice, in an unprecedented fashion, to regulate, but do you want the Department of Justice to have a role more than “What do you think?” The Department of Justice, under this amendment, would have a role to say, “There is not competition at the local level, and we do not believe this application should be approved.” That is the question before us.

We are going from a monopoly to a competitive environment. We are not citing enormous power in a conspiratorial fashion. With or without this amendment, I say to my colleagues, there is substantial deregulation. Without this amendment, if this fails, your cable company can still price its premium service without being regulated. Rupert Murdoch can still acquire 50 percent of the television stations in a local area. With or without this amendment, you have companies out there that will be doing things they were previously prevented from doing. This bill will deregulate without this amendment.

So this is not a question before the body that you have to answer, such as, “Do I want to deregulate, or do I want to continue the current regulatory structure?” We are going to deregulate either way.

The question before the body is, do you want the Department of Justice, with a date-certain requirement, involved or not just. Oh, what do you think about this proposed”—I almost said merger. But that is what it becomes. One of the ironies is, if a local telephone company acquires or merges with a local cable company, the Department of Justice would have to approve it. Nobody suggests that is undue regulatory authority. Effectively, when you go from a monopoly with a local franchise into long distance, it is effectively the same thing. The question before us is: Do you want the Department of Justice getting involved, or do we not think there is competition?

Now, very instructive for Members, as you try to reach that decision, I think, would be to go through either one of the checklists. There are two, by the way. In section 251 there is a checklist that says here is what a local company has to do, if a long distance or another carrier—and my vision for competition, by the way, again, is that you get competitive choice not for the purpose of cutting down the quality of businesses, but you get it for a package of information services. So it is likely to come, this desire to compete at the local level, and the competition and the desire is just as likely to come from a medium-sized entrepreneur that wants to deliver information services to a resident in Cleveland, or Omaha, or wherever. That is apt to happen.

In section 251 there is a checklist, as well, that says here is what you have to do, if a pretty, if you want. In fact, it may be tougher than in 251. In 251, you have a checklist that says this is what you have to do if you want to do interLATA, or long distance service. If you are a local telephone company, this is what you have to do. Well, I do not doubt—and indeed I know—that the committee spent a long time putting this checklist together. There are 14 things. But read them. Read them and then ask yourself the question: Does this mean I have competition? Is this making a competitive choice at the local level? For the consumer a competitive choice means that if they do not like the business
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that is offering to sell them something, they can shop it someplace else. That is a competitive choice. Competitive choice means that business person that is selling you something has to make sure that the price and quality and all of the other terms and circumstances of the sale are what you want, or you take your business someplace else. That is what a competitive choice provides a consumer.

Well, I do not know if this 14-point checklist has done it. Does it do it? Maybe it does. I do not know. Again, it is a very impressive check-list. Members ought to read it. Ask yourselves what does it mean if I have "nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating company's telecommunications network that is at least equal in type, quality, and price to the access the Bell operating company affords to itself or any other entity."

That is a very simple formula to mean that you have a competitive opportunity. I do not know. The real test of competition is going to occur when the consumer says, "I have competitive choice," and when that person in the neighborhood says, "I have competitive choice," and my service does not do it like this. The price is too high. The quality is not what I want. I am going to take it someplace else." You do not have that today with local telephone and cable.

We are trying to move from that monopoly situation to a competitive situation, and we are merely saying with this amendment: Ask the Department of Justice—not giving them regulatory control in some sort of dark and mysterious fashion, but ask the agency that, on a regular, routine basis, is charged with a responsibility of assessing whether or not you have competition. If you do not think they can do it, look at their success in this industry.

Are they any real concerns about the Congress in 1982 that stood up to AT&T. Congress did not stand up to AT&T and say we have had enough of this monopoly, our consumers and citizens are complaining; we are going to pass legislation and divest you. Congress did not do that. The people's Congress did not respond to that and pass legislation. It was the Department of Justice that filed a suit against them originally, and eventually, as a consequence of AT&T believing they would win the suit, wrote up a consent decree and file it with the judge.

I hope that colleagues understand that this amendment is not offered as a consequence of our desire to continue regulation. As I said, we are deregulating telecommunications with or without this amendment. So the choice is not do I favor deregulation. With or without this amendment, you will have deregulation. I hope my colleagues do not fall into the illusion that this is a choice between do I want another layer of bureaucracy, or do I want to prolong the process? If there is a specific objection to the language of this bill that implies there might be an unreasonable delay or might layer on bureaucratic bu- reaucracies, bring it. We have made modifications already in the amendment. I do not want to layer on excessive bureaucracy.

I urge my colleagues to go back and look at airline deregulation, in particular, with the purpose of trying to revisit and reargue that thorny, old problem, but to look at what happened to the Department of Transportation, which was making the decisions, and the Department of Justice was merely in a consultative role. They merely said, "We advise against them," rather than being in a position where the companies understand that they do have the ability to say there is competition, thus, let us go forward, or say there is no competition, do not allow it to go forward. I yield the floor.

Mr. GORTON. Mr. President, as one of the members of the Commerce Committee, I think it is in order to balance this legislation in the fashion that it appears here on the floor, and also as a Senator who has great respect for the views of the Senator from Nebraska, I must say that I find myself unsatisfied with a competitive choice. Competitive choice means that business person that stood up to AT&T. Congress did not do that. The real test of competition is not the story of the sale are what you want, or you take your business someplace else. That is what a competitive choice provides a consumer.

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television service or simply seeking to get into the long exchange business, are able to do so that the various conditions—some of which have been referred to by the Senator from Nebraska—are included in the bill.

Mr. President, the goal of the bill, the non-authority, is to create added competition in both telephone fields, in both long distance and in the local exchange.

Any additional requirement which slows down that process on both sides of the equation seems, to this Senator, to be undesirable.

So what the bill does is to set up a set of 14 reasonably objective conditions that must be met by the regional Bell operating companies to open up their local exchange before they could get into the long distance business and provide competition and, one hopes, lower prices.

The committee was not absolutely satisfied any more than the Senator from Nebraska is absolutely satisfied with the existing matter of those 14 conditions would, under all circumstances, be sufficient to open up the local exchange.

So it added the public interest convenience and necessity condition, really; the need for a regional telephone company, for the Federal Communications Commission, which almost from time immemorial, has been the Government entity and agency with expertise in this field, to determine in the broadest possible sense that the requested authorization was consistent with the public interest, convenience, and necessity. A test which has been a test utilized by that Commission ever since or almost ever since its creation.

