TELECOMMUNICATIONS & ELECTRONIC MEDIA

THE FCC VERSUS THE CONSTITUTION

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JUDGE WILLIAMS: The structure of today's panel is that first two challengers will present a set of attacks -- those are Randy May and Greg Sidak -- and then there will be a defense roughly of the status quo from Jane Mago and Andy Schwartzman.

Greg, you are closest.

MR. SIDAK: Thank you.

Usually when I'm on a panel like this, I joke that I'm there to make the other people sound reasonable, but this is a Federalist Society event, so I am among friends.

As I was thinking about what I might say this morning, a song kept popping into my head. About 30 years ago, Graham Nash of Crosby, Stills & Nash put out a solo album. There was a song on there that you might remember that was about the scope of Congress' commerce power, and you will recognize the chorus: "We can change the world, rearrange the world. It's starting to get better."

I think that tells us a lot about how we approach telecommunications policy because the Telecom Act of '96 had this very ambitious goal of rearranging and changing the market, and the assumption certainly was that it was going to get better.

That, in turn, leads to all kinds of interesting questions of statutory interpretation and constitutional law, and the theme that I've been particularly interested in over the last several years is the Takings Clause and how attempts at regulatory change (I hesitate to use the word deregulation because it's not always clear that we end up with less regulation) may affect the taking of property.

Implicit in the idea that things are getting better is the idea that we are increasing welfare in some way. Presumably we are not passing legislation just to shift rents back an forth from one entity to another, but we are increasing the size of the pie. So if the size of the pie is going up, the means exist to compensate losers from the gains that winners get, in theory. So the potential exists to award compensation if there is a taking of property as a result of the regulatory change.

There are a couple of cases in the Supreme Court this term that raise these issues. The one that is most on point is the one that was argued last month involving the pricing of unbundled access to the telecom network. I am sure that we will get into a lot of the fine points of that later on in the panel, so I don't want to talk about cost models right now. But let me make just a couple of general observations.

I think that the Supreme Court approaches a case like this with a view that is not very 21st Century; it's more the 19th Century view of property, thinking of property more as, in the words of William Fischell a clot of earth. So the Court may have difficulty with the idea that use of a network, the movement of bits through a network, is somehow infringing on someone else's property, and could that be a taking of property. And the same kind of argument has come up in electricity deregulation where there is wheeling of power by competitive generators over some incumbent's transmission and distribution network; how could that be a taking of property?

Now, of course, there is a strand of cases involving physical invasion of property. These cases have, and that has the advantage for the property owner of entitling him to a finding of a per se taking, and thus permitting him to move directly on to the question of calculation of just compensation. The courts and certainly the regulatory bodies, (which, of course, are adverse parties in these proceedings) typically, have been resistance to look at something like view the movement of bits or electrons as something that is physically intruding on another party's private property such that it could possibly give rise to just compensation.

So with the physical invasion strand of cases, and (the keynote case there is *Loretto v. Teleprompter)*, with that getting a cold shoulder, we fall back on more traditional doctrinal categories of regulatory takings involving in the public utilities. That line of cases, which seems to be the way the Supreme Court, at least judging from the kinds of questions last month, is looking at this issue of unbundling in pricing. There the major case is, from the '40s, *Hope Natural Gas,* and a follow-up case from, I think in 1989, called *Dusquense*. These cases involved the question of whether some regulatory action denies the utility a fair rate of return to such a degree that it constitutes a taking of the property of the shareholders of the utility, and that is a pretty tough standard for a utility to prevail on.

There is some interesting language in the *Dusquesne* case that says, if the regulator was whipsawing back and forth between two contradictory regulatory models just to achieve some opportunistic outcome, we might be more concerned. I think that's actually is an interesting hook for these contemporary network unbundling cases to focus on. I would urge judges to consider that when there is a fundamental change, when there is this Graham Nash rearranging of the world and we say, "Okay, we're going to trash the old rate of return monopoly franchise kind of regulation, we're going to go to open access, open competition,"— we're really changing the nature of the market. We're changing the expectations that the parties who made the investments have to recover the costs of those investments over time.

So I think that something that is not currently well defined in takings jurisprudence is the idea of compensation for transactions, for regulatory transactions.

Let me just conclude, then, by making one other point. The Supreme Court and the lower Federal courts (with the exception, of course, of the D.C. Circuit) and the state supreme courts are not cracking their Econ 1 textbooks as much as they could in some of these takings cases, particularly those involving the deregulation of network industries or the regulatory restructuring of network industries. There seems to be resistance to the idea that there are any immutable economic truths, such as demand curves slope downward or that risk is an inherent feature of investment. The push back that I detect is the line of questioning that I think the Chief Justice had in the case last month—that the *Hope Natural Gas* test says it's the end result that determines whether a regulatory action is confiscatory or not, not the methodology that the regulators use. There is almost the whiff of *Lochner* in the air. To say that a certain costing or pricing methodology is constitutionally required would be to enact Mr. Herbert Spencer's social statics. I don't think that's right. There may be for some an even more ominous brooding omnipresence of natural law—that, if economic principles are given constitutional dignity, this is natural law. I don't buy any of that. I think that judges have to be expected to be economically literate. That is just part of having a view of constitutional and statutory interpretation that keeps up with the times.

HON. WILLIAMS: Okay. Thank you.

Randy.

MR. MAY: Thank you, Judge.

I don't want to use my time this morning at the outset to argue with any degree of certitude that a particular FCC order or policy is or is not constitutional if the issue were litigated all the way up to the Supreme Court.

Rather, I want to suggest that, having in mind certain constitutional principles or constitutional norms, the FCC on its own accord ought to move in certain policy directions which I would maintain are consistent with those norms, policy directions decidedly different than those of the past including even those of the recent past, the post-1996 Telecom Act era.

Recall at the outset that in passing the 1996 Act, Congress proclaimed that it had established a, quote, "pro-competitive deregulatory national policy framework," close quote.

The first point I want to note, because this is a panel on the "FCC versus the Constitution," is that the FCC, of course, is one of those so-called independent regulatory agencies supposedly free from Executive Branch control and supervision. But a wise man once said, back on April 27th, 1998, referring to the FCC, that: "There are only three branches of government set out in the Constitution, and we are not one of them." That wise man was Michael Powell, then a mere commissioner, but now the chairman of the FCC.

