REMARKS OF
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Thank you Your Honor, for that kind introduction. It is terrific to return to the Federalist Society's National Lawyers Convention. Thank you for having me again. I'm looking forward to listening to what promises to be a lively discussion by some of America's foremost experts on communications law over whether Congress should re-write the statute that covers about one-sixth of America's economy.

Only lawyers could look forward to spending an otherwise lovely Saturday morning with other lawyers to discuss the finer details of such a matter. And being an attorney myself, I have to confess that I, too, have looked forward to this day.

While preparing my remarks, I reviewed my speech from last year. And boy – was it long! Sorry about that. Any speech that touts 21 footnotes must have been a real stem-winder. I must have been thinking that I would get extra CLE credit for all of that work. But thank you for so politely staying awake throughout it all.

But as I read through it, I realized that I could give pretty much the same speech today. Don't worry, I won't – at least not all of it. In some ways, the debate over whether the FCC should regulate Internet network management hasn't changed much in the past 365 days. On the other hand, I have heard a lot of "chatter" from the communications bar, Wall Street analysts and reporters, just in the past 72 hours. This morning, speculation abounds. Let me say at the outset that, as a commissioner of the Federal Communications Commission, appointed by two presidents and unanimously confirmed by the Senate each time, I have absolutely *no idea* what's going to happen … or when … or even *if*. So I'm going to talk about what I do know.

One question regarding the Commission's authority to regulate Internet network management under Title I has been answered – and correctly, in my view – by the D.C. Circuit in its decision in the *Comcast v. FCC* case. Just to refresh memories, I dissented from the Commission's 2008 *Comcast* order because, for starters, I did not think that the FCC had the power to act as it did. In April, a unanimous panel of the D.C. Circuit thought likewise when it held that the Commission failed to show what underlying statutory mandate provided the legal foundation needed to claim Title I ancillary authority to regulate the Internet. The court did not go so far as to say that the Commission had absolutely no authority to act. It merely determined that the FCC failed to make its case. The court reminded the Commission that ancillary authority has to be

related to some mission explicitly authorized by Congress. When it comes to regulating network management, however, Congress has passed no such law.

After repeated and exhaustive reviews of the statute and the record, I still can't find anything close to a congressional directive for the FCC to regulate information services as some have proposed over the years.

Although Congress has not passed legislation on the matter, it has not been silent either. In the past year, a large bipartisan majority of Congress (when was the last time you heard those words strung together?) warned the Commission against trying to issue net neutrality rules. More than 300 Members of Congress, including 86 Democrats, have demanded that the Commission abandon its proposed course and leave this issue for Congress to decide. It is my sense that the volume behind this message will only increase.

Some are guessing that the FCC could try to adopt rules that look something like the legislation recently drafted by current House Energy and Commerce Committee chairman Henry Waxman. In addition to barring a classification of Internet access services under Title II, the old telephone part of the 1934 Act, the Waxman draft bill contained a "sunset" provision that would end new Title I regulation of network management after two years. In short, the bill was designed to be temporary or interim.

Those who may think that the Commission will escape another appellate rebuke merely by labeling a new Title I order as "interim," should reevaluate their strategy. Although courts generally have been deferential to an agency when it issues an interim order, it helps an agency's case tremendously if it can point to some facts to justify such extraordinary action, such as an emergency – a real emergency.

In the case of regulating Internet network management, where is the evidence of an emergency? Should administrative agencies be allowed to regulate far beyond the bounds authorized by Congress merely by labeling an order as "interim"? If so, wouldn't agencies' legal powers essentially be unlimited? Wouldn't Congress become irrelevant in such a scenario?

Appropriately, this morning's panel is intended to focus on what Congress should do when it comes to updating American communications policy. (Before I go further, please keep in mind that I subscribe to the philosophy that I, as a commissioner, shouldn't tell Congress what to do. Congress tells *me* what to do.) But whether policy changes affecting broadband Internet access services emanate from the FCC or Congress, a plethora of important threshold questions abound, and I hope that legislators would ask all of them, and then some. Among them are:

- Is the broadband Internet access market broken?
- If so, can only the government fix it?
- In other words, where is the evidence illustrating that today's deregulatory model -- the same model that has been in existence since the Internet was privatized in

1994 – has failed? Hasn't today's model produced the open and freedom-enhancing Internet that has thrived so amazingly precisely *because* governments have kept their hands off of it? Isn't it the greatest de-regulatory success story of all time?

