Engage

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Speech and Privacy Regulation in the World of Drugs & Healthcare

Of Senate Default and Judicial Nominations: Does the Constitution Require the Full Senate to Act?

Judicial Confirmation Process: Perspective from the Three Branches

Government by Regulation: Are Class Actions Subverting the Political Process?

The U.S. Response to the International Criminal Court: What Next?

Judicial Speech Codes: Supreme Court Review of Republican Party of Minnesota v. Kelly

Engage

Volume 3 October 2002 Supplement

Administrative Law & Regulation

Speech and Privacy Regulation in the World of Drugs and Healthcare--pg. 3
An Address by The Honorable Daniel Troy--pg. 14

Corporations

6th Annual Corporate Governance Conference--pg. 19

Criminal Law & Procedure

The U.S. Response to the International Criminal Court: What Next?--pg. 65
Will the ICC Provide Adequate Procedural and Structural Safeguards?

Federalism & Separation of Powers

The Role of the Senate in Judicial Confirmations--pg. 79
The Judicial Confirmation Process: Perspectives From the Three Branches--pg. 91

International & National Security Law

The U.S. Response to the International Criminal Court: What Next?--pg. 92
Can the ICC be Effective on the World Stage?

Labor & Employment Law

Labor Briefing--pg. 108

Litigation

Government by Litigation: Are Class Actions Subverting the Political Process?--pg. 121

Professional Responsibility

Judicial Speech Codes: Supreme Court Review of Republican Party of Minnesota v. Kelly--pg. 137

Religious Liberties

School Vouchers: Past Lessons and Future Prospects--pg. 150

ADMINISTRATIVE LAW & REGULATION

SPEECH AND PRIVACY REGULATION IN THE WORLD OF DRUGS AND HEALTHCARE*

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Mr. Richard Samp, *Chief Counsel, Washington Legal Foundation*
Ms. Paula Stannard, *Counselor to the General Counsel, U.S. Department of Health & Human Services*
Mr. William C. Waller, *Chairman Food and Drug Subcommittee, Federalist Society, Venable, Baetjer, Howard & Civiletti, moderator*

MR. WALLER: I'm the Chair of the Federalist Society's Food and Drug Subcommittee and I'm welcoming you to Speech and Privacy Regulation in the World of Drugs and Healthcare.

The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principle that the state exists to preserve freedom, that separation of powers is essential to our Constitution, and that it is emphatically the province of the judiciary to say what the law is and not what it should be. The Federalist Society seeks to promote both an awareness of these principles and to further their application through its activities and programs like this.

This morning, we have two important topics to cover. The first is HIPAA and Privacy and the second is the First Amendment. Our plan is to have our speaker Paula Stannard and then proceed to the First Amendment panel.

Paula graduated magna cum laude from Amherst College in 1987 and — I found this particularly interesting — she had her degree in political science and Latin. She received her J.D. from Stanford Law School, and she now serves as Counselor to the General Counsel of the U.S. Department of Health and Human Services, where she has worked on proposed bioterrorism legislation, regulatory reform initiatives, and of course the HIPAA privacy rule.

So, without further adieu, Paula Stannard.

MS. STANNARD: Thank you. The first thing I'd like to stress is that the Administration believes firmly in the need for federal protection for the privacy of healthcare information. But we recognize that that protection cannot occur at the expense of patient access to quality healthcare, and not at the expense of the commonsense practice of medicine.

Earlier this spring, we proposed some modifications to the Privacy Rule. In considering how to modify the Privacy Rule, our touchstone was the commonsense analysis of patient expectation. What would reasonable patients expect? We believe that they would expect that the confidentiality of their medical records would be protected, but in such a way that it did not interfere with them getting needed medical care or their ability to communicate with their doctors regarding their health and treatment.

What I'd like to do today is briefly outline the framework of the Privacy Rule and then focus on a couple of areas which are particularly relevant to the food and drug area — adverse event reporting and other public health reporting; research, and marketing provisions.

I will close my introduction with a caveat. We have proposed modifications affecting some of the areas that I'm going to be talking about, and my comments will talk about the modifications. But these proposed modifications are still not the final word on how the Privacy Rule is going to be modified. So, stay tuned.

The framework of the privacy rule. The Privacy Rule governs the conduct of what we call "covered entities". Those are healthcare providers who transmit health information in electronic transactions, health plans, and healthcare clearing houses. Some other organizations and entities provide support services to these covered entities, and are called "business associates". The Rule requires that a covered entity enter into a written contract with its business associates, requiring the business associate to protect the confidentiality of health information.

Now, the Privacy Rule governs the uses and disclosures of identifiable health information. It doesn't govern at all de-identified information. It also requires that individuals receive a notice of covered entity's privacy practices and how the entity uses that information.

There are broad requirements, and very specific requirements also, but there are three categories of types of uses and disclosures by purpose. The first category is use of healthcare information for treatment, payment and healthcare operations. Now, these uses and disclosures are sufficiently related to treatment that an individual seeking care would understand that his health information is going to be used for those purposes. And so, we believe it would be unfair to the providers and other covered entities to create obstacles for use of the information for these purposes. Under the proposed modifications, there is really no restriction or no requirement that a patient authorize the use of his medical records or health information for treatment, payment and healthcare operations.

The second category of purposes that healthcare information can be used or disclosed for is public health or other

public purposes. And in weighing importance of public health versus the importance of individual rights, there are certain purposes that were determined to be of sufficient importance that information can be used or disclosed without an individual's authorization. There are restrictions on how that information can be used, but this category includes such things as reporting of infectious diseases to public health authorities; adverse event reporting; research; reporting of suspected abuse; and healthcare oversight activities.

And then, there's this big third category of everything else, which requires specific patient authorization before his health information can be used or disclosed.