Mr. President, in adding the Department to this mix directly as a regulatory rather than as an advisory entity, the amendment, it seems to me, creates the worst situation, worse then abolishing the FCC and having this done only by the FCC, worse than leaving the way it is in the bill at the present time.

Because, Mr. President, the Attorney General expressly has advisory authority to the Federal Communications Commission in this connection.

I suspect that in most cases, the Attorney General goes to the Commission and says, "This is a terrible idea, to let this Bell into the long distance business." We think it is going to, somehow or another, create a tremendous morass.

I strongly suspect that the FCC will listen to and abide by that advice unless, in its own greater expertise in the communications business, it feels that the Attorney General is flat out wrong, just do not know very much about this particular subject.

The sponsors of the amendment, in their desire to have two different entities involved in this business, have really created a most curious division of authority.

Whereas, the bill as it stands without this amendment, the authority of the Federal Communications Commission in dealing with a determination of
public interest, convenience, and necessity, is essentially unlimited, this amendment deprives the Commission of the ability to consider the effects of the authorization in any market for which the authorization is sought, with respect to its impact on competition.

Mr. President, it is very likely that may be the centerpiece of what the FCC would base its determination of public interest, convenience, and necessity on under normal circumstances.

This mention of public interest, convenience, and necessity is carved out in order to be given to the antitrust division of the Office of the Attorney General. In other words, the FCC is really going to no longer be able to consider all of the elements which go into a determination that authorization is in the public interest, convenience, and necessity.

Just last week, Mr. President, in balancing this bill, we turned down an amendment which would have stricken that authority. We did not feel, a majority of the Members did not feel, any more than a majority in the committee felt, that we could absolutely and under all circumstances rely on the 14 categories.

So, now, in the interests of speaking out on antitrust matters, the sponsors of this amendment were normally thought to be on this side of the debate. The amendment, sponsored last week’s amendment were on that side, and the committee in the middle, are doing much of the work that the sponsors of last week’s amendment sought to do themselves and were rejected in that course of action by, I believe, all of the sponsors and most of the supporters of this amendment.

So, to recapitulate, this proposal deprives the Federal Communications Commission of authority it ought to have to continue to operate as a new kind of authority to the Attorney General of the United States, a kind of authority that the Attorney General does not have at the present time.

I want to go back. The Attorney General in this bill is to be consulted by the Federal Communications Commission, and in this bill the Attorney General is not deprived of any of the authority of that office with respect to monopolization or the enforcement of the antitrust laws, just as it can stop a merger in cases that the Attorney General believes that the impact of such an authority is to create a monopoly, it may bring the same kind of litigation that it brought that resulted in the breakup of the old AT&T. But one further matter, as that is brought up as something which took place through the Department of Justice, the Department of Justice did not determine to sue AT&T to break up that monopoly in 90 days. And here in this bill the Attorney General is given only 90 days to make this determination, not of something that has happened in the past—which is fairly easy to determine—but something that might possibly happen in the future. I do not believe, that the authority given the Attorney General in this bill can effectively be used in a period of time like that. It is clear that we now have two different Federal entities under this amendment having authority over the same matter. One on the one hand, based on the FCC’s authority on two quite different sets of tests and that, apparently, they will not relate to one another.

Finally, it is clear to this Senator, at least, that it is more likely than not that this added authority, this two month authority of the Federal Government rather than one, is likely to slow down the creation of competition, certainly in long distance, and very unlikely to speed it up in connection with the local telephone market.

So, I would summarize by saying I do not believe the committee on which I serve and on which this structure was worked out by the careful work of the chairman and the ranking Democratic member, and for that matter almost all the members of the committee, is some kind of justice compromise. It is the result of careful and sober thought as to what was the best system available for reaching two goals: one, the creation of competition in the most rapid possible fashion, both in long distance and in the local exchange; and at the same time the prevention of monopoly and the service of the public interest.

So, my own summary is that the bill, as it stands, is greatly superior, from the perspective of the public interest and competition and consumers, than it would have been had the McCain amendment been adopted last week striking the public interest section and, equally, than it will be if this amendment is adopted putting two different entities of the Federal Government into the same mix, artificially divorcing them from one another, frustrating the traditional role of the Federal Communications Commission and, in my view, frustrating the development of technology and of competition.

For those reasons I trust when the distinguished chairman of the Commerce Committee moves to table this amendment tomorrow, that his motion will be successful.

Mr. PRESSLER. If my friend will yield for a question. Let me say, in the context of this, I hope the Senator from California will offer her amendment. The leader has asked that there be a vote—if that is agreeable to everybody—at about 6:30 on the Feinstein-Lott amendment. But I would like to, just in concluding, commend the Senator from Washington, a former State attorney general. There is one question, if he could make a response before, hopefully, the Senator from California departs on the floor, and that is the extraordinary, unprecedented decisionmaking role for the Department of Justice that is proposed in the Doran-Thurmond amendment.

As a former State attorney general, he has ever seen a proposal where the Justice Department would become the decisionmaker, a regulatory decisionmaker? I guess this question goes to the heart of the division of powers in our Government.

Mr. GORTON. I do not believe I have. I would hate to make a totally generalized statement on that, but certainly I would say not in the memory of my experience as State attorney general nor do I find the Department of Justice have such authority.

I yield the floor.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I have actually two amendments, one involving the cities and a preemption clause in the bill, and the second is an amendment I would like to send to the desk right now.

AMENDMENT NO. 1269

(Purpose: To provide for the full scrambling on multichannel video services of sexually explicit adult programming)

Mrs. FEINSTEIN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN] for herself and Mr. LOTT, proposes an amendment numbered 1269.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Page 146, below line 23, add the following:

SEC. 407A. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

"SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent and harmful to children on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of any channel so that one not a subscriber to such channel or programming does not receive it.

(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION.—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the audio and video portion of the programming cannot be received by persons unauthorized to receive the programming."
(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of the enactment of this Act.

Mr. PRESSLER. Will my friend yield?

Mrs. FEINSTEIN. I certainly will.

Mr. PRESSLER. Mr. President, I ask unanimous consent a vote occur on the Feinstein and Lott amendment at 6:30 this evening and the time between now and 6:30 be equally divided in the usual form.

I might say I am going to yield as much of my time to the Senator from California as she wishes. And I ask unanimous consent no second-degree amendments be in order to the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from California.