Despite separation of powers concerns, the constitutional status of the agencies of this, quote, "headless fourth branch," close quote, is argued by many commentators to have been sanctioned in *Humphrey's Executor* case, with which I think most of you are familiar. The Supreme Court held that President Roosevelt, as the FTC Act specified, could not remove an FTC commissioner "without cause."

The Court has never specifically decided the issue of whether the existence of these independent regulatory agencies is, in fact, consistent with our constitutional structure of three separate branches. But putting that issue aside, it seems to me the mere existence of that question suggests that the FCC, in exercising its authority under the Communications Act, should adopt a posture of heightened sensitivity regarding constitutional norms that, absent explicit statutory commands to the contrary, at least guide its decisions in the direction of the values that animate those particular constitutional norms.

Already having invoked the FCC chairman's words, in a moment I want to do so again to illustrate two areas in which I think new direction should be taken at the Commission, having in mind these constitutional values. I do so knowing that perhaps my good friend Jane here, in her previous incarnation as a senior advisor to then-Chairman Powell, may have penned some of these words, or at least certainly collaborated in inspiring them.

Now, as you know, a significant chunk of the FCC's activity takes place under "public interest doctrine". In fact, in the Communications Act, there are approximately 100 separate public interest delegations. Some of them are obviously used more than others as justification for chunks of the FCC's activity, such as in the provisions that mandate that the FCC grant licenses to use the spectrum in the public interest.

I have argued that the public interest doctrine is so standardless as to be unconstitutional as a violation of the non-delegation doctrine, which requires that Congress at least provide an intelligible principle when it delegates law-making authority to another entity. You can actually find that argument in this book that the Freedom Foundation put out, "Communications Deregulation and FCC Reform," and in one of the recent FCBA law reviews.

But after last term's *American Trucking Association* decision, it is clear that the Supreme Court does not agree. In sustaining the Clean Air Act against a non-delegation challenge, Justice Scalia made his point by stating in so many words that we have even found an intelligible principle in the public interest standard, citing the venerable NBC case.

By the way, I was at the Commission for three years in the General Counsel's Office. There is a special key on the computer terminals that they use in the General Counsel's Office. The FCC lawyers can just punch Control-N, and it inserts that NBC case citation where Justice Frankfurter said that the public interest standard is, quote, "As concrete as the complicated factors for judgment in such a field of delegated authority permit." Think about that statement. Anyway, that key still there, I'm sure.

Okay. So now I must go back to my wise man for support for the direction in which I would like to see the FCC move. I want to share why I'm quoting these. It's because of my fondness for these quotes and out of respect and just to recall them to mind for anyone who may have forgotten about what I thought were really terrific speeches.

On October 28th, 1998, then-Commissioner Powell said, "I believe we need to reassess the Commission's application of the public interest standard. Specifically, I believe it is imperative that we try to enunciate principles that will discipline the broad discretion we have held historically. Only by looking to such principles can the Commission, in my view, reach conclusions that are relatively predictable, reasoned applications of the public interest standard, and not just the result of the most effective lobbying or political pressure or our unguided subjective judgment. More importantly, by adopting such principles, we may release from the `black box' the regulatory fears of private actors in the market who understandably assume that what they don't know about the regulator's future decisions may harm them."

So even though the public interest standard may not be unconstitutional, and I am accepting that for now, as a matter of prudence the Commission should develop a policy statement which sets forth its understanding of some limiting principles which will guide its decisionmaking. To take one example, and we could talk about some more later possibly, that is ripe for this type of prudential discipline that Chairman Powell has called for: the handling of license transfer applications in the context of mergers. As many of you know, the existence of this standardless public interest authority in the context in which parties come before the Commission obviously anxious, within some reasonable time frame, to complete a merger transaction, has led at least to the appearance that the Commission seems to negotiate so-called "voluntary" conditions in order for the parties to get the merger application approved by the Commission. Very often, these voluntary conditions seem more appropriately the types of requirements that would be adopted, if at all, in generic rulemaking proceedings.

So I would say that the Commission, in order to discipline itself, could announce in a policy statement that, number one, it will not generally duplicate the competitive analysis undertaken by the antitrust authorities that are looking at the same merger transaction, at least without articulating special concerns that it has; and number 2, that absent extraordinary circumstances, it will not impose conditions uniquely on the merging applicants that more appropriately should be considered in generic rulemaking proceedings because the requirements should apply to all similarly situated applicants.

Another area where the Commission could also discipline itself as well with regard to the public interest standard is content regulation. This is an area obviously where the public interest standard shakes hands, so to speak, with the First Amendment, so that cautionary restraint in the exercise of the agency's authority should be particularly valued.

The FCC's regulation of program content of broadcasters is distinct from the hands-off First Amendment model applicable to print and other media, in which content regulation is forbidden. Broadcast content regulation was sanctioned in the 1969 *Red Lion* case, principally on the basis of a scarcity rationale. Because of the physical limitations of the spectrum, the Supreme Court said, quote, "There are substantially more individuals who want to broadcast than there are frequencies to allocate."

I think Judge Bork put it nicely in the *TRAC* decision in a D.C. Circuit opinion. He said the attempt to use a universal fact -- physical scarcity -- as a distinguishing principle necessarily leads to analytical confusion. And that's the argument that newsprint is scarce, of course, and other resources are scarce in the same sense that broadcast spectrum is scarce. We can talk more about that later.

I think Judge Bork is a pretty wise man. But for this morning's purposes, I want to go back to that other really wise man of the day, then-Commissioner Powell.

This is from a speech before the Media Institute in April of 1998. 1998 seems to have been a particularly great year for Powell speeches. Commissioner Powell was accepting an award for his strong First Amendment principles, and in a speech entitled "Willful Denial and First Amendment Jurisprudence," Powell declared: "I submit the time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace. As far back as 1984, the Supreme Court indicated in the League of Women Voters case that it would await some signal from Congress or the FCC that technological developments have advanced so far that

some revision of the system of broadcast regulation may be required. I believe we should be getting those signal fires ready."