Now, going to specific areas of interest, adverse event reporting is, as I said, a use or disclosure that we have categorized in the public health area. As I said, the rule recognizes the importance to public health and public safety of covered entities being able to use or disclose health information in certain areas for public purposes.

Adverse event reporting falls into this category. It includes adverse event reporting of drugs, biologics and medical devices. As you know, the way an adverse event is reported is that a provider, a doctor, usually reports this information to the company that has made the drug, biologic or device. They, in turn, either voluntarily or as required by law, report that information to the FDA.

The current rule permits covered entities to report adverse events to the manufacturer, if disclosure is made to a person that's required or directed to report such information to the FDA. This includes to track products; to enable product recalls, repair or replacement; or to conduct post-marketing surveillance. We heard, however, that this may not cover the universe of the current adverse event reporting. There was also concern that the rule made voluntary reporting by a provider to an FDA-regulated company impermissible in certain circumstances, where a company was not required by law to report these events to the FDA. So, as I said, we've proposed a modification to assure that a provider can continue to disclose this information to the company.

The second area of interest is in public health and public purpose is research. The research provisions of the privacy rule apply to human subjects research, like clinical research, as well as research involving just health records. A covered entity can only disclose identifiable health information to a researcher, if the researcher has obtained a individual's specific authorization, or if the researcher obtains a waiver of authorization from an institutional review board or privacy board. And if a researcher presents an authorization to a doctor or medical center, or a certificate that an IRB has waived authorization, that provider is entitled to rely on that piece of paper if that reliance is reasonable.

The current Rule establishes eight criteria that an IRB or privacy board has to consider before they can waive the requirement that there's individual authorization of access to the health records. We heard a lot from researchers that these criteria were vague, confusing, and sometimes internally contradictory. So, in the proposed modifications, we have proposed to streamline and simplify that to make it more closely aligned to the Common Rule, which is a rule that is common to about 17 federal agencies that fund medical research and so governs federal research, as well as other research conducted in America.

As I said, these proposed criteria more closely follow the common rule but apply specifically to privacy considerations. And the first criteria is that the use or disclosure of the health information involves no more than minimal risk to the individual's privacy. We've explained what that means: It means adequate planning to protect identifiers from improper use or disclosure; an adequate plan to destroy identifiers as soon as possible consistent with the needs of research; and adequate assurance that there's no reuse or disclosure of the information, except for other research, for oversight, or as required by law.

The second criteria is that the research could not practically be done without the waiver; the researcher couldn't go out and get individual authorizations. And finally, the research could not practically be conducted without access to the protected health information. In other words, this health information is necessary to the research.

We've also proposed a couple of other modifications to simplify just the administration of the privacy rule in the research area by combining the requirement for authorizations for various types of research and by combining of an authorization to disclose health information with informed consent. Then, there are certain proposed transition provisions that permit current research to continue without hindrance.

I indicated that there are two ways that a researcher can get identifiable information under the privacy rule. We're looking at another way to enable researchers to get information. The current rule doesn't apply to de-identified information, as I indicated earlier. But de-identification requires removal of 18 types of information, and many researchers indicated that they really need some types of information that was included in those 18 categories; information that doesn't directly identify the patient, but nevertheless contains certain identifiers, such a zip code or dates of admission or discharge. As I said, this information is not considered de-identified under the Privacy Rule, but it is necessary for certain research or for analysis of healthcare use or quality for state hospital associations, for example.

We've sought, through the comments received during the comment period, input on how to construct a limited data set that could be used for such purposes, what types of information would not be facially identifiable, what type of information that would be, and what purposes such a limited data set could be used for. You couldn't directly identify someone by that information but it would be useful for research purposes. We're proposing that a covered entity be required

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to sign a data use agreement with a researcher or whoever receives this limited data set to control the use of that information by the researcher and prohibit reconsideration.

The final topic that I'd like to talk about briefly is marketing. In general, if someone desires to use identifiable health information for marketing purposes, it requires patient authorization.

The current rules establish three categories of types of communications and establishes different Privacy Rule with respect to how identifiable health information can be used. There are certain communications that are not considered to be marketing and do not require authorization. There's another category of communications that is considered marketing but doesn't require an authorization. But the provider has to provide notice to the individual whose health information is being disclosed and marketed, identify who's making the communication, if the covered entity is receiving payment for this communication, how can opt out, and the basis for targeting the individual. And then there's a third category that requires specific authorization.

Everyone agreed that these three categories were confusing and that no one was sure whether a communication fit into which one of those categories. We've attempted to propose common sense modification to these marketing rules using the understanding that patients don't want their health information to be used for unsolicited marketing pitches that have nothing to do with their care. But they do want to receive information about their treatment alternatives and, for example, benefits and services offered by their health plans or healthcare providers. This is certainly one of the areas in which we've received the most comment on.

Our proposed revision is to have just two categories — marketing and not marketing. Marketing will require an authorization by an individual. Communications not considered marketing would not. We excluded from the definition of marketing communications on treatment for the individual; communications about the individual's case management or care coordination; communications to recommend treatment or therapies or different providers; and communications about plan or network providers and products and services that a plan or provider has.

These modifications, if adopted, would permit prescription refill reminders, recommendations of alternative treatment — things like that. I should note that regardless of what modification is proposed, a covered entity is required to disclose in the notice of healthcare privacy practices that they give to their patients if they're going to be using the healthcare information to communicate appointment reminders or information about treatment alternatives or other health-related benefits and services. This provides an opportunity for the patient to object to such a use or to request limitations on their use.

I look forward to your questions on the privacy rule and other aspects of HIPAA. Thank you.

MR. WALLER: Do you have any practical tips for HIPAA compliance? What should people really be focusing on right now?