Mrs. FEINSTEIN. I thank the Senator from South Dakota and I thank the Chair.

Mr. President, on behalf of myself and Senator LOTT I offer this amendment, which is a rather simple and direct amendment. It concerns the proliferation of adult video programming that is not sufficiently blocked for children to view. It is a commonsense amendment and it is simple. It would require multichannel video programmers, such as cable operators, to fully scramble or otherwise block sexually explicit adult programming unless a subscriber specifically requests such programming.

The full blocking requirement would apply to those channels primarily dedicated to adult sexually oriented programming, such as the Playboy and Spice channels. Until these channels are fully blocked, cable operators would have to restrict their broadcasts to certain times of the day when children are least likely to view it, such as at night.

Last year I learned that in many households across America, adult programming was being broadcast around the clock on certain primarily sexually oriented channels, with only partial audio and video scrambling.

This issue first came to my attention when a local city councilman in Poway, CA, a suburb of San Diego, wrote to me about the problem in his community. He said that in San Diego County, partially scrambled video pornography—replete with unscrambled and sexually explicit audio—was being automatically transmitted to more than 320,000 cable television subscribers.

Unfortunately, many subscribers and parents were unaware of these transmissions until they or their children accidentally discovered the programming. In San Diego County, for example, the partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons unless it was easily accessible for children to view.

Parents would come home after work only to find their children sitting in front of the television watching or listening to the adult’s-only channel, a channel that many parents did not even know existed. In Poway, the city councilman’s young son learned about the adult’s-only channel at school, where the easily accessible programming was a hot topic among children and sexual explicit program. Until just a few months ago, the local cable company here in Washington also automatically transmitted partially scrambled video pornography—replete with unscrambled and sexually explicit audio—to all of its subscribers.

To their credit, some local cable companies are taking voluntary steps to address this problem. For example, in San Diego, one local cable company restricted the times when such programming was broadcast. In Washington, the local cable company eventually fully blocked the programming so both the video and audio portions of the signal are now indistinguishable.

However, numerous other cable services and operators are transmitting similar adult video and audio programming that is not sufficiently scrambled, with many subscribers and parents unaware of its contents. And, with the emerging information superhighways, forms of video programming now or soon to be available, such sexually explicit adult programming will be even more prevalent.

The problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television. Currently, adult programming varies from community to community, as does the amount and effectiveness of scrambling on each local cable system. Right now, it is up to the local cable operator to regulate itself. This is like the fox guarding the hen house.

Following complaints from myself and other officials—and the threat of legislation—the National Cable Telecommunications Association agreed that this was indeed a problem and adopted voluntary guidelines that local cable operators can follow. The California Cable Television Association also adopted similar guidelines.

However, the voluntary guidelines simply recommend that local cable operators “block the audio and video portions of unwanted sexually-oriented premium channels at no cost to the customer, upon request.” While this is a somewhat commendable effort on the part of the industry, I do not believe that it goes far enough.

First, the guidelines are only voluntary and simply recommended that local cable operators take action. There is no guarantee that such blocking will be provided and no enforcement mechanism.

Second, the guidelines put the burden of action on the subscriber, not the cable company, by requiring a subscriber specifically request the blocking of indecent programming. As I stated earlier, many subscribers do not even know that such programming exists, only to discover their children watching and listening to adults-only channels.

I do not believe that sexually explicit adult programming should automatically be broadcast into a program subscriber’s home. On the contrary, I believe that such programming should be automatically blocked unless a program subscriber specifically requests the programming.

The amendment I am proposing today is similar to language approved by the Commerce Committee last year as part of S. 1222 and contained in Senator Exon’s bill, the Communications Decency Act of 1995. It would require that all sexually explicit adult programming be fully scrambled unless requested by a subscriber.

This amendment does not prohibit or out-right block indecent or sexually explicit programming. Anyone requesting such programming is entitled to receive it, as long as it is not obscene, which is not protected by the first amendment. The amendment protects children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming.

The cable television industry, in maintaining the rating system or so with my staff, have expressed their opposition to this amendment, citing technological and fiscal concerns. The bottom line, however, is that fully scrambling both the audio and video portion of a channel is often technologically feasible. In fact, several cable operators have already instituted such blocking, such as here in Washington. With regard to their fiscal concerns, I have never been given any information from the industry to document what the actual costs to cable operators would be.

This amendment gives the industry flexibility in implementing the requirement to fully scramble all sexually explicit adult programming. The voluntary guidelines of the multi-channel video programming distributor are in full compliance, access to such programming will be limited to protect children from the sexually explicit material. The programming will be prohibited from those times of the day—to be determined by the FCC—when a significant number of children are likely to view it, such as during the mid and late morning, afternoon, and early evening.

So, the amendment leaves it up to the local cable operator on how and when to come into full compliance. Some cable operators, for example, are already in full compliance. For those operators that are not in full compliance, children will still be protected in the adult programming can be fully scrambled or otherwise blocked.

This amendment also does not become effective until 30 days after enactment, so cable operators will have plenty of time to either fully block the programming or restrict access to certain times of the day.

While I realize that some cable operators may incur costs in implementing
In 1992, Congress enacted Public Law 102-356, section 16 of which required the FCC, within 180 days of enactment, to promulgate regulations that prohibit broadcasting of indecent programming from 6 a.m. to midnight, except for public radio and television stations that go off the air at or before midnight, which may broadcast such material until 1 a.m. This statute was challenged, and, in Action for Children's Television v. Federal Communications Commission (ACT III), a three-judge panel of the U.S. Court of Appeals declared it unconstitutional. The full court of appeals agreed to decide the case, but a decision has not yet been issued.

In the meantime, uncertainty is clear from the Supreme Court's decision in Pacifica, supra, that the time in which indecent programming is prohibited must be limited. In 1995, the court held that the FCC's restrictions on indecent programming were unconstitutional. It is unfortunate that this amendment gives the industry flexibility in determining the widest safe harbor period consistent with the protection of children. The amendment is necessary. One would have thought that the FCC and industry would have taken the position that, if there is no technological way to block indecent programming around the clock, then limiting the time during which it is broadcast during the hours of the day (as determined by the Commission) when children are likely to view it may be overboard. This is because some children seem likely to be watching television at all hours of the day (and night), and it would apparently be unconstitutional to ban indecent programming around the clock. To be constitutional, your proposal must be limited to 12 midnight. The Constitution requires that broadcast programming be 'fit for children.'
We made calls to the industry. Yet in many instances, they have not adequately taken action to safeguard the children. It is an example in my opinion of where we need more corporate responsibility. But since we have not gotten that yet, we need this amendment.