Powell went on to debunk the scarcity rationale. He listed all the changes from 1969 to now in terms of the number of media outlets, cable homes, cable outlets, all of those things which I won't go into today and, of course, have changed even since 1998 in the direction of more outlets for expression.

But then he went on to say, "The fact is that spectrum is not really scarce." And he said, "More importantly, the advances in technology have been astonishing since the time of *Red Loin*. Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium. The TV will be a computer, the computer will be a TV, cable companies will offer phone service, phone companies will offer video service. Digital convergence means sameness of distribution."

Then Powell concluded, "Should we continue to apply the reasoning of *Red Lion* to determine the First Amendment rights of broadcasters in today's communications environment? At the very least, any responsible government official who has taken an oath to support and defend the Constitution must squarely address this important question."

So what to do? Well, in December 1999, the Commission issued a notice of inquiry in a proceeding it called the Digital Television Proceeding to examine what the public interest obligations of broadcasters should be in the digital age, the broadcasters who were receiving the new digital licenses. But when you look at the notice, it seems to refer to all broadcasters, at this point, both analog and digital broadcasters.

In that Notice, the Commission, in asking about the public interest obligations, suggests that content obligations on broadcasters under the public interest doctrine might include everything from being required to provide targeted weather forecasts, which is easier to do in a digital world, to mandatory free airtime for political candidates. In the fashion of notices of inquiry at the Commission, the Notice does not telegraph the answers, but it does ask wide-ranging questions.

What was so striking to me about the Notice is what it does not ask or even mention. There is no discussion in that notice of the current marketplace environment for the mass media industry and what this environment, with its multiplicity and diversity of sources of information means for the continuing application of the public interest obligations.

There is no discussion of this digital convergence to which Chairman Powell had earlier referred. The Commission's Notice focuses only on broadcasters as if there are not digital cable-casters, digital direct satellite broadcasters, digital web casters. Indeed, the Internet is not even mentioned in this Notice to which I am referring. Most striking, there is not a word in the Notice about the relevance of the First Amendment to the Commission's inquiry.

So what I would say, to offer another specific suggestion for consideration, is that the Commission ought to use this outstanding notice on which comments have been filed, approximately a year and a half ago, to make a powerful statement about free speech in the digital era along the lines that Chairman Powell has spoken so eloquently about in those earlier speeches.

It should proclaim that, consistent with its understanding of the First Amendment and the present realities of the marketplace brought about by the digital revolution, the FCC will abandon all mandated content regulation that is not expressly required by statute. So I am focusing on what the Commission can do itself under its own regulations and not focusing on what Congress has mandated.

To wind up, some other areas that come to mind in which, if the FCC were to have a somewhat heightened sensitivity to the First Amendment where the decisionmaking process could benefit, those areas would be, for example, the cable ownership rules where there are obvious First Amendment considerations that at least lurk in all of these media ownership rules.

There is another one that I was just looking at a couple days ago. The Commission has on remand the rules relating to the disclosure of customer proprietary network information that telephone companies have and the extent to which that information should be able to be disclosed. This is on remand from the Tenth Circuit decision where the Tenth Circuit said you have to balance the privacy interest in nondisclosure of this type of information with the First Amendment.

So that is an example where, even if the First Amendment does not absolutely dictate the result, an appreciation of those free speech values might tilt in the direction of a result that would allow more disclosure.

I will wind up now. Thank you, Judge.

HON. WILLIAMS: Andy, I will have you speak now so that Jane can be in the position of defending all FCC positions that she wants to.

MR. SCHWARTZMAN: Well, I am torn between making some broad generic observations that may be important and timely and apply to some things said and engaging in a house-by-house line-by-line defense of Randy's thoughtful work.

I feel that Randy and I have spent a lot of years, we share an institutional habit of swimming upstream. Somehow, though, we're swimming in opposite directions. I've never understood that.

MR. MAY: Let me say one thing. When I started, we were swimming more in the same direction, but over the years, the world

has changed. But that's why we will engage in the discussion. But I was swimming with you for a while.

MR. SCHWARTZMAN: I will limit my generic observations to the thought that recent events perhaps have heightened the importance of seizing too quickly on constitutional principles as useful litigation tactics as a substitute for getting legislative relief and using the democratic process to attain one's objectives.

Perhaps the Commerce Clause takes on new meaning when we are dealing with anthrax and airline security questions and perhaps the Fourth Amendment takes on different meanings when we are talking about redefining national security. I know there are divisions within this organization on some of these things, the libertarian streak that runs through many people associated with the Federalist Society has been sparked by some recent events, and I know the Vice President has been addressing this as well. I am concerned at the notion that we're going to decide that people are not entitled to basic rights of counsel and public trial and due process and evidence and Federal sentencing guidelines even based on an unreviewable predetermination that they are not citizens anyway, and so they're not entitled to the same rights, which is a paraphrase, but pretty close to what the Vice President said the other day. If you do not have counsel to have that initial determination, maybe a citizen is going to get lost in the shuffle. There were several people who had the misfortune of having the wrong name who wound up being imprisoned as material witnesses for days on end recently.

I think the same thing is true with respect to the delegation clause in Randy's persevering in the face of the *American Trucking Association* case when even Judge Williams, who wrote the best case you are ever going to have to support invalidation of a statute, didn't get anywhere. I think Judge Williams exceeded the authority of the Supreme Court on this, for the time being.

Anyway, I think that there are some dangers here, and I would make that generic observation about property. It is not a litigation tactic. How did the property get acquired? How did all of these rates of return regulation systems get developed? What municipal, state, Federal rights-of-way, what special rights of access, what special poll attachment rights, contributed to the creation of this property in the first place, and how did that happen?

There is a case in the Fourth Circuit involving a challenge, including a takings challenge, to the so-called Chavia Act. It relates to broadcasting and retransmission of local television systems on direct broadcast satellites, and the satellite broadcasters are challenging the statute as a taking. One of the problems I have with this exercise is that these same companies helped write the statute and lobbied aggressively for it and forcefully fought for its enactment. Now they are turning around and challenging it, which was a tactically valuable thing for them to have done. Now they are turning around and, having won certain rights, they are trying to get certain of the other rights in the statute thrown out as unconstitutional. I think that that cheapens the Constitution. I think it cheapens the rights that we ought to care about.