MS. STANNARD: I think the most important question that people should be focusing on is whether your company, entity or organization is a covered entity. That requires looking at whether they are a "health plan," as defined both in the statute and the regulations. Both the statutes and regulations provide a long list of specific health plans that are included, and then throw in any other organization that provides or pays for healthcare.

Is it a "healthcare clearinghouse?" A clearinghouse is more rare. Basically, they obtain health information and payment information in one form and convert it to another form. They are basically serving other healthcare organizations.

And the third is, are you a covered "health provider?" That is limited at this point to providers who conduct electronic transactions for which the Secretary of HHS has adopted standard form transactions. One caveat to that. The original law permitted healthcare providers — doctors, pharmacists, hospitals — to choose whether or not to conduct electronic transactions, and thus, whether or not to be subject or not to the Privacy Rule and the other HIPAA transaction rules. However, in providing under the Administrative Simplification and Compliance Act for this extension of time to comply, Congress also told HHS, and specifically Medicare, if transactions are not submitted to them in electronic form, they have an obligation to deny payment. Of course, there are certain situations under which the Secretary is authorized to waive that requirement, but that's certainly an incentive for more providers to conduct electronic transactions.

MR. WALLER: If you're doing clinical trials for FDA approval and you're precluded from having any patient identifier information, how does HIPAA apply to you?

MS. STANNARD: I don't know exactly what identifiers FDA considers to be identifiers. But there's a very long list of what we consider under HIPAA, under the Privacy Rule, to be identifiers. There are some things that you wouldn't immediately think of as an identifier, such as a county of residence, a zip code, things like that that are important for certain types of research. If you need that type of information, then you either have to get an individual's authorization in order to obtain any identifiable medical information, or you need to go through an IRB process to get a waiver.

As I said, we are proposing and looking at a third option, which is a more limited data set that excludes facially

identifiable things — probably some things that under FDA are considered to be identifiers— that we could permit you to obtain as a researcher under a data use agreement, where you say you're not going to use it for any improper purpose.

AUDIENCE PARTICIPANT: Is there a private right of action under HIPAA?

MS. STANNARD: I think that, as with enforcement of any regulation, there'll be a broad range of approaches. We're certainly committed to providing assistance to covered entities in understanding what the Rule requires and complying with it. One of the things that we're working on right now is some material that we can provide to help entities to determine whether they're covered or not. Obviously, HHS is required to investigate any complaints that it receives, and the Privacy Rule sets up some type of procedure for complaints to the entity, if someone thinks that their privacy rights have been violated, and also a complaint process, in the case of privacy, to complain to the Office for Civil Rights at HHS.

MR. WALLER: We thank you Paula for your comments and we will now move on to our First Amendment panel.

(Whereupon, the first segment concluded.)

MR. WALLER: We're honored to have two eminent scholars in the First Amendment area here with us. The first is Richard Samp, who is the Chief Counsel to the Washington Legal Foundation. Richard is a 1974 graduate of Harvard College, and he received his law degree from the University of Michigan. He was previously a litigator at the D.C. law firm of Shaw Pittman. And Mr. Samp served as the lead counsel in the *Washington Legal Foundation v. Friedman*, the case that led to the District Court decision striking down, on First Amendment grounds, FDA restrictions on the dissemination of truthful information about off-label uses of approved products.

Second, we have David Adams. He's a partner at the Venable Law Firm in D.C. He has a B.A. from the University of Louisiana, and he's a graduate of the New York University School of Law. He teaches food and drug law at the George Washington University Law School. And he was former FDA associate chief counsel for drugs in the Office of Chief Counsel, and director of the Policy Development and Coordination staff in the Office of the Commissioner at FDA. He's published numerous articles and is an expert on FDA constitutional authority.

MR. SAMP: The whole idea of First Amendment restrictions on what FDA can do is a relatively recent concept. It's something that really wasn't discussed up until about 20 years or so ago, and that's really because up until then, the Supreme Court had consistently said that commercial speech isn't protected by the First Amendment. Only since the late 1970s has commercial speech begun to get increasing amounts of protection. As that protection has increased over the last two decades, the issue of what restraints there are on FDA has become increasingly prominent.

There are still, however, many restraints on anybody actually raising First Amendment claims against FDA. Probably the biggest constraint is the agency's extraordinary power. The fact is, as everyone knows, FDA has authority not only to regulate manufacturers, but also to approve their new products. Manufacturers generally believe that one should not directly take on FDA, if one wants to get one's new products through the pipeline. Perhaps it's not much of a coincidence, therefore, that some major First Amendment cases that have been litigated in recent years have not been brought by major pharmaceutical companies.

The Washington Legal Foundation, as Bill was mentioning, has been involved in litigation for a number of years, and we expect we probably will be again. WLF is simply an interloper in Washington that gets involved in various agency matters and tries to do what we think is in the public interest, which usually means greater dissemination of information and less government restriction on what companies can say.

The difficulty, of course, for someone like WLF is how do we get into court. We've had problems with that in the past, and I'm sure we will in the future, as well. The nice thing about First Amendment claims, however, is that it's not just the speaker who has the right to assert them. The listener does, as well. The Supreme Court has said that a listener who's feeling as though he's not receiving as much speech as he would like has the standing to go into court and sue, and to say, "I want to do some more listening". That's sufficient by itself to get into court on First Amendment grounds.

The difficulty, however, in getting into court with FDA is compounded by the fact that FDA, as with most government agencies, has available many procedural defenses. Chief among them is that the action being brought against the agency is either not a final agency action, or it's not ripe for review. And the best way for an agency to ensure that these defenses will be available is not to write final regulations. Rather, an agency will write lots of guidances and draft guidances, documents that try to give the industry a little bit of an idea of which way it's coming from. But it also gives the agency deniability, so that if industry tries try to challenge what you've said, you can say, well, that was just the opinion of the individual letter-writer or the musings of an agency official, but it really does not represent official agency policy.