In the amendment, the critical definition is this:

The term ‘scramble’ means to rearrange the content of the signal of the programming so that the audio and video portion of the programming cannot be received by persons unauthorized to receive the programming.

I think that sums it up. I think it is a very simple amendment, but I do think it is one that should be added to this very important bill. And it will be well received by a lot of people who are concerned by what we have seen in the past months in the cable programming of this type of material.

So I yield the floor, Mr. President, at this time unless there are any other Senators wishing to speak on this particular amendment.

Could I inquire, Mr. President, about the parliamentary procedure. Has there already been an agreed to vote at 6:30? The PRESIDING OFFICER. The vote will occur at 6:30. Who yields time?

Mr. HOLLINGS. Mr. President, I ask for the yeas and nays on the Feinstein amendment.

The PRESIDING OFFICER. The vote will occur at 6:30. Who yields time?

Mr. HOLLINGS. Mr. President, I ask for the yeas and nays on the Feinstein amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second. The yeas and nays were ordered. Mr. PRESSLER, Mr. President, I ask unanimous consent that tomorrow the motion to reconsider the vote on the adoption of the Feinstein amendment, I move to reconsider the vote.

The PRESIDING OFFICER. The request is withdrawn.

The question is on agreeing to amendment No. 1269, offered by the Senator from California [MRS. F

Mr. PRESSLER, Mr. President, I ask unanimous consent that tomorrow the second Feinstein amendment, which will be offered tonight, be voted on at 9:30—Mr. President, I think we better proceed with the vote. I withdraw my request.

The PRESIDING OFFICER. The request is withdrawn.

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This is the Senate's business. We hope that we can move along now expeditiously on this side of the aisle. If there are any amendments, we do appreciate the Senator from California, ready and willing and able to present the next amendment. Beyond that, I hope we can get some other amendments. I yield the floor.

AMENDMENT NO. 1270

(Purpose: To strike the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services.

Mr. President, on behalf of Senator KEMPTHORNE and myself, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The amendment is as follows:

On page 55, strike out line 4 and all that follows through page 55, line 12.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 55, strike out line 4 and all that follows through page 55, line 12.

Mrs. FEINSTEIN. Mr. President, I come to the floor today joined by our colleague, Senator KEMPTHORNE, to offer this amendment on behalf of a broad coalition of State and local governments. Since announcing my intention to proceed with this amendment, I have received letters of support from hundreds of cities across the country, including the States of Arizona, Colorado, Florida, Illinois, Indiana, California, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Ohio, Texas, and Washington.

This amendment is supported by the National Association of Counties, the National Association of City Chiefs of Police, the National League of Cities, the National Conference of State Legislatures, the National Association of Attorneys General, and the U.S. Conference of Mayors, to name a few.

Mr. President, as a former mayor, I fully understand why Governors, mayors, city councils, and county boards of supervisors question allowing the Federal Communications Commission to second-guess decisions made at State and local government levels.

On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; on the other hand, this bill, as it presently stands, takes these protections away.

The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority.

That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialists at the FCC, on what may be a very broad question of State or local government rights.

In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and States. I hope to explain why. I know my colleague, the Senator from Idaho, will do that as well.

A cable company would, and most likely will, appeal any local decision it does not like to the telecommunications experts at the Federal Communications Commission.

The city attorney of San Francisco advises that, in San Francisco, city laws provide that all street excavations must comply with local laws tailored to the specifics of the local communities, including the geography, the density of development, the age of public utility infrastructure, the width, what other utilities are under the street, the kind of surfacing the street has, et cetera.

The city attorney anticipates that, whenever application of routine local regulations interfere with the scheduling or efficient use of trenching equipment, the cable company will appeal.

If they did not like an order to relocate facilities to accommodate a public improvement project, like the installation, repair, or replacement of water, sewer, our public transportation facilities, they would appeal.

If they did not like a requirement to utilize trenches owned by the city or another utility in order to avoid repeated excavation of heavily traveled streets, they would appeal.

If they did not like being required to place their facilities underground rather than overhead, consistent with the requirements imposed on other utilities, they could appeal.

If they were required to pay fees prior to installing any facility to cover the costs of reviewing plans and inspecting excavation work, they could appeal.

If they did not like being asked to pay fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation, they would appeal.

If they did not like the particular kinds of exchange requirements or techniques that a city mandate that they use, they could appeal.

If they did not like the indemnification, they could appeal.

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What does this mean? It means that financially struggling cities and counties will undoubtedly be forced to include in franchise fees, charges to recover the cost of local maintenance requirements that constantly cutting into streets requires. The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator get to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their roads. States should have control over their highways.

The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on States and local governments for the right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.
I would also like to point out the preemption will change the outcome in some of the dispute between communication companies and cities and States. The FCC is the Nation’s telecommunications experts. But they do not have the experience and concern a mayor, a city council, a board of supervisors, or a Governor would have in negotiating and weighing a cable agreement and setting a cable fee.

If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court.

This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or county government would have to come to the Federal court in Washington after an appeal to the FCC.

Appellate proceedings involve thousands of pages of argument, testimony, and should be a slow and literature death sentence.

I would also like to point out that the FCC ruling on a city’s or State’s determination of fees for providing communications services would create a new requirement for Los Angeles, states this will be legally binding and costly to implement.

In Washington, and many will be just unable to afford the cost.

If the preemption provision remains, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances.

Edward Perez, assistant city attorney for Los Angeles, states this will be a very difficult standard to reverse, if they have to come to Washington. On matters involving communication issues, courts are likely to require a tough, heightened scrutiny standard for matters involving first amendment rights involving freedom of speech. Courts are likely to defer to the FCC judgment.

The FCC proceeding and its appeal in Washington will be very different from the Federal court action in a locality. Both the city and the communications company are more likely to be able to develop a more complete and thorough record if the proceeding is before the local Federal court rather than before a Government body in Washington.

We also believe the FCC lacks the expertise and concern. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquakes, and you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

Mr. President, this stack of letters opposing the preemption includes virtually every California city and virtually every major city in every State.

What the cities and the States tell us they want to do is give local governments the opportunity for home rule on questions affecting their public rights-of-way. If the cable company does not like it, the cable company can go to court in the place where the preemption, we can increase fairness, minimize cost to cities, counties, and States, and prevent an unfunded mandate.