I am somewhat heartened that the National Association of Broadcasters has just filed in the Supreme Court, supporting us, I might add, to make it even seem odder, expressing concern about using constitutional rights as a tactic to attack economic regulation. I think it's very dangerous. We ought to limit the invocation of constitutional rights to living, breathing citizens who have living, breathing concerns, and living, breathing persons, I suppose, in some cases.

That is a broad, generic set of observations, and it is not directly applicable to any particular point that Greg has made about TelReg where I think much of the criticism has a lot of validity. But I do create that generic set of observations.

With respect to Randy's discussion of the public interest standard, it does work pretty well. We have a system of checks and balances. The courts have had a pretty good understanding of what this can mean. Familiar language does not necessarily mean that it is imprecise or wrong, and we all use word processors. To repeat things doesn't mean that they are wrong; it may just mean that they are right.

I do think that delegating authority to agencies, giving them a lot of discretion in how to decide difficult questions that the legislative process in a complex society can't possibly deal with, is not only important and necessary; I do think that there is a difference between judicial review for excesses and a blunderbuss of saying, well, this is something that we don't like and we haven't been able to get Congress to fix it, so we are just going to attack it.

With respect to the stretching of the public interest standard conditions in negotiations, I don't see anything inherently wrong in a settlement discussion where there is a perceived problem for a package of remediation to be developed which may include some things that are not literally within the four squares of what the particular cause of action is about, but nonetheless has effect of changing the balance and positively affecting the outcome in private litigation or in litigation with the government. I do not think that there is anything wrong with that.

My problem, for which I would hope there would be more support from the people from the right side of the political spectrum on, is the way in which this is often done in secret. I think transparency is a very important aspect. I have been highly critical with only limited success in trying to open up the FCC's secret processes, abuse of their *ex parte* rules.

Indeed, the problem with the kinds of settlements and negotiations that Randy is talking about is that they have been conducted behind closed doors in secret, despite rules that supposedly preclude that from happening, rules which are now routinely waived as part of the checklist of what the FCC staff does when a merger comes in. It's one of the first things they do on their little checklist; they publish a public notice saying that the Commission's *ex parte* rules don't

apply.

I think openness would help a great deal and would facilitate action in the public interest and facilitate some understanding of what the public interest is rather than just saying the public interest doesn't mean anything.

Finally, without launching into a full-bore defense on the *Redline* spectrum area, I think a few comments may be worthwhile.

First of all, yes, there are more outlets out there. Yes, the digital technology uses the spectrum much more effectively. Yes, the demand for spectrum far exceeds the supply as the auction process for licenses undoubtedly demonstrates. It is not irrelevant that on September 11th, 20 percent of the cellular telephone calls in Manhattan were effectively completed and about 40 percent in Washington, D.C. Without taking sides and without agreeing that they are right, the cellular industry says that that's because they don't have enough spectrum, and they want more and they have been complaining about caps, which the FCC has now addressed. That does not strike me as abundance.

As far as signals are concerned, in 1983, in the Leland voters case, in a footnote, an opinion that was joined by six Justices, the Court said, we await a signal from the Congress or from the Commission. That is 18 years ago.

What has happened since then? A lot of things. First of all, the dependence on over-the-air television for news and information is greater than ever. The Internet doesn't do anything about local news and information to speak of other than repeat stuff that comes from the same newspapers and television stations, if that.

Congress passed the children's television law in 1991, finding that there was a lack of programming for children and a marketplace failure. In 1992, it passed a statute because of the concern about the dependence of a large portion of Americans on free over-the-air television. It imposed public interest programming requirements, including equal time and a set-aside of capacity for non-commercial use on direct broadcast satellites.

In 1996, Congress not only reenacted the public interest standard as the basis on which license renewals would be awarded, but it gave a large chunk of spectrum to incumbent broadcasters without challenge, simply because they were incumbent broadcasters, free of charge, and then loaned them their current spectrum indefinitely, free of charge, in the interim. Now the FCC is trying to push them off, bribing them in the case of Channel 69, by allowing them to sell something they got for nothing for billions of dollars because other people want it and it's scarce.

I don't see any signals from Congress or the FCC that it's time to revisit the scarcity principle at all, and I don't see the stock market evidencing any particular concern that the people who occupy spectrum are having a particularly difficult time because of the diminishing value of the spectrum that they are utilizing.

I could go on, but I won't.

HON. WILLIAMS: Thank you.

Jane. Wind up.

HON. MAGO: All right.

My goal today is to say as little as possible because I think I can only get myself into a lot of trouble, but let me start off by saying to you that I object to the name of this panel. It is not the FCC versus the Constitution. The FCC is simply a poor little administrative agency, we're a creature of Congress, as Randy pointed out, and we were created to implement the law.

We are not a court and we're not a legislature. We have no power to declare acts of Congress unconstitutional as Judge Williams told us in the *Syracuse Peace Council* case, I believe.

We also said in *Syracuse Peace* that you did have an obligation not to concoct your own innovative violations of the Constitution. I've now said enough. I said I was only going to get myself in trouble.

But, it's true, the FCC does have a duty to implement the laws that Congress tells us, and we have a duty also to defend those laws.

In the course of my 23 years at the agency, I have personally been involved in the defense of the broadcast indecency laws. We have a statute that tells us that we must, in fact, defend that. I've also been involved in litigation to defend restrictions that Congress put on dial-a-porn, the availability of dial-a-porn over the telephone network. I have also been involved in defending Congress's directions to us to place restrictions on unsolicited telephone calls going into your home through the Telephone Consumer Protection Act, and in defending some of the restrictions that Andy referred to a minute ago with regard to the direct broadcast satellite, the four to seven percent set-aside with regard to educational services, some of the political requirements. Currently, I am dealing with the defense of the statute that also Andy mentioned in the Fourth Circuit of the Satellite Home Viewer Information Act, Andy?

MR. SCHWARTZMAN: Something like that.

HON. MAGO: Yes. Where the satellite industry said that they should have a right to take the local signals of broadcast television and put them over the satellite in order to be able to grow the service, but now are saying that having had that right

to take the local signals, they shouldn't have an obligation at the same time to take all of the signals, all of the local signals. They want to be able to pick and choose.

