

August 13, 1999

## Fight for Internet Access Creates Unusual Alliances

By STEPHEN LABATON

Unimaginable as it might have seemed a year ago, President Clinton's top private lawyer and the former senior aide to Kenneth W. Starr in the impeachment battle recently joined to argue on the same side of one of the biggest legal fights in years.

The two men, David E. Kendall and Brett M. Kavanaugh, are but one example of the unusual alliances being forged in the dispute over which companies will end up dominating high-speed Internet service delivered through cable systems.

Mr. Kendall, representing America Online, and Mr. Kavanaugh, whose firm represents G.T.E., are among a legion of advisers who are quickly finding business in the dispute, which has turned into the latest full employment act for lawyers and lobbyists here and in many cities around the nation.

Their common adversary in the fight is AT&T, which is rapidly acquiring cable systems and offers high-speed Internet access over those lines exclusively through a company, Excite@Home, in which it owns a major stake. Led by America Online and G.T.E., a coalition of Internet service providers and other telephone companies have mounted a nationwide campaign to force AT&T to let cable customers use Internet providers other than Excite@Home without additional fees.

The AT&T opponents have several business interests with billions of dollars in future revenues at stake. G.T.E. is developing a rival high-speed Internet service, and many smaller providers believe that if AT&T's system proves popular, they will be doomed if they are shut out. Some of the other telephone companies in the fray are either competitors of AT&T or are using the issue to press for greater deregulation and the ability to compete with the company's long-distance service.

AT&T contends that it would have little incentive to upgrade its cable systems to provide high-speed Internet service if it must serve as a carrier for all providers and that in any case, comparable telephone- and satellite-based services will insure competition.

While a precise figure on spending on the lawyers and lobbyists and for campaign contributions is not available, executives and lawyers involved in the case estimate that it is already in the tens of millions of dollars.

"In a field where exaggeration is common, it is fair to say that this issue is regarded as the most important public policy question in telecommunications for the decade," said Andrew Jay Schwartzman, president of Media Access Project, which promotes consumer rights and diversity on the airwaves and has taken sides against AT&T.

"In the near term," Mr. Schwartzman said, "there's billions of dollars in revenue at stake. Over the longer term, the outcome of this fight will play a large role in determining who will be the dominant telecommunications and Internet players for the next decade. As a consequence, the bedfellows are stranger than strange."

When Mr. Kendall and Mr. Kavanaugh found themselves on the same side recently, for instance, "their eyes were like saucers," recalled William P. Barr, the general counsel at G.T.E. and a Attorney General in the Administration of President George Bush, who was in the same room with them.

For their part, consumer groups have joined the anti-AT&T side but acknowledge that they are in an awkward position, allied with telephone companies that they have sharply criticized in the past. The consumer advocates have also criticized William E. Kennard, the chairman of the Federal Communications Commission, after lobbying fiercely to get him appointed two years ago. Mr. Kennard has in essence sided with AT&T by formulating a policy that only the Federal Government, and not local authorities, has jurisdiction, but ruling out intervention for now.

There have been high-stakes struggles over telecommunications policy in the past, but perhaps never one fought on so many fronts, including a number of localities where approval is needed -- and conditions on the Internet issue can be attached -- if AT&T is to assume the franchises of the cable companies it is acquiring.

One reason cable has become a focus of the Internet battle is that it is expected to be a dominant source of high-speed service, at least in the near term. Today fewer than 1 million homes have such connections, offering speeds 10 to 80 times those of conventional phone lines. But by 2002 the number of high-speed customers is expected to reach 10 million to 16 million, industry analysts say, with 60 percent to 85 percent using cable connections.

The current dispute is also notable because it involves a convergence of technology that has far outpaced laws, court opinions and

regulatory decisions, all of which treat cable and telephones differently and, for better or worse, have said little explicitly about the Internet.

On one front where AT&T's opponents have scored their biggest gains, the issue is heading to a Federal appeals court. It will hear oral arguments in October over a decision by Portland, Ore., to require AT&T to open its cable lines there to any Internet company on the same terms as Excite@Home.