Further complicating efforts to obtain judicial review is the fact that FDA is constantly reviewing all these various issues. On the one hand, I think it's a great thing that FDA is studying First Amendment issues and claims to be very concerned about First Amendment matters. Indeed, about two weeks ago in the *Federal Register*, FDA put out a very

lengthy notice in which it invited public comment on just what the First Amendment ought to mean to the agency, and that's a very good development. In fact, Dan Troy, FDA's Chief Counsel who likely had a good deal to do with FDA's publication of the notice was one of WLF's attorneys in our First Amendment litigation.

But the downside of FDA doing these sorts of studies is that if anybody attempts to bring FDA to court, it can argue that litigation is premature because it is studying this issue; it argues that the litigants should wait until FDA is done studying the issue before filing suit. WLF initially filed its lawsuit over the dissemination of off-label information in 1994, and it took several years to convince the court that it was not premature to take a hard look at the issue. We did win a First Amendment judgment in the district court; but then FDA, after we won, changed its policy. And whenever you have a change in policy, there's a question of whether the original decision is in any way moot?

The case went up to the court of appeals in 2000. The U.S. Court of Appeals for the District of Columbia Circuit said that a portion of our case was moot, and we've been arguing with FDA ever since about exactly what portion of the case is moot and how much leverage we have in trying to guide future FDA actions in this area.

By far the best development in this area — and it's noted in your materials — is that the Supreme Court several weeks ago, in the *Western States* decision, for the first time weighed in on the issue of FDA and the First Amendment. The mere fact that there is now a statement from the Supreme Court saying essentially that the First Amendment applies fully to FDA, just as it does to other government agencies, is a tremendous step forward.

For example, one argument that FDA has repeatedly made in defending against First Amendment claims is that because the pharmaceutical industry is a heavily regulated industry that has become used to having its First Amendment rights denied over the years, it has essentially waived those rights. A heavily regulated industry simply doesn't have as many First Amendment rights as other do. After the *Western States* decision, that is a very difficult argument to make.

Probably the most important First Amendment issue involving FDA regulation that's likely to be litigated in years to come is the issue of direct-to-consumer advertising. The issue is the subject of on-going debate in Congress. Opponents of direct-to-consumer advertising repeatedly argue that some of this advertising is misleading. The simple response to that argument is that one misleading ad does not justify blanket restrictions. If an ad is misleading, tell us how, and we take care of the problem by putting disclaimers into our advertising.

But when it comes down to it, I don't really believe that the misleading nature of some ads is the main reason that some people want to restrict advertising. The objection is not that anyone is really being misled, but that really they're getting too much truthful information. Opponents believe that too much information is not good for people because, after all, that gets people thinking that maybe they are due for some new treatment and talking to their doctors, and maybe they'll pressure their doctor into writing a prescription that the doctor may not think is absolutely necessary. Increased prescription-writing leads to increased medical costs. Many people, particularly state governors, are looking for ways to hold down their medical costs. They object to increased advertising, which is highly likely to lead to increased spending on prescription drugs. So, the real First Amendment battle coming up is over efforts to suppress advertising as a means of suppressing consumption of prescription drugs. WLF opposes any such suppression efforts and we certainly intend to be part of that battle as it continues.

I have to say in fairness to FDA, that they have loosened up considerably in the area. In 1997 the FDA significantly relaxed its rules on direct-to-consumer advertising in broadcast media; and as a result, you see quite a bit more advertising on TV than you did before. Manufacturers are allowed to advertise without having to include thousands of words of disclaimers that nobody would read anyway. There are still problems with excessive FDA restrictions on print media advertising, particularly in terms of disclosure requirements that even FDA doesn't really think are necessary. But even in that area, FDA is not enforcing its restrictions as tightly as it used to.

The result is that we are getting more print media advertising than we used to. And it's also true that we're getting a lot more drug advertising in this country than in any other country that I'm aware of. In most other countries, prescription drug manufacturers may not advertise directly to consumers. The general feeling among regulators in other countries is that consumers simply don't know enough to be able to handle the information that you can give them.

So, what direction should FDA be taking? The Federal Trade Commission has provided over the years a very good model. Advertisers are not required to go to the FTC ahead of time for permission to say truthful things about their products. Rather, advertisers can be sanctioned by the Federal Trade Commission after the fact, if they provide false or misleading speech. But the FTC never requires prior approval. Although FDA sometimes claims that it, too, does not impose prior approval requirements, the practical effect of FDA rules believes those claims — most manufacturers still go to FDA in advance to get approval for what they're going to be saying in their advertising.

With respect to WLF's litigation to prevent FDA from suppressing truthful off-label information, I have to say that we are disappointed that FDA has not seen fit to agree with us that we actually won our litigation. In January 2002, FDA denied the citizen petition that WLF filed, asking FDA to state that it would comply with the court order we won. Exactly where WLF is going to take the issue from here, I don't know. We may end up back in court with FDA. That remains to be seen. But there is reason to hope that FDA's respect for First Amendment rights will increase. On the one hand, FDA denied WLF's citizen petition and insisted that it has the absolute right, if it wants, to prevent manufacturers from disseminating

what are known as "enduring materials". (That is a category of written materials that includes both reprints of medical journal articles and medical texts.) These are the kind of things that FDA doesn't really think are false; but it nonetheless insists that since they have not been approved by FDA, manufacturers shouldn't be allowed to disseminate them.

But on the other hand, FDA has made it clear that they are not going to go after any manufacturer who simply disseminates enduring materials. It's only if manufacturers go beyond such dissemination that FDA is likely to crack down hard on a manufacturer for promoting off-label use of their products.