We also at the Commission have been involved in any number of other constitutional issues over time that deal with equal protection. We have equal protection rules that have gone before the courts and we have defended those.

We have had to deal with the takings issues. As Greg mentioned earlier, those take on very many forms, from the physical co-location requirements for the telephone network that went down under the *Loretto* theory to some of the types of things that Greg was talking about, some of the takings with regard to the recovery for the telephone companies. Those are the issues, the TelReg principles that are before the Supreme Court right now.

The government's position, that we have to be able to defend is not that the companies are entitled to recover everything that they have ever put into their network, but rather that they are entitled to a reasonable regulation that does not impinge on their financial integrity, and that is something that is very different. I think we will probably get into this a little bit more as we go along.

Before I go on there, I need to give you a quick disclaimer on this, which is that I personally do not get involved in defending the telephone cases because my husband works for one of the telephone companies and it leads to bad harmony at home.

We also have due process issues that are raised constantly.

The key message that I really have is that the FCC is an implementer. We do not have the authority to overrule Congress. We do have a duty where we have policy choices, as Judge Williams said a few moments ago, to look at those issues and to make sure that the policy choices that we are making are consistent with constitutional principles, and that is something that we do in every single proceeding that comes before us.

We are looking at precisely those principles right now in any number of contexts, including how we are dealing with the owners of multiple-dwelling units and the rights that carriers have to have access to those structures. How we set up rules and regulations consistent with the Constitution that will ensure that the competitive spirit that's embodied in the 1996 Act goes on?

We are looking at the various issues. We have just initiated a proceeding in the radio ownership context to take a comprehensive look at where we are right now in the broadcast industry. Where do we stand? What should we be thinking about in terms of implementing our policies and taking the kind of look that Randy was talking about just a minute ago at where the industry stands and where should policy be going? In the course of that, we will be taking a look at how it fits with constitutional principles and the current realities of the marketplace. We are doing similar actions with regard to the cable industry.

I think that it is not true that we never think about constitutional principles as we go through all of this. We constantly look at those principles. We make judgments. Certainly reasonable minds can disagree as to some of the judgments that we make, and frequently they do, but that is part of our obligation, to take that into account, and we are going to be doing more of that.

Let me address a couple of the things that came up in the course of some of my fellow panelists' discussions. One, I have to point out that Randy lied to you about the computer key on the Commission because he said that it was there when he was at the Commission. Now, having been there when Randy was there, and writing briefs at that time, we not only didn't have computers, we didn't have push-button telephones. We only got push-button telephones at the FCC about five years ago.

MR. MAY: That is all true, and I was afraid that the NBC case had not been decided by then.

HON. MAGO: At this point, I am starting to feel a little bit wary about trying to throw age jokes. They come back at me.

But with regard to mergers, I wanted to make a couple of observations there. The Commission is, in fact, trying to take a very comprehensive look at our merger policies to ensure that we do have the kind of transparency in our dealings that Andy was talking about, and that we provide the fairness to the parties that is essential.

Michael Powell does very much believe that the agency should be in a position of looking at any particular merger that is in front of us. If there are conditions that are necessary to put on that merger to ensure the public interest, he has no qualms about putting those conditions on. But if there are conditions that are more appropriately set for a wider range that do not fit as something that goes to an individual party rather than something that should be an industry-wide condition, the chairman's position is that the agency should not be imposing those in the individual context of a merger just because it may be that the parties would want to try to negotiate that to get a better leverage, but rather that the agency should be initiating a rulemaking proceeding to say, should we be addressing this across the board?

It causes distortions in the marketplace if we have conditions that apply to one particular entity but not to others. That's not say there is no condition that should not be applied in a merger context. There may well be something that is specific to the parties that should be applied. Those are the kinds of things that we have to look at.

Addressing for just a second the *ex parte* issue on this, I wasn't quite sure what you were referring to,

Andy, when you said that we say we don't apply the *ex parte* rules.

As far as I know, what the Commission says is that we frequently make a particular merger proceeding permit but disclose, which means that the *ex parte* rules apply. But that means that the parties can come in, they have to tell us what it is that they've said in their pleadings.

You and I have talked about this on other occasions where those reviews or those summaries of what is being said at the Commission can sometimes be a little bit too terse. I think that they should be more comprehensive and agree with you on that, but I think that is a different thing than saying that the *ex parte* rules get thrown out the window.

What else did I write here in my many, many notes that I was throwing around?

Content regulation. Hit that one for just a second. As I noted when I first started here, the content regulation that we do is by and large in response to specific statutory requirements. We are required by statute to deal with broadcast indecency. We are required by statute to look at the unsolicited telephone calls, we are required by statute to look at political broadcasting issues. Those are all things that Congress has directed us to address, and as an agency we have an obligation to do so until the courts or Congress tells us differently, and I think that we have to continue in that regard.

I think I have probably said enough to get myself in trouble, right? That's probably it. I will stop there before I say something really bad.

HON. WILLIAMS: Okay. I thought I would open it up for questions in a minute, but I would indulge my privilege as chair to pose a hypothetical question.

Suppose that right after the ratification of the First Amendment, the first Congress had looked out on the scene before it and was concerned about the high price of paper and the way in which the high price of paper made it hard for many would-be newspaper operators or pamphleteers to get their views across.

So as a solution, it adopted a statute whereby an agency would be established which would buy up all paper suitable for printing purposes. One can theorize about the way in which the price would be worked out, but anyway, let's assume roughly approximate to what would have been the market price absent this. They buy it up and then they would provide it free to those who wish to operate newspapers, publish pamphlets, books and so forth.

Now, then, they weren't fools in the first Congress, so they recognized that if they offered the paper free, the demand would be virtually infinite, which would be much in excess of the supply, and there would be tremendous scarcity. So they said, well, we have to have some way of allocating this paper. Well, I think the agency that buys it up should also be in charge of allocating it on the basis of applications. But it is awfully hard to say exactly which newspaper publisher is more worthy. Who is going to more usefully inform people than another. We cannot foresee in advance, we cannot set up general rules. So this agency should allocate the paper for these purposes in accordance with the public interest. Then the system started flowing merrily along. Then, of course, you get to how they would exercise it and so forth and you could have a lot of sub-hypos which I won't give you and I won't even ask you give answers to it, but I will now invite questions by the panelists.