The dispute also is moving to a new group of cities that are considering whether to permit AT&T to acquire the cable franchises controlled by Media One. Among other places, new skirmishing is expected in the suburbs of Boston and in other parts of Massachusetts, where a drive to get the issue on a statewide ballot in 2000 began this week, as well as Minneapolis-St. Paul, Richmond and major parts of Florida.

In Washington and cities around the nation, both sides have retained battalions of advocates. This week, for instance, the anti-AT&T forces announced that in addition to Mr. Kendall, they had retained Lloyd Cutler, the former White House counsel, and Bruce Ennis, a leading Washington lawyer.

For its part, AT&T and the cable industry have retained many of Washington's lobbyists, including Vin Weber, the former Republican representative from Minnesota, and the lobbying firm founded by the late Dan Dutko, a major Democratic fund-raiser who died in an accident two weeks ago. More than 50 lobbyists for AT&T and the cable companies showed up at an organizational meeting last December.

"A lot of people have told me that they owe me thank-you notes," said Gregory Simon, a former top aide to Vice President Gore, who is collaborating with Richard Bond, a former chairman of the Republican National Committee, in directing the anti-AT&T coalition. "They were retained just so I couldn't hire them. In Washington it took weeks to find somebody who was not lobbying for AT&T. I could not find three firms that had not been retained on this issue."

Nonetheless, the regional Bell telephone companies have managed to retain some well-known Washington figures for the fight, including Haley Barbour, a former chairman of the Republican National Committee; Michael D. McCurry, the former White House press secretary; and Susan Molinari, the former Republican Congresswoman from Staten Island. They say that Congress and Federal regulators should eliminate restrictions on their clients to make it easier to offer high-speed Internet services to compete against AT&T.

The experience in Florida is illustrative of the magnitude and fervor of the struggle. Local records show that AT&T and the cable companies have retained more than 40 lobbyists in the state. G.T.E. responded by persuading officials in Broward County to adopt an ordinance requiring AT&T to open its cable system to other Internet service providers -- and by agreeing to pay the county's legal costs if AT&T sued over the issue. AT&T lawyers say they are preparing to challenge G.T.E.'s legal assistance to the county.

There have also been Potemkin-like efforts at local organizing, a process that is known by some consumer advocates as Astroturf campaigns, in contrast to grass roots. Contrived rallies were staged in front of San Francisco City Hall, for instance, and both sides have made extensive use of telephone banks to gin up support by asking loaded questions and making alarmist predictions.

Executives and lobbyists from all sides are pouring campaign contributions into the coffers of the major Presidential contenders, although none of the candidates have stated a clear preference. (The issues have transcended party politics, although some of the major players have been identified with particular candidates. For example, James W. Cicconi, general counsel and head of government relations for AT&T and a former aide to President George Bush, was recently co-chairman of a fund-raiser in Washington for George W. Bush. George Vradenberg, the general counsel for America Online, is a top adviser and fund-raiser for John McCain. And Mr. Simon has been raising money for his former boss, Vice President Gore.)

Lawyers on both sides say the candidates are not likely to take a position that could jeopardize more donations.

While competing legislation over the issue was introduced in Congress in recent weeks, both sides acknowledge that there is nothing the lawmakers will likely do any time soon. As a result, the anti-AT&T forces have embarked on a strategy of trying to find support in states and municipalities, hoping the issue may then begin to resonate with more force in Washington.

Despite the intensity of the fight, there is a widespread assumption that it will be settled either at the corporate bargaining table or by a Supreme Court decision, which could be years away.

"Everybody's got a business motivation here and everybody likes cloaking their arguments in terms like open access," Mr. Cicconi said, "but what's really going on here is AOL has a business plan and wants the government to put its thumb on the scale to tip the balance in its favor." He said the opposition has been "going in at the local level and hiring as many people as possible who have connections with city commissioners and local officials."

But consumer groups and AT&T's corporate rivals say the battle is as much over principle as it is over business.

"I'm in awe of the magnitude and money involved," said Donna N. Lampert, who had to leave her law firm, which represents major cable companies, to continue her work for America Online. "But at its core this is really about an important principle. This involves a lot more than whose garage the Mercedes will be parked in, as the saying goes about big money cases. It involves who will control the Internet."