One final issue needs to be addressed. One tactic FDA has used to avoid First Amendment constraints is to claim that it's actions aren't really speech prohibitions at all. All we are doing, FDA insists, is using your speech as evidence that you really do have an intent to distribute your product for an unapproved new use. Because such distribution is a violation of the law, FDA insists that it's really your conduct we're going after, not your speech. I don't believe that any court would actually uphold that argument. FDA made that argument in the *Western States* case in the Supreme Court. The Court didn't address it; the fact that the Justices didn't address it despite the fact that it was raised suggests that the Court didn't think very much of the argument.

FDA's argument makes little sense. In effect, FDA is admitting that it has no objection to the drugs you are selling or how they are labeled. But the moment you engage in speech (by disseminating enduring materials that discuss off-label uses of your approved products), FDA will suddenly deem your otherwise unobjectionable sales activity to be a violation of the law. That's just a roundabout way of banning speech. We will continue to work with FDA to try to convince the agency that it cannot avoid First Amendment restraints by pretending that it is not regulating speech at all.

In conclusion, we've come a long way in the last decade in terms of increasing FDA respect for First Amendment rights. There has been considerable improvement in the area. Moreover, there are very good people at FDA and HHS right now who are aware of the problems and are working to curb First Amendment violations. There's obviously a lot of battling against the forces of darkness in this area that is still to come, but I'm hopeful that things will be improving in the future. Thank you.

MR. ADAMS: Good morning. It's a pleasure to be here with you folks. Bill was talking about the positions that I had at FDA. I left FDA about eight or nine years ago, going into private practice, and I represent generally drug companies, medical device companies, and companies that develop and market therapeutic products. And I was thinking before I left the agency, I used to quip that the Bill of Rights started at number two.

As Richard has alluded, over the years FDA has taken a fairly restricted view of the applicability of the First Amendment or of the restrictions in the First Amendment on FDA's regulation of advertising, promotion, and commercial speech. It has even argued that there perhaps should be a general exception for this special kind of industry that FDA regulates, pervasively regulates, in the arena of healthcare because these are healthcare products.

As Richard also has stated, the courts haven't really warmed up to that theory on the part of the agency. And so really what people have been talking about in the courts is an analysis of FDA's regulation of advertising under the commercial speech doctrine.

Before I get too much further into this, I ought to start giving my disclaimer, which is going to be a little different from the usual disclaimer because one's views, a lawyer's views, an advocate's personal views, are not always the same as the views of the clients that one represents. I was certainly well aware of this when I used to read Richard's briefs, and I knew deep down in his heart of hearts he couldn't possibly believe all of the things he said about FDA and about the dire things that were going to happen if the courts really applied the First Amendment. So, my disclaimer is that the views expressed here today are not necessarily the views of my clients; they're not necessarily my views. In fact, they're the views of Richard Samp, and this is what Richard really believes.

I think the Supreme Court case that Richard spoke about, the *Western States* case, is profoundly important, and I want to tell you why I think it's important. I'll start by giving a little bit of background on how FDA regulates promotion, advertising, commercial speech.

The agency has traditionally placed significant restraints not just on misleading or untruthful information but on information that may well be truthful and non-misleading. It wasn't really FDA who started this; it was Congress, when Congress wrote the Food, Drug and Cosmetic Act, which is in large measure one big prior restraint on truthful and non-misleading speech, especially when one looks at approval requirements in the Act, where FDA approves labeling word for word for products and approves them for specific uses. This concept is built into the Act.

There are also provisions in the Act about how products have to be labeled. The courts and the FDA have the view that the Food, Drug and Cosmetic Act really requires products to be labeled for all of their intended uses, all of the uses suggested by the manufacturer in any way. So, if you suggest a use, then it's supposed to be in your labeling under the Act, and if it goes into your labeling, then it's probably going to have to be approved, if your product is a drug. What that means is, there's a big restraint on your ability to talk about certain possible uses of your product because under the law, they become intended uses and you have to get them approved. So, you can't say that until you get approved. That's a prior restraint.

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You see it in the area of promotion or dissemination of information on off-label uses of approved drugs. This was the primary concern dealt with in Richard's case, the *WLF* case. You had approved drugs, approved devices, biological products, but FDA was saying that companies — not that it was a total restriction on dissemination of information on off-label uses, on approved uses, but there was a rather significant limitation — FDA had certain exceptions, certain safe harbors, under which you could provide information. Generally, the rule was that you just couldn't do it because, as soon as you did it, that would be your intended use, and you'd have to put it in labeling. So, you'd have to have your product approved before you promoted a use for it.

The second area in which FDA has gotten into the business of restraints on truthful, non-misleading speech, is in creating exceptions to the statutory approval requirement — generally the statutory approval requirement for drugs. One exception was for health claims, for foods. We started quite some time back.

Remember Kellogg's All-Bran cereal? Suddenly, All-Bran cereal, quoting the NIH — certain kinds of bran can prevent cancer, prevent a disease. Well, the drug definition says any articles intended to prevent a disease is a drug. Did FDA want to say that All-Bran cereal was a drug? No, they really didn't want to say that, especially when the NIH said it was a good idea to give that information. So, they developed a policy allowing certain kinds of health claims for foods that otherwise would have been drug claims. It's an exception to the rule. If you do it a certain way and we okay it, we will accept you.

Congress ultimately put this approach into the statute. You have to go to FDA with a certain kind of evidence and the FDA has to approve it. But the basis for the approval really restricts the way you can talk about this issue and talk about your evidence. So, the way the exception works is to limit your freedom of speech. And you can't really just have that general limitation of speech. You ought to be able to say things with appropriate disclaimers; that's the *Pearson* case.

Another area is what we saw in the *Western States* case for restrictions on compounding. Compounded drugs are new drugs theoretically requiring approval. That was FDA's position. It wasn't always totally clear, but the Supreme Court really seemed basically comfortable with the FDA's position that all of these drugs compounded by pharmacists start out being new drugs requiring approval. That's rather stunning. That means they're all illegal. It's an interesting discussion about that, that I'd like to get into, but I need to focus on the issue at hand.