If the preemption remains in this bill, it creates a major unfunded mandate for cities, for counties, and for States. I hope this body will sustain the cities and the counties and the States, and strike the preemption.

So I ask unanimous consent to have a number of letters printed in the Record.

There being no objections, the letters were ordered to be printed in the Record, as follows:


Mr. KEVIN CRONIN, Office of the Senate. Mr. KEVIN CRONIN, Senate Hart Office Building, Washington, D.C. DEAR MR. CRONIN: You asked for our thoughts regarding S. 652, Sec. 254(d) Preemption.

Section 254(d) would permit the Federal Communications Commission ("FCC") to preempt local government:

"(d) PREEMPTION.—If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section or any rule promulgated pursuant to this section, the Commission shall immediately preempt such requirement to the extent necessary to correct such violation or inconsistency." Section 254(d) repose sweeping review powers in the FCC and in effect converts a federal administrative agency into a federal administrative court. The FCC literally would have the power to review any local government action it wishes (either sua sponte or at the request of the industry). It has the power to review any action taken by a city; it is not limited by the Federal district court of the local jurisdiction. By deleting the preemption, we can increase fairness, minimize cost to cities, counties, and States, and prevent an unfunded mandate.

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Mr. KEVIN CRONIN, Office of the Senate. Mr. KEVIN CRONIN, Senate Hart Office Building, Washington, D.C. DEAR MR. CRONIN: You asked for our thoughts regarding S. 652, Sec. 254(d), which would create broad preemption rights in the FCC with respect to actions taken by local governments. Specifically, you are interested as to how section 254(d) could frustrate the ability of local government to manage utilities. We believe, as a practical matter, Local Government should (See Sec. 254(c)) and how it could prevent Local Government from imposing competitive requirements on telecommunications providers to preserve and advance Universal Service, protect the public safety and welfare and to ensure the continued quality of telecommunications services and safeguard the rights of consumers. (See Sec. 254(b)).

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In addition, because if the procedural structure of the FCC, the normal right to cross-examine and their testimony is not present. The right to comment and reply to another interested party’s comments theoretically permits the FCC to make a fair and informed judgment. However, these comments are not under oath and the testimony that is filed under penalty of perjury is never is reality tested for truth and accuracy.

The practical effect is that anybody may say anything they wish with impunity. The decisionmakers, therefore, may be misled into believing erroneous “facts”. This view is further supported by the fact that the courts are the answer for all issues. There exist some practical problems with the courts; they may be too slow and they may lack the technical expertise. However, Section 254(d) appears to effectively eliminate the courts because of the absence of any real or effective review of FCC decisions. Senate Bill 652 must be amended to leave local issues to local government and thereby permit local citizens, local governments and local courts to be active participants in the resolution of local issues.

Finally, the industry has clearly captured the decision making of officials at the FCC. In recent years, the voice of local governments and its citizens have been routinely rejected by the FCC and the industry appears to have a lopsided influence.

We recommend that Section 254(d) be eliminated in its entirety. If that is accomplished, violations of S. 652 will be decided in the forum properly equipped to do so—the local Federal Courts.

As an additional note, we wish to comment that section (a) of S. 652 also represents a serious invasion of local government authority over local interests. Most any action taken by local government in this area can be construed as having “the effect of prohibits the FCC from granting a communication services. Surely more precise wording can be developed which would not so significantly erode the power of local government over local matters. Please advise if you would like further comment regarding this section.

If I can be of further assistance, please do not hesitate to call.

Very truly yours,

EDWARD J. PEREZ, Assistant City Attorney.

OFFICE OF CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO, June 12, 1995.

Re Telecommunications Competition and Deregulation Act.

HON. DIANE FEINSTEIN, U.S. Senate, Washington, D.C.

DEAR SETOR: I am writing to commend you for sponsoring an amendment to the telecommunications bill to preserve local control over the public rights of way. It is critical that Federal agencies develop a process to enable elected and other officials of State, local, and tribal units of government to provide input when Federal agencies are developing regulations.

The conference report of that legislation passed overwhelmingly. In the Senate it was 91 to 9. In the House it was 394 to 28.

An overwhelming majority said in essence enough is enough, that the Federal Government must reestablish a partnership with local government. It is very straightforward. This movement toward local government has consistently been expressed in the legislative reform occurring in both the House of Representatives and the Senate. But I feel, as I think the Senator from California feels, that this provision in this telecommunications bill is causing a slippage back to our old habits. What we have before us in section 254 of the bill before us is a reversal of the positive progress that we have been making.

As the Senator from California pointed out, in subsection (d) the committee has added broad ambiguous FCC preemption language that states, if the FCC “determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”

We are going to give this power to the FCC over the jurisdictions of the local communities and the State governments. This is a disturbing directive that instructs the Federal Commission to invalidate duly adopted State laws and local ordinances that the Independent Commission may deem inappropriate. This preemption would be generated by a commission that in a majority of cases would be thousands of miles away from the local government jurisdiction that would be affected by their decision.

I know of no one in local government who objects to the language which ensures nondiscriminatory access to the public of repeated street excavation. Throughout the country, such local laws are tailored to the specific characteristics of each local community, including local geography, the density and age of the local population, public streets and facilities. The language of subsection (d) would severely undermine local government ability to apply such local tailored requirements on a uniform basis.

Whenever application of routine local requirements interferes with the schedule or convenience of a telecommunications supplier, subsection (d) would authorize the company to seek FCC preemption. To identify just a few examples, my colleague city attorney from Washington, Mr. Kemphorne, would have to send an attorney off to Washington every time a telecommunication company challenges our authority to:

1. Regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts.
2. Require a company to relocate its facilities to accommodate a public improvement project, like the installation, repair or replacement of water, sewer or public transportation facilities.
3. Require a company to place facilities in joint trenches owned by the City or another utility company if the repeated excavation of heavily traveled streets.
4. Require a company to place its facilities underground, rather than overhead, consistent with other utilities’ requirements on other utility companies.
5. Require a company to pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work.
6. Require a company to pay fees to recover an appropriate share of the increased street repair costs that result from repeated excavation.
7. Require a company to use particular kinds of excavation equipment or techniques suited to local circumstances to minimize the risk of major public health and safety hazards.
8. Enforce local zoning regulations;
9. Require a company to indemnify the City against any claims of injury arising from the company’s excavation.