- How has the factual landscape changed since this *past January* when the Department of Justice examined this market and concluded that no evidence of a concentration or abuse of market power existed that would warrant regulation?
- What would be the international implications of the U.S. expanding government intervention into this area by reversing hands-off policies that have existed since the Clinton-Gore Administration? Would U.S. regulation spark an international chain reaction of Internet regulation?
- How could the U.S. justify being more regulatory than the European Commission, when its chief digital agenda policy maker just last week announced that she opposes new regulation of Internet network management?
- Wouldn't some proposed rules cause irreparable harm to network operators by affecting their ability to raise crucial investment capital needed to modernize their facilities, not to mention irreparably harming their ability to innovate?
- If the Commission were to adopt such rules, couldn't a petition for stay of the order be granted due to a likelihood of success on the merits because of the lack of even *implicit* statutory authority?

Most importantly, one can't speak at a Federalist Society event without mentioning the … Constitution. In fact, as luck would have it, do you know what happened 221 years ago today? New Jersey became the first state to ratify the Bill of Rights. So that fact provides a nice segue to one of the most important sets of questions lawmakers should ask: Would brand new government regulation of privately funded communications networks survive Constitutional muster, especially under the First and Fifth Amendments?

There is a way to avoid all of these pitfalls, however. I hope that, before the Commission takes a giant leap into a potentially dark and dangerous regulatory abyss, it would seriously consider an idea that I have suggested for several years now. For those fearful of anticompetitive conduct in the broadband market, in lieu of new rules, the FCC could create a heightened role for itself. It could lead a coordinated effort with similarly inspired partners such as already established, non-governmental, Internet governance groups, the Federal Trade Commission and other antitrust and consumer protection agencies, public interest and consumer groups, trade associations, academics, engineers, economists and others. This new alliance could spotlight allegations of anticompetitive behavior and use already existing consumer protection and antitrust laws to punish bad actors and aid consumers. Coupled with a continued drive to create new opportunities for broadband competition, such an approach could help preserve the open and freedom-enhancing Internet we enjoy under today's deregulatory model, all without the uncertainty, costs and risks new rules always bring. My door remains open for discussing the creation of such a framework.

But back to today's panel. Personally I hope that most legislative efforts would involve issues unrelated to network management. Ideas I'm hopeful the panel will discuss include everything from reform of our bloated and inefficient Universal Service subsidy program, to updating the cumbersome Sunshine in Government Act, to voluntary incentive auctions to spur broadcast spectrum reallocation, to elimination of the 76-year-old statutory "stovepipes" that no longer bear any resemblance to the state of the marketplace.

For example, like the vast majority of American consumers, my three children, ages 3 through 11, don't care which platform or technology delivers their video and audio content, be it wireless, broadcast, coaxial cable, copper wires, fiber or satellite. To them, the delivery mechanism is meaningless. They just want the content when and where they choose. Shouldn't the law reflect these realities – realities that didn't exist just a few years ago?

Regardless of whether legislators pursue narrow bills or comprehensive rewrites, we should all remember that James Madison's separation of powers construct was designed to make it difficult to turn legislation into law. These tasks may be even harder with today's newly divided government.

Of course, when it comes to communications legislation, we should keep in mind that a newly minted Republican Congress passed the Telecommunications Act of 1996 and a first-term Democratic president signed it. But that came about after an intensive bi-partisan effort that stretched over 12 years, starting with the break-up of the Ma Bell monopoly. When it comes to new legislation, sometimes the best watchwords are patience, persistence and, most importantly, prudence.

One thing is for sure: the coming weeks and months will be fascinating for FCC watchers. So, enjoy the show!

Thank you again for having me today. I look forward to learning from our distinguished panel.