FDA created an exception. Obviously, they had to. They can't stop pharmacists from compounding drugs. But, there's no way a pharmacist can run out and get approval for every drug compound. But the exception incorporated a number of elements, one of which was restrictions on advertising, promoting specific drugs — "we compound this drug, that drug, the other drug." The Supreme Court said, no, you can't condition the exception based on this limitation on speech, if there are other ways to achieve your noble ends in this situation.

Another situation involved things that were at issue in Richard's case. FDA had created certain exceptions. FDA called them exceptions — safe harbors from what FDA said was a general rule against promotion of off-label uses. If you were involved in real educational programs, supporting real educational programs and disseminating certain kinds of articles peer reviewed in certain kinds of circumstances, that was an exception. Richard challenged those policies, saying, you can't really have these limitations. FDA doesn't really have authority here.

The court agreed with Richard, but only up to a certain point. The court really didn't go all the way there. The court agreed that FDA's restrictions were not narrowly enough prescribed in terms of what the government's interest is. We have this notion under commercial speech, under the commercial speech test, that if the government has an appropriate goal and is directly advancing the goal, it still should restrict speech no more than is necessary. We've called it in the past the least restrictive means test, and the Supreme Court has flipped around, and sometimes it doesn't sound so restrictive. Now it sounds very restrictive.

The district court in the *Washington Legal Foundation* case didn't throw out all of FDA's restrictions on speech in that arena. The court said, no, FDA has been too narrow here. We think companies ought to be able to participate in continuing education programs and suggest speakers. We think companies always ought to be able to give out peer-reviewed articles, always ought to be able to give out published textbooks, things of that sort. But the court didn't go all the way and say other truthful, non-misleading speech is also constitutionally protected.

So, the third area where FDA regulates truthful, non-misleading speech is the area of pre-approval promotion. This is an area that has not gotten a great deal of attention, and that's surprised me quite a bit because my own view is that this is the most vulnerable arena of FDA regulation under the First Amendment. Companies are restricted in FDA's view, in saying things about products before they're approved. Before they're actually marketed, FDA will say you are violating the law if you start talking about your product before we approve it. That's interesting.

If you're not marketing, the statute really says you can't do this, that and the other — basically, introduce into commerce or hold for sale a product unless you do certain things, get it approved. If you're not doing that, if you're not yet selling your product, how is it a violation? The FDA says, well, you're commercializing an investigational exemption. You're somehow commercializing your product. And the statutory basis for that sort of regulation is, in my view, very questionable. And if you look at the theory behind that sort of regulation, the theory that you're commercializing an IND or commercializing a product before it gets approved, well, that doesn't really square with the only valid interests that the courts have accepted

in terms of FDA's regulation of commercial speech. FDA has talked about the commercial speech doctrine not really applying because these are healthcare products in a pervasively regulated industry.

FDA also earlier on talked about its general interest in preventing misleading information and discussions about products, before they get approved, as being inherently misleading. The agency hasn't gotten very far with that theory. But the courts have agreed — even Richard Samp's favorite judge, in his case — that FDA has a valid interest in preserving the integrity of the drug approval process and having incentives for people to do good studies, get their drugs evaluated and approved and get this good information and labeling. That's a valid interest, and hardly anybody can disagree with that.

But in the area of pre-approval promotion, how is that interest furthered? It's not a disincentive; it's not going to prevent people from getting their products approved. In fact, it occurs in a situation where the company is trying its darnedest to get a product approved. It is hoping for an approval in the near future. So, the basis for that sort of regulation is not clear under the statute, and it's kind of hard to square with the only valid interest FDA has asserted that the courts are willing to accept in terms of regulating commercial speech.

Again, let me emphasize what this primary governmental interest is that the courts are accepting and that become the basis for evaluating FDA's authority. Is the government's interest in preserving the integrity of the drug approval process, in having a real incentive for people to go through this process? If they can go out and promote their products without going through the process, why would they spend millions of dollars to do really good studies and go through and jump through all the hoops and get their drugs labeled and have FDA totally control their labeling? There wouldn't be very much reason to do that. Most people seem to agree. That was the reason that Congress, when it was putting some of these provisions into the Act under FDMA did so.

So, when you look at that basis for the government's regulation of commercial speech and you look at what the Supreme Court was starting to say not just in the *Western States* case but a few years ago in a case called the *Liquor Mart* case, you start worrying about FDA's position, if you're an FDA person. I started writing an article on this issue after the *Liquor Mart* decision because what the Court was saying there was — the Court had come up with a very restrictive standard in terms of assessing whether there is more regulation than is necessary in terms of regulation of speech.

The Court had come up with a very strict interpretation and application of this least restrictive means test. The Court said, really, you have to look at whether there are any alternatives, any legislative alternatives — not just does FDA have a regulatory alternative to restricting speech, but could the whole system fundamentally achieve this government interest. And by some program or some means, some legislative enactment that wouldn't restrict speech as much as this one does. The court said that the burden is on the government to show that there isn't some mechanism, some form of legislation, that could advance the government's interest, that would restrict speech less.

The court didn't say that the alternative had to be a necessarily politically realistic alternative, so what does that mean? The government essentially has to prove a negative, that there is nothing Congress could do that would achieve our governmental interest, other than restricting speech — not just that there's nothing Congress can do practically, but if one theorize a Congressional enactment, that might well be an alternative because the court hasn't suggested that your First Amendment rights depend on whether the alternative is a political reality; only that there's a legislative alternative. That's going to have to be fleshed out, but that could be an extraordinarily difficult burden for the government.