The panelists, of course, those who have had people speaking after them, may want to get their licks in and they can exploit a question to achieve that if they like. Only if you've got a question, Randy, only when you've got a question.

MR. MAY: Can I ask just one clarifying question about your hypo.

HON. WILLIAMS: Clarifying question.

MR. MAY: If the first Congress also passed a law saying that no newspaper publisher named Rupert could be licensed.

PANELIST: I might note that we really haven't been told we have to answer this question, but you asked me essentially the same question once in oral argument and used up about a good ten minutes of my time.

HON. WILLIAMS: It's a useful device, obviously.

PANELIST: And I prefer the option of not having to answer it.

HON. WILLIAMS: All right. Questions. Yes?

AUDIENCE PARTICIPANT: This is for Mr. Schwartzman. It's more of a comment than a question. You said something here today that Congressman Markey essentially said, too. I think it is the most dangerous thing I've ever heard said at a Federalist Society conference. You said that if someone is at the table negotiating a bill and a member of Congress really wants to pass it badly, that person has to come back to the table again and deal with that member of Congress, and under that

pressure, they cut a deal. They should not then go to the courts to avail themselves of any constitutional flaws that are in that bill to protect their rights unless they are living and breathing people.

The Media Access Project is not a living and breathing person, either, and I hope that you will think about that, whether you really believe that in the event that you are involved in negotiations on an important bill and you might have to deal with a member of Congress and you don't want to tick him off, and you are forced to go along with a bill that violates your rights, and in return for that, you give up your right to challenge that in court. I found that to be a very dangerous doctrine.

MR. SCHWARTZMAN: Well, let me address it. The instance that I just described was not a coercive situation. As I indicated, this was a statutory provision that the groups in question affirmatively supported and sought enacted. This was not a compromise that was worked out where I would have no problem accepting a compromise and reserving a right to litigate. That is not the situation I just described.

Media Access Project is not a living, breathing citizen. We do not assert standing on our own behalf; we function as a law firm. We represent organizations, each of which have living, breathing members on whose behalf we act, and we have been highly critical of organizations from the right and left that have attempted to obtain standing, Article III standing, for an entity that does not track itself to some sort of membership function, and that is a matter of great concern for us.

Sure, we have individual opinions and we are often asked what we think about this and that, and there is an implicit kind of representation in those things. But when we go to court, we do it on behalf of citizens because I think that that is a very important part of the role. I hope that's responsive.

MR. SIDAK: Can I add something to that?

HON. WILLIAMS: Sure.

MR. SIDAK: Corporations have shareholders and they are people. They have employees and they are people. So I don't see where that's a very helpful basis for distinguishing between whether you should or should not be forced to waive your right to challenge a statute in court on constitutional grounds.

AUDIENCE PARTICIPANT: Good morning. I'm Scott Delacourt. In a panel on FCC and the Constitution, I have to ask about the *Next Wave* case.

This morning's Post reports that the government and the parties are near settlement: but who knows? I wanted to get the views of the panelists on a question lurking in that case, which concerns FCC spectrum licenses and property interests therein.

HON. WILLIAMS: A call for volunteers.

PANELIST: It is often too easy to pass off distinctions in saying this case is *sui generis* or however you choose to pronounce the Latin. But this one certainly has certain attributes that are unlikely to come up again.

HON. MAGO: One can only hope.

PANELIST: That aside, and one of the special aspects of this is that I think, as many people in the communications bar have learned, definitions of what constitutes property and what constitutes rights for purposes of bankruptcy are not the same as definitions that apply in other areas of jurisprudence, and that is okay, too. But I think it has proven difficult to generalize some of those concepts over into other concepts.

That said, what we are talking about here is a lease, a leasehold, but a leasehold terminal under conditions, breach of duty and subject to certain kinds of unusual conditions.

Deciding whether a lease for a term certain subject to certain conditions confers some degree of property rights, whether you answer it yes or whether you answer it no doesn't really answer the larger question that you asked, and I think that the litigation suggests that it may be true and it may not be true and there is not even a lot of agreement about whether the Second Circuit and the D.C. Circuit are in conflict with each other.

We may not get the answer to this at this time or ever, but what we are talking about when the question is answered is not going to be this broad sweeping question that you asked. I don't think it's going to have a lot of bearing on that broad sweeping question about whether there is a property right in a spectrum license in other situations.

MR. MAY: Could I respond to Scott's question this way? I agree with a lot of the way you actually put that. I don't want to

spend all morning quoting other people, but I want to read to you from a court decision, from an opinion, not even a majority opinion, which I think is very useful for all of us to have in mind when we think about this very question.

I think *Redline*, the broadcaster, could only have claimed its speech rights in a sense if the government, had allocated, property rights, I would say.

Let me just read you this. There is perhaps good reason for the Court to have hesitated. This is in a discussion about that same issue of whether, the license is property. It is a good reason for the Court to have hesitated to give great weight to the government's property interest in the spectrum.

"First, unallocated spectrum is government property only in the special sense that it simply has not been allocated to any real owner in any way. Thus, it is more like unappropriated water in the Western states that belongs effectively to no one. Indeed, the common law courts have treated spectrum in this manner before the advent of full Federal regulations," citing that *Chicago Tribune* case which you have seen cited.

"Further, the way in which the government came to assert a property interest in spectrum has obscured the problems raised by government monopoly ownership of an entire medium of communication."

SPEAKER: Even reading these wonderful quotes?

MR. MAY: Wait a minute. Let me answer Judge Williams' hypothetical this way.

"We would see rather serious First Amendment problems if the government used its power of eminent domain to become the only lawful supplier of newsprint and then sold the newsprint only to licensed persons, issuing the licenses only to persons that promised to use the newsprint for papers satisfying government-defined rules of content."

Okay. I commend that decision. This is an opinion by Judge Williams --

HON. WILLIAMS: It's regrettably not a decision; it's merely dissenting from a denial of --

MR. MAY: Dissenting from a denial of -- I was going to say that, to make it clear -- dissenting from a denial of petition of rehearing. But to me, it's an excellent discussion that frames this issue of property rights, and I agree with his answer to the hypothetical that he posed.