All of the requirements described above are routinely imposed by local governments in exercise of our responsibility to manage the public rights of way. Granting special favors to telecommunications companies, compared for example to other utility companies, will undermine the uniformity of local law and could dramatically increase the costs to local taxpayers of maintaining public streets.

In these times, when the federal government is asking state and local governments to take on many additional duties, the FCC should not be empowered to interfere in this area of classic local authority. This is especially true because, for many cities, the FCC is a remote, costly and burdensome arena in which to resolve disputes. The courts are well-suited to resolve any disputes that may arise from the ‘Removal of Barriers to Entry’ language of Section 254 without placing heavy burdens on local governments.

I appreciate the leadership you have shown on this difficult issue. Please let me know if I can offer any further assistance with your efforts on behalf of cities.

Very truly yours,

LOUISE H. RENNE, City Attorney.

THE PRESDING OFFICER, The Senator from Idaho.

Mr. KEMPHORNE. Mr. President, I am honored to join my friend from California, Senator FEINSTEIN, in this amendment. This is not the first time we have teamed up together. I think perhaps our background as both being former Mayors has allowed us to bring to this position some perspective to how we realize, with regard to local and state governments, the need for a strong State-local partnership really ought to be ordered.

The Senator from California was very helpful when we brought forward the bill, the Unfunded Mandates Reform Act of 1994, which the previous ambiguous leader had designated Senate bill 1, and which allowed me to team up with the Senator from Ohio, Mr. J. GLENN. In March of this year, as you know, Mr. President, that unfunded mandates legislation was signed into law.

Part of that new law in essence says that Federal agencies must develop a process to enable elected and other officials of State, local, and tribal units of government to provide input when Federal agencies are developing regulations.

The conference report of that legislation passed overwhelmingly. In the Senate it was 91 to 9. In the House it was 394 to 28.

An overwhelming majority said in essence enough is enough, that the Federal Government must reestablish a partnership with local government. It is very straightforward. This movement toward local government has consistently been expressed in the legislative reform occurring in both Houses of Congress. But I feel, as I think the Senator from California feels, that this provision in this telecommunications bill is causing a slippage back to our old habits. What we have before us in section 254 of the bill before us is a reversal of the positive progress that we have been making.

As the Senator from California pointed out, in subsection (d) the committee has added broad ambiguous FCC preemption language that states, if the FCC “determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”

We are going to give this power to the FCC over the jurisdictions of the local communities and the State governments. This is a disturbing directive that instructs the Federal Commission to invalidate duly adopted State laws and local ordinances that the Independent Commission may deem inappropriate. This preemption would be generated by a commission that in a majority of cases would be thousands of miles away from the local government jurisdiction that would be affected by their decision.

I know of no one in local government who objects to the language which ensures nondiscriminatory access to the
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public right of way. But what they do vigorously object to is that this proposed FCC preemption does not allow them the prerogative to manage their right of way in a manner that they deem to be appropriate and in the best interests of the community. If I may, Mr. President, let me give you an example. When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the utility and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

I think one of the things that you hear so often is that everyone wants to standardize. Everyone wants to put things into the radio talk shows, is when a new street has been paved, within 6 months you see crews out there cutting into that new pavement, and they are putting in a new utility. That is expensive, and it is unnecessary if you can coordinate things. Surely, we do not think that an independent commission in Washington, DC, is going to be able to better coordinate that than the local government in San Francisco or the local government in Boise, ID. It just does not happen.

This proposed preemption is based on two assumptions. First, that it is the role of the Federal Government to tell others what to do; second, that local units of government are not capable or responsible enough to make the right decisions. I reject both of those presumptions.

Like the Senator from California, with the hands-on experience that she has had at the local government level, we natural solutions do not always meet local problems. You have to take into account the local conditions and the local innovations. These Federal solutions have not worked in the past. They are not working now. They will not work in the future.

So why would we step back with all of the progress that we have been making this congressional session in reordering the partnership between the Federal, the State, and the local governments if you are asking us to go back to the future? This language which introduces expanded FCC jurisdiction into the local decisionmaking process is ill-conceived, and it should not be included in the final language of this important legislation. Our amendment would strike the offending subsection in its entirety. This would leave control of local right of way matters with local elected officials, which is exactly where it belongs.

The goal of Congress in regulatory reform should be to remove existing Federal roadblocks that limit productivity and creativity and innovation. We should legislate in a manner that enhances Federal-local intergovernmental partnerships for mutually beneficial results. We should not be guilty of imposing new, unnecessary bureaucratic hurdles as has been done in this case.

So, again, I am so proud to join the Senator from California in this effort. We make a good team. This is a worthy effort to team up with because this present preemption needs to be removed from the telecommunications bill.

I yield the floor, Mr. President.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I would like to thank the Senator from Idaho for those excellent remarks. I think he hit the nail on the head with respect to the rights of local government, and the way in which this Congress is moving. This preemption sets all of our progress regarding the relationship between Federal and local government back, and hurts cities, counties, and States in the process.

So I want the Senator to know how much I enjoy working with him on this. I thank him very much.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I reluctantly rise in opposition to this amendment from two of my most respected colleagues in the Senate. The issue addressed in this amendment goes to the very heart of S. 652, eliminating barriers to market entry.

In the case of section 254, which I have here in front of me, entitled “Removal of Barriers to Entry,” we do preempt any State or local regulation or statute at State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The actual authority granted to the FCC in subsection (d) is critical to ensuring that State and local authorities be preserved. And I understand that a State or local government has permitted or imposed any statute, regulation, or legal requirement to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral basis.

Inconsistent with this section, the Commission shall not preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The intent therefore is to leave protected State regulatory authority, to leave protected local government authority, but there have to be some cases of preemption or a certain city could impose a requirement of some sort or another that would be very anticompetitive, and that is where we come out.

I have joined in a lot of efforts here to ensure that our State and local authority be preserved. And I understand there will possibly be a second-degree amendment. We have worked closely with Senator HUTCHISON and the city, county, and State officials to achieve the balance that is where the committee came out.

I feel very strongly that it is a fair balance. It takes into account State regulatory authority, takes into account local government authority. But it also recognizes the need to open up markets, the removal of barriers to entry. In many cases these do become barriers to entry, barriers to competition.