So, what does all this mean at this point? It means, first, that FDA is going to have to look to changing its regulatory paradigm. It ought to be doing that now; I'm sure it is. And the regulatory paradigm is going to have to be focused on the government's interest in protecting people from misleading speech. This concept of being misleading is pretty broad, the courts agree that it's pretty broad. FDA will probably end up focusing on ensuring that the information that people provide is balanced and includes not just the positive but the negative. Also, that it's substantiated and that the lack of substantiation or that the problems are really discussed and emphasized.

Now, FDA hasn't done too much of this in terms of preventing information on off-label uses and this sort of information because it really hasn't had to. But now, they're really going to have to look at that. The fact of the matter is that the courts have been pretty kind to affirmative disclosure requirements. The conservatives on the Supreme Court have always talked about more information being better. In the *Pearson* case, the court talked about the fact that there ought to be disclaimers. I believe FDA has a lot of room to operate in terms of regulating this kind of speech by requiring more information, by requiring balanced information. I think creative lawyers at FDA, if they really sit down and noodle this, are going to find ways of restricting speech and regulating promotion that you don't necessarily see out there now. I think this is possible, and I think it will happen.

The second thing — what we have now, I think, is probably the most significant policy development, or change in policy, since the 1962 amendments, where the approval requirements were engraved a little more firmly into stone, the breadth of products. The scope of products that have to go through the approval process for drugs I'm talking about was broadened considerably, and the standards were tightened extraordinarily by bringing in a requirement of proof of effectiveness, based on adequate and well-controlled clinical investigation. This is rather significant.

But what we have now, in the face of the Supreme Court decision and FDA's reaction to it, I think, presents the potential for another significant change in how the agency regulates the industry; not just drugs, not just in the arena of

Engage

therapeutic products, but also in terms of food and dietary supplements. But I think, more significantly, in the arena of therapeutic products. And I think the industry really needs to focus on this and participate very aggressively in this policymaking and policy development process. I think there is a potential for extraordinary change in the way FDA does a large part of its job.

The third thing is that I think the General Counsel's Office at FDA has a responsibility now to go out and educate the regulatory centers within FDA — this is the Center for Drugs, Center for Foods, Center for Medical Devices and Centers for Biological Veterinary Medicine — about what's happened. Something significant has happened. Essentially, the law has changed in a really significant way. And you say, well, constitutional law never changes.

In the case of the First Amendment, there isn't much text there to tell you specifically what the First Amendment means; it basically says Congress shall make no law abridging freedom of speech. The First Amendment really means what the Supreme Court says it means, and that's it. And the Supreme Court over the years is constantly changing what it says the First Amendment says. So, this very fundamental component of the law is constantly changing.

The Supreme Court for a while said there wasn't even any protection for commercial speech. And then they came up with this elaborate analysis of commercial speech that you go through, and they had been changing the rules for working in that elaborate analysis. Currently, after the *Liquor Mart* and *Western States* cases, the rules have changed significantly. FDA's General Counsel's office really needs to communicate this to the agency's regulatory components because people in industry are going to start exercising the rights that the Court has pretty strongly suggested that they have here, and realize that the *Western States* case was looking at FDA's regulation under the Food, Drug and Cosmetic Act. The Court examined the government's substantial interest in the integrity of the drug approval process and said it isn't enough. Five members of the court said that.

Companies shouldn't be left in the position of going out and doing these things and telling the Centers — having to literally challenge the way the Centers have done business for years and years, based on understanding that there's a bright-line test, that you can't do pre-approval promotions and you can't promote off-label uses. The General Counsel's office needs to quickly educate the Centers that this sort of thing is going to happen. It's not happening because these companies are bad players or don't respect you anymore; it's because the law has clearly changed.

I think the initiative that we saw published in the *Federal Register* to examine these First Amendment issues as part of that process — but I think things are going to start changing before FDA finishes that process, and I really call on the General Counsel's office to start going out and talking to the Centers about what I believe is going to happen.

AUDIENCE PARTICIPANT: I don't know whether either of you speakers have had the opportunity to read the Washington Post editorial[1] by former employers of yours, Mike Taylor and Bill Schultz. I don't know whether the audience is familiar with that editorial and what it says, but I was wondering whether if you have had a chance to take a look at it and whether either of you would like to comment on it. One of their examples was, could you say that the product will make people better, when the product itself may not but one is likely to get better just by the passage time, by letting the disease run its course. I think that the specific criticism made was that the process of opening the docket to discuss the issues was an inappropriate step.

MR. SAMP: I certainly disagree. I think it's appropriate that we are discussing these kinds of issues. As I said before, I think the real agenda of many people, such as Mr. Taylor, isn't so much that they are afraid about misleading speech getting out there, but that they really would just as soon have less speech, allow the experts to control what gets done in the area, and then maybe you wouldn't have quite as much medicine being consumed. And so, they object not only to increased First Amendment rights but even any discussion of the area because they're afraid of what might result from that.

MR. ADAMS: I don't agree with Richard. But I also don't agree with everything that was said in the editorial either. I do think that what they said reflected legitimate concerns on their part and on the part of people who have been involved in regulation in the healthcare arena over the years. There is potential harm from talking about off-label uses, talking about products in a pre-approval situation where a product's claims may not be substantiated. They pointed out one instance involving flecainide and encainide, where there was a significant off-label use and it turned out to raise some significant risks, and there was a concern that if this had been allowed to have been promoted by the companies, it would have been far worse. In fact, that's true. The discussions and promotion of off-label uses will amplify off-label use, it will amplify the effects of off-label use, and sometimes those effects can be bad. Sometimes, they'll be based on not enough information, not properly evaluated information, and it can amplify bad effects.

But you also have to acknowledge in the same breath that it amplifies a lot of good effects. An awful lot of information that comes out before FDA approves it is good, valuable information that may well save lives. To the extent that companies talk about that, the more that information gets out, you also have an amplification of positive effects, and you have to consider both those things in developing a policy.