HON. WILLIAMS: I didn't quite answer it. I just said there are First Amendment problems.

PANELIST: I don't suppose we should get off of the spectrum issue without inviting Greg or Randy to make some unpatriotic remarks about the role of the Department of Defense in spectrum management.

PANELIST: Well, let's don't waste a lot of time on that.

MR. SIDAK: The big problem there is that DOD and other government agencies that have spectrum cannot directly benefit from selling to somebody else.; tThe money has to go back into the Treasury for reasons that were made well known during the Iran Contra Affair. All money goes into the Treasury, and it has to be appropriated out.

HON. WILLIAMS: Yes.

AUDIENCE PARTICIPANT: Art Aldenaff. I also work for an agency authorized under Article 1.5 of the Constitution.

Recently, the FTC's general counsel -- Phil Kavosich's recent talk at the ABA and several conferences suggested that the development of a so-called domestic competition network might be useful. One thinks of AOL-Time Warner. And the notion is that currently, mergers undergo review from a variety of different regulatory bodies. Sometimes quote/unquote "antitrust" principles informing the review are applied by different bodies, and I think his notion was that in going overseas and talking to foreign competition bodies about the optimal system, they asked why state, local utility commissions, several Federal agencies are all playing with the same merger transactions, and then he explains that's the beauty of our system.

I guess the broad question is, do you think, speaking personally and not for the Commission, that there might be some interest in having some kind of coordinating group for dialogue among the Federal antitrust enforcers and those independent agencies that also examine mergers.

HON. MAGO: In fact, there already is a certain amount of dialogue that goes on. This is a common concern. Are we duplicating the efforts? In fact, Randy could probably find six more quotes from Michael Powell for raising that very concern, that we not be duplicating the efforts of other agencies.

When we at the FCC try to look at them, we in fact take into account that our mission is somewhat different.

We have a responsibility to look at the public interest from the point of view of diversity and economic competition, and that is something that we, bring into our review of it, and we attempt not to simply duplicate the efforts of other agencies, but we do defer to their judgments. We have announced that in a variety of decisions where we have deferred to the Justice Department or to the Federal Trade Commission.

I think you are proposing a somewhat more formal body to oversee that, and I guess my reaction to that, and this is a purely personal reaction, is I don't think we need any more regulation on top of the regulation we have. What we need to do is to be able to have effective coordination among the groups that do have responsibilities under the statutes now.

AUDIENCE PARTICIPANT: Actually, I am not proposing something formal. I mean, I think the notion was here to have a forum, perhaps a regular forum where say public utility -- let's take public utility officials, perhaps people from FERC, FCC, you know, sit down, people from the Antitrust Division of the FCC, and get some current thinking. For example, how do we analyze effects on particular markets of these mergers, what are you hearing?

The notion again is not at all something formal, but something not requiring statutory or regulatory action. Perhaps a forum, outside the context of any particular transaction, to help shape the debate.

HON. MAGO: Again, I think we're looking at that in the broad context of all of our merger regulation, and that is a very important point.

HON. WILLIAMS: I might just say that Judge Posner, in a talk on antitrust in the new economy, was very hesitant about a lot of issues, but one firm proposal he made was that, certainly for the new economy, the power to enforce antitrust laws be vested nationwide, that is to say governing the states as well, in a single body, substituting one veto power for 52.

AUDIENCE PARTICIPANT: My name is Tom Fisher. I do some telecom cases.

I was thinking about the problem, going back to the newsprint and the scarcity issue, and I always come back to the notion that, like newsprint, it seems like the spectrum could just be, left to the market and let that take care of it.

But the problem I have a hard time getting my arms around is the idea of policing who is actually using spectrum, whether they are trespasses or whether the notion of typical laws of trespass could be used in the same way as with newspapers and could be criminally prosecuted as trespassers would be.

Would those kind of laws be effective in the area of spectrum or does the FCC's role in allocating that also have to do with the ability to police all of that?

MR. SIDAK: No.

PANELIST: Will you elaborate?

MR. SIDAK: The Federal Radio Act of 1927 was enacted when Congress realized that they were going to lose control if they did not pass a statute to regulate radio, because at common law in Illinois, in the *Oak Leaves* case, a trial judge laid out the law of radio trespass. The best place to look for this is Tom Hazlett's writings. He analyzes the early political economy of radio broadcasting.

But what is really interesting, too, about what the judge came up with was that it was identical to the rules that the Federal Radio Commission came up with once Federal law preempted all the state common law decisions.

PANELIST: This is on the interference issue.

MR. SIDAK: On the interference issues, yes.

HON. MAGO: I can take a slightly different view on that. From the agency perspective, one of the jobs that I have had over the course of time was as the deputy chief of the Enforcement Bureau, and in that context, we have some responsibility for dealing with all the different interference issues.

Frequently I was dealing with local jurisdictions who wanted to get into interference protection. Talking about the different definitions of what we were, what was interference, and what really was a problem, it became clear to me in that context that having that be something that could vary on a state-by-state or even locality-by-locality basis would be something that could cause mass confusion.

PANELIST: Yes. I don't think any of the radicals in this area object to the concept of Federal rules of the road with respect to broadcasting.

PANELIST: Let me make one observation about the delegation part here and the need to afford an agency with enough latitude to deal with the kinds of questions you raise in a changing technological environment.

Something that I think everyone on all sides of the political spectrum, at least on the extremes of the political spectrum, happy about is technology that affords much greater opportunity to use spectrum in new and wonderful ways.

Spread spectrum technologies and so-called ultra-wideband technologies that are coming into play that use the spectrum differently or defy the principles of allocation that have been employed over the years offer some tremendous opportunities, opportunities for innovation, opportunities to do new and different things.

I have been pushing very hard for development of low-powered radio, which is a somewhat analogous situation where technology now permits the insertion of large numbers of small low-power radio stations without causing interference or, depending on who you talk to, too much interference. And this is not something that a legislature can effectively deal with on a year-to-year basis and it's not something that can be dealt with very well without having a generic set of principles like a public interest standard within which to evaluate and balance these considerations.

It is a testament to the kind of innovation that can be possible, that the FCC is trying to develop these technologies, and if it did not have something as supple, one of my favorite words in the precedent NBC, the FCC would not be able to do that.