So I rise in reluctant opposition to the amendment.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.
Mr. HOLLINGS. Mr. President, you are to have sure of foot to be opposing two distinguished former mayors. The Senator from California is the former mayor of San Francisco, and the distinguished Senator from Idaho is a former mayor of Boise. Both had outstanding records.

But let me suggest that what they have read into the preemption section is a requirement and an idea that just does not exist at all. I will have to agree with them in a flash that the Federal Communications Commission has no idea of coordinating, as the Senator from Idaho has outlined, the digging up in front of all of the sidewalks and stores and everything else, putting in the regular necessary conduit, refirming the soil and the sidewalks walk again in front. We have no idea of the FCC doing it.

Let us tell you how this comes about. Section 254 is the removal of the barriers to entry, and that is exactly the intent of this Senate amendment. First, the Senate does. The States must perform this job here of removing all the barriers to entry, we went, I say to the Senator, with the experience of the cable TV. I sat around this town—I was in an advantaged section up near the cathedral. I had the cable TV service, but two-thirds of the city the cable folks took care of just a couple of influential councilmen, and they would not give service or could give service or run up the price and everything else of that kind.

We have had experience here with the mayors coming and asking us. And this is the response. That particular section (c) is in response to the request of the mayors. If they do not do that, if they do not put it, not put put it in a competitively neutral basis or if they put it in a discriminatory basis, then who is to enjoin? And we say the FCC shall start it. Let us not go through the Administrative Procedures Act. Let us not go through every individual.

Yes, we want those mayors and all to come here and everybody to understand rules are rules and we are going to play by the rules and the rules protect those mayors to develop, to administrate to see that 100 percent said to the Senator from Idaho, that the FCC has never performed the job of a city mayor. But they shall and must perform this job here of removing the barriers to entry. And if we do not have them doing it, then I will yield the floor and listen to what suggestion they have. But do not overread the preemption section to other than centralizing the authority and responsibility in the FCC to make sure, like they have in administering all the rules relative to communications here and all the other entities involved in telecommunications, they have that authority to make sure while the cities got their rights of way, while the States have got their public welfare and public interest sections to administer, that it is done on a nondiscriminatory basis.

Mr. KEMPThORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, my colleague from Idaho took the words right out of my mouth. I think he is exactly right in his interpretation of this section. The barrier for entry is clearly done away with by this section. Nothing Senator KEMPThORNE or Mr. President could do would change that. What we do change, however, is simply delete the ability of a remote technical commission to overturn a city decision and create an enormous hassle for cities all across this Nation. I would like to just give you the exact wording of what the city attorney of Los Angeles said this section does. He says:

"It proposes sweeping review powers for the FCC in effect, converts a Federal administrative agency into a Federal administrative court. The FCC literally would have the power to review any local government decision, either on its own or at the request of the industry. A Federal agency, with personnel who do not directly respond to the public, will be doing in fine detail what the government and their citizens across the country shall have to follow. The FCC would be
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Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, the distinguished colleague from Idaho said “came so late in the process.” I want to correct that thought. I am referring back over a year ago to a bill with 19 cosponsors, this same language: * * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this subsection, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to prevent such violation or inconsistency.

It did not come late in the process. We have been working with mayors and have several former mayors at one time and we both understand that every city has different needs when it comes to cable television.

I remember as the mayor of San Francisco when Viacom came into the city. I worked just with the affluent sections of the city, I refused to wire the poorer areas of the city. Unless local government had the right to require that kind of wiring, it was not going to be done at all. That is just one small area with which I think everyone can identify.

But when it comes to the rights-of-way and what is under city streets, the city must be in the position to set rules and regulations by which its street can be cut. This preemption gives the Commission the right to simply waive any local rulemaking and say that is not going to be the case. It gives the FCC the right to waive any local fee and say “That’s not the way it is going to be.”

That is why countless cities and counties across the country, not just one or two, but virtually all of the big organizations, including the League of Cities, the national Governors, local officials and others, say, “Don’t do this.”

If a city has a problem with anything we in local government do, let them go to court. Let a court in our jurisdiction settle the issue. I think that is the right way to go. For the life of me, I have a hard time understanding why people would want to preempt these issues with the technical, far-removed FCC agency.

So I think Senator KEMPTHORNE has well outlined the situation. I think we have made our case.

I thank the Senator from Idaho.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I appreciate the good efforts of the Senator from South Carolina, because I have always found him to be a gentleman whom I can work with and we can find areas of agreement which we can see some common ground.

With regard to my comment that it came late in the process, this may be a concept that had been discussed quite a bit. Right, Senator Keating from South Carolina referenced, it was local officials who told me that this particular language of (d) was not in the draft bill’s language, it was not part of the draft bill when it came out.

And it was really after Senator HUTCHISON from Texas, who raised this issue, had section (c) added that (d) then came back.

I do not know, it may have been something that has been discussed for some months, but think putting it in the bill, it was not there.

The other point then about how do we deal with this, again, Senator FEINSTEIN and I are in absolute agreement that with respect to this whole issue of removal of barriers to entry, if there are problems, if a cable company is getting a bad deal and being put off by a local government, they can go to court, but they go to court in that area, they do not have to come to Washington, D.C.

The avenue for remedy already exists, so why do we then say, again, everyone must come to Washington, D.C.? That is expensive. I think it is unnecessary and these cable companies, if there had been particular problems and there is a trend, they can establish a precedence in the court, and I think the local communities are going to realize if there is something wrong, they will not do it again because they will lose in court. I think the spirit in which Senator FEINSTEIN and I have joined in this is on behalf of State and local governments, that they are going to own up to their responsibilities. Let us not make them come to Washington, D.C. and make every one of them subject to the FCC in Washington, D.C.

I yield the floor.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I wanted to speak very briefly on this. I know our whip is here with some business.

First of all, I think we have to put this in context. As Senator HOLLINGS has pointed out, this section has been the result of hours and days of negotiation, it is in S. 1822 last year, and it is here. I think we have to take a step back and look at some of the cable deals and problems that have occurred in our cities. The cities have granted exclusive franchises in some cases and are not allowing competition and required certain programming be put on and other requirements on those companies.

Our States have granted, in the telephone area, certain exclusive franchises, not allowing competition. And the point is, if we are having deregulation here, removal of barriers to entry, we have to take this step. I think that is very important for us to considerate this point.

Now, section 254 goes to the very heart of this bill, because removal of barriers to entry is what we are trying to accomplish with this bill. We preempt any State or local regulation or statute or State or local legal requirements that may provide the effect of prohibiting the ability of any entity to provide telecommunications services.

The authority granted to the FCC in section (d) is critical if we are going to open those markets, because a lot of States and cities and local governments may well engage in certain practices that encourage a monopoly or that demand certain things from the business trying to do business. That would not be in the public interest.

At the same time, make no mistake about it, Mr. President, the authority granted in subsection (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fair-handed and balanced manner with legitimate concerns of State and local authority. These were negotiated out with State and local authorities.

We have worked closely with Senator HUTCHISON and the city, county, and State officials to strike a balance. We have gone to great pains and length to deal with concerns of the cities, counties, and State governments that are legitimately raised. We dealt with the concerns in subsection (b) and (c), while at the same time setting up a procedure to preempt where local and State officials act in an anticompetitive way, by taking action which prohibits, or the effect of prohibiting, entry by new firms in providing telecommunications services.

Now, the real problem created by the amendment offered by my friends, Senators FEINSTEIN and KEMPTHORNE, is that the very certainty which we are trying to establish with this legislation is put at risk. Certainly, a company has to own up and do right and if a local city or State will put some requirement on it to provide some kind of programming, or even to do something in
the city to provide some service, or it will grant an exclusive monopoly. What we are trying to get are barriers to entry, and we are reserving to the State and local governments certain authorities. So the certainty we are looking for is to allow a way—no guarantee that entry barriers will be toppled and no guarantee of uniformity across the country.

The committee has dealt with federalism concerns throughout this legislation that this has gone to the heart of a technical detail of federalism and the Federal Government's relationship to State and local government. It is one of the most complicated areas of this bill. Believe me, it is hard to strike a balance. But if we strike this out, it gives every city in the country the right to put up barriers to entry. It lets every State have the right to have a monopoly unless they can extract something for the State in one way or another. I would not blame cities if we did that, it goes to the very heart of this bill.

Now, I take a back seat to no one in advocating federalism principles. I like much power in the State and local government. It must be balanced with our other goal—removing the what, everpresent restrictions at the local level which restrict competition. Exclusive franchising in the cable and telephone markets is the very way that established monopolies in the past.

So, my statements on this, I understand that there may be a possible second-degree amendment to this tomorrow that would deal with the language on line 8 on page 55, "preemption," which would deal with the words, or is consistent with. But I am not certain that that second degree will be offered.

In any event, to conclude, this particular section of the bill goes to the heart of dealing with the federalism issue. I would like to allow the cities and the State to put up barriers to entry to telecommunications firms? In the past, we have done so, with cable television. We have allowed cities not only to add a franchise fee, but also to require certain programming, and sometimes the companies do something else for the city as an incentive.

In telephones, we have allowed our States to set up a monopoly in the State and sometimes to collect certain things. Allowing the cities and the State to put up barriers to entry to telecommunications firms? In this bill, S. 652, we are trying to deregulate, open up markets, and we are trying to let that fresh air of competition come forward. If our companies and our investors have the uncertainty of not knowing what every city will do, of not knowing what every State will do and each State legislature and each city council may change, the companies will be in the position of having to endlessly lobby city officials and State officials on these issues—not only that, at any time certainty is taken out.

This bill, S. 652—if we pass it—will provide a clear roadmap with certainty for competition. It will create an explosion of a new investment in telecommunications and new jobs and new techniques. And it will help consumers with lower telephone rates and lower cable rates. It has been carefully crafted and worked out in close to 90 nights of meetings, plus last year, a whole year, plus a lot of Senators' input. I know it sounds good to give the power to the city and the State, and I am usually for that. In this case, we reserve power to the city to do what we very firmly say that the barrier to entry must be removed.

Mr. President, I wish to point out that I think there may be a second-degree amendment to this tomorrow at some point. I want to give Senators notice of that. There may not be. But I rise in opposition to the amendment.

Mr. LOTT. Mr. President, I do have some business to conduct, including the closing statement. At this juncture, I would like to do a couple of things, and if the Senator from Nebraska wants to make a statement, I will withhold on the closing unanimous consent.

CLOTURE MOTION
Mr. LOTT. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION
We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 652, the Telecommunications Competition and Deregulation Act.

The PRESIDING OFFICER. The acting majority leader.

REMOVAL OF INJUNCTION OF SECRECY—EXTRACTION TREATY WITH BELGIUM (TREATY DOCUMENT NO. 104-7); SUPPLEMENTARY EXTRADITION TREATY WITH BELGIUM TO PROMOTE THE REPRESSION OF TERRORISM (TREATY DOCUMENT NO. 104-9); AND EXTRADITION TREATY WITH SWITZERLAND (TREATY DOCUMENT NO. 104-9)

Mr. LOTT. Mr. President on behalf of the leader, as in executive session. I ask unanimous consent that the injunction of secrecy be removed from the following three treaties transmitted to the Senate on June 9, 1995, by the President of the United States:

Extradition Treaty with Belgium (Treaty Document No. 104-7); Supplementary Extradition Treaty with Belgium to Promote the Repression of Terrorism (Treaty Document No. 104-8); and Extradition Treaty with Switzerland (Treaty Document No. 104-9).

To the Senate of the United States:
With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1991. Also transmitted is the Supplementary Extradition Treaty of the Department of State with respect to the Treaty.

This Treaty is designed to update and standardize the conditions and procedures for extradition between the United States and Belgium. Most significantly, it substitutes a dual-criminality clause for the current list of extraditable offenses, thereby expanding the number of crimes for which extradition can be granted. The Treaty also provides a legal basis for temporarily surrendering prisoners to stand trial for crimes against the laws of the Requesting State.

The provisions in this Treaty follow generally the form and content of extradition treaties recently concluded by the United States. Upon entry into force, it will supersede the Treaty for the Mutual Extradition of Fugitives from Justice Between the United States and the Kingdom of Belgium, signed at Washington on October 26, 1901, and the Supplementary Extradition Conventions to the Extradition Convention of October 26, 1901, signed at Washington on June 20, 1935, and at Brussels on November 14, 1963.

This Treaty will make a significant contribution to international cooperation in law enforcement. I recommend that the Senate give early and favorable consideration to this Treaty and its advice and consent to ratification.

WILLIAM J. CLINTON.

To the Senate of the United States:
With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism, signed at Brussels on April 27, 1991 (the "Supplementary Treaty"). Also transmitted is the report of the Department of State with respect to the Supplementary Treaty.