I also think that the article really shows up why the fundamental problem is legally here for FDA. If you really look at what they were concerned about, one was the possibility of someone saying something truthful, if you drink colored water,

you might have a 50-percent chance of recovery, and in fact you'd have a 50-percent chance of recovery anyway. That would be misleading, and also the possibility that these off-label uses might be bad and that you would amplify the bad effects.

But really, the problem is if you look at the legal basis for what FDA is doing or trying to do here, the government interest that FDA says it's trying to protect is not really based on misleading information. In fact, FDA has authority to police misleading information, and FDA has authority not to allow people make statements about colored water being 50-percent effective. That's misleading on its face, I believe, and FDA could in fact require people to provide balanced information when they start talking about uses of products.

In terms of the off-label use being amplified, the government itself endorses off-label use. The government thinks that is a good thing. And the government is really asserting just an interest in court of keeping an incentive for products to go through the drug approval process. The problem is, if that's the only interest you can identify, there are really these alternative mechanisms out there by which Congress could encourage to go through the drug approval process without restraining speech.

The concern, you know, is really more on immediate effects in the public health for misleading information and harms to the public. But those immediate effects, from an amplification of off-label use and from misleading information don't get directly tied in to what the government asserts its interest is here. That's what the conundrum is.

I think what the General Counsel's office is doing there is something that they have to do. They have to go through an evaluation and try to develop an evidentiary record to support whatever the agency's going to do. I'm not going to presuppose to tell you what's in the back of their mind or whether they want to undo restrictions and totally open up the agency to broad notion of the First Amendment that ends what the agency's able to do. But the agency has to conduct this assessment at this time, and it's good to get people's views on this issue, and I think that's what they're doing.

AUDIENCE PARTICIPANT: My question is a follow-up on the flecainide and encainide issues. It seems to me that the current restrictions on dissemination of off-label use either by doctors or by other people in the marketplace is reasonable. So, the flecainide-encainide situation actually occurred in the circumstance where such off-label promotion would be illegal.

If the company were able to discuss the alternative use and the limitations and provide disclaimers, then the argument could be made that in fact a circumstance that existed in this situation was made worse by the agency's restrictions of speech, rather than permitting dissemination, especially when the restriction is on doctors.

MR. SAMP: I agree with you. And I think there's nobody who knows more about a product, generally, than a manufacturer. Yet, doctors can say anything they want about the product, the one person who generally prohibited from giving unsolicited speech is the manufacturer, and they kind of have to wait by the phones for somebody to call up and ask. I suspect they'd have a lot more accurate information out there, if they were a larger player in the field.

MR. ADAMS: The answer is that might have been true; perhaps, it probably would have been true. But in many cases, it wouldn't be true. And in many cases, you know and I know, having worked at FDA and seeing usually the worst things that go on in the world, there's quite often an inclination of companies not to really provide the most balanced view of what the science is, because they want more use of their product, because shareholders want greater profits. And that's what FDA's concerned about.

I think FDA's view on that might be, okay, it might have been better if we'd let the company disseminate information which would be balanced information. And maybe FDA will now say we're going to go the next step and come up with rules about how companies give that out to make sure companies give balanced information. That might be their response to your question.

AUDIENCE PARTICIPANT: Since the Federalist Society is a conservative/libertarian organization, or at least it purports to be, I'm a little perplexed — I've been perplexed at other Federalist Society meetings — that I rarely hear true libertarian positions. I'm wondering whether anybody on the panel is willing to address the issue of what type of government regulation at all is justified in the FDA area. We all seem to just argue about the nuances and positions of various forms of regulation, without getting to the basic question of whether the free market tort system is adequate to deal with the issues that the government and the FDA face.

MR. SAMP: As somebody who shades toward being a libertarian, I can tell you that there are a lot of government agencies that I would vote to abolish, but I don't think I would vote to abolish FDA. I think the public demands somebody out there so that they can rely on to do something. And if there's ever a food scare or a health scare, always the first question is, where was the government protecting us?

People demand something like this, and I think it definitely leads to a lot more increased confidence in the market and we have a much smoother securities market in this country because of the SEC, and we have a better food and drug delivery system in this country because of the FDA. That's not to say that I like the agency all that much, but it's better than no

agency.

MR. ADAMS: And I can't help you. Bill told me I'm supposed to be here as the guy you throw tomatoes at. I'm not really a libertarian. I would be worried if there wasn't an FDA out there policing the industry and what they say and making them do good studies.

[1] William B. Schultz and Michael R. Taylor, Editorial, *Hazardous Hucksters,* Wash. Post, May 28, 2002, at A17.

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ADMINISTRATIVE LAW & REGULATION

SPEECH AND PRIVACY REGULATION IN THE WORLD OF DRUGS AND HEALTHCARE
AN ADDRESS BY THE HONORABLE DANIEL TROY*

Honorable Daniel E. Troy, Chief *Counsel, United States Food and Drug Administration*

MR. TROY: Thank you very much. It is always a pleasure to get outside the beltway. You know what Justice O'Connor said about Washington, D.C.? She said it's a city that has even more lawyers than it does people.

I know you all want to hear about the First Amendment, which is not going to be the topic of my talk. It is a pleasure to speak to the Federalist Society, but it actually makes me feel a little bit old. I remember when there was no Federalist Society.

Culture counts. The Federalist Society was created in reaction to a particular culture that pervaded the law schools during the 1980s. And reflecting on the Federalist Society's effect on that culture and on the legal culture generally caused me to think about FDA's culture, as well. Even though I'm far from a sociologist, I want to share with you some reflections about FDA's culture so that you can better understand the context in which FDA's decisions, including decisions about the First Amendment, get made. One word of warning up front — when the eminent sociologist Daniel Bell was asked what he specialized in, he quipped, "I specialize in generalizations."

To