HON. WILLIAMS: Yes.

SPEAKER: Mr. Schwartzman, what case law might stand for the proposition that a party which was involved in lobbying a particular provision into a law is somehow estopped or has waived the right to challenge that in court or what ethics opinion binding on counsel might establish such a policy?

AUDIENCE PARTICIPANT: I don't think there is any. I was making a policy point. I don't challenge the right to do it, but it does raise questions, in my mind, about the dangers of using constitutional principles as litigation tools. I think it demeans the democratic value in a generic way, and that is the concern that I was trying to express.

SPEAKER: You argue that it might be unethical for counsel to make such arguments?

AUDIENCE PARTICIPANT: I think so. It would raise concerns on my part. It makes me question the motives.

SPEAKER: Because I know of no ethics opinion that says anything even close to that.

AUDIENCE PARTICIPANT: I am not suggesting that they are barred from doing it; I am suggesting that it ought to raise some questions about how we approach the intersection between the branches of government.

SPEAKER: My concern is that ethical issues are now being brought in to limit the right to petition the courts on the part of private parties, and that counsel, in effect, are implying it's unethical for counsel to make an argument against a statute in which negotiated a provision, and I see no authority for that and I see very serious implications for the parties and their constitutional rights to take it in front of the court.

AUDIENCE PARTICIPANT: The point is not unimportant; it's well taken.

SPEAKER: Are the people who were actually broadcasting before 1927 and staked out of their own piece of the spectra, exempt from all this re-licensing?

MR. SIDAK: No. In fact, there were some early spectrum takings cases litigated around 1929, 1930, and they were all shot down by the courts.

HON. MAGO: We have dealt with this in the pirate radio context where there have been a number of challenges over the last several years of various entities contending that they have a right to use the spectrum without having an FCC license and they have been consistently put down by the courts.

PANELIST: Tom Hausis, as I recall, has a wonderful fantasy. Suppose the United States, on acquiring the unoccupied western lands, had set up a Western Lands Allocation Commission, and it would mark out, say, everything south of one line for cattle and everything west of some line for sheep and so forth, of course, subject to modification in later rulemakings.

PANELIST: In the public interest.

PANELIST: Well, I would note that the Land Grant College Act and the set-aside of property for land grant colleges proved to be pretty effective public policy.

PANELIST: I think I can see subtle distinctions, yes.

SPEAKER: Before September 11th, the stock market had its own September 11th, and it was all in telecom, just oceans and oceans of capital lost, $210 billion at last count, much bigger than the S&L bailout. I know some of the companies that have gone under pointed the finger at the FCC for failure to really police the opening of competition that came out in 1996.

As I sit hear listening about the FCC, all I'm thinking about is all the stocks I own.

Would any of your proposals or positions that you are taking, help with this in the future?

HON. MAGO: Well, let me jump in first and say I don't take that rap.

The 1996 Act opened up competition, and I think it has been described several times as attempting to drink from a fire hose to see if we could figure out how to implement this Act in a reasonable way. Some of the choices of the Commission helped to shape where the market went, but I think that the market itself took off and various parties developed their business plans. Investors in fact invested in those companies, and there was a real sense that some of the plans were not well founded. When that was realized, that helped lead to that sell-off, and it was not simply FCC regulation or government regulation as a general principle.

PANELIST: Could I just add? I agree with Jane generally and I would not want to tie particular stock market prices to the FCC's policy very closely. But I want to use your question as an opportunity to say that in my view, what the FCC's policies have done in implementing the Act really are tilt. It is a matter of balance and judgment.

The Communications Act itself was not really explicit in so many ways, including the ways that I am going to talk about. But I think the FCC has tilted its interconnection and network unbundling rules -- this is what the Supreme Court case is about that Greg talked about -- too much towards promoting resale of services versus facilities-based competition. And in the sense that the FCC has required an excessive amount of sharing at these TelReg prices, which I think are too low (it would take more time than we have to explain why that's so), what happens is that it disincents the new entrants that you want to come into the market to provide facilities-based competition. That is ultimately the only type of real competition, when people own their own facilities and control them. It disincents new entrants from constructing their facilities if they can share the incumbent's facilities at prices that are arguably too low, but it also disincents, and this is important, the incumbent from investing in new facilities if it has to share away the profits.

Reid Hunt basically said in his book that because the Communications Act was not explicit that we were able to give the new entrants a fairer chance to compete. That was the way he put it: a fairer chance to compete. Relating this back to the Constitution and the subject of our discussion, that when you give someone a fairer chance to compete as opposed to a fair chance, that it actually it implicates the type of discussion in those cases that Greg was talking about in terms of the rate-making balance and the takings argument, that we talked about.

So when you set out to do that, you are implicating, constitutional principles and values in the way that I talked about before. If a provision is ambiguous enough to give the FCC the authority to tilt one way, then it is also ambiguous enough now, if it explains why it is changing its policies, to go back, I think, and tilt in another direction that would incent more facilities-based competition rather than just this resale. Ultimately, if that happens, you will see the stock market zoom way up. That's my prediction.

PANELIST: Did you learn whether to buy, sell or hold?

SPEAKER: You didn't say when.

PANELIST: Watch these guys at the FCC, and don't watch what they do, and there is a lot of talk about new reorganizations and they are going to move the boxes around and create new bureaus. You know, that all might be very nice, but watch actually what they do substantively in terms of the policies.

MR. SIDAK: May I add a word to that? I think that it is also important not to view regulatory agencies as angels, to invoke Madison. And it is the Federalist Society event here, so somebody can tell me which Federalist number that is; I've forgotten.

PANELIST: Fifty-one, I think.

MR. SIDAK: Fifty-one? Okay.

But regulatory agencies are subject to all kinds of pressure, not only from interest groupsAgencies have their own agendasIf the public interest standard is, in fact, as supple as Justice Frankfurter thought, it's supple in ways that may not be good., and tThat can translate into what might be called regulatory opportunism.An argument can be made that some of the big decline in the value of telecom companies was because it became more apparent that there was a kind of regulatory risk out there in the way the '96 act was being implemented.

HON. WILLIAMS: It looks as if we're out of questions, so will the audience give a hand to the panelists. Thank you very much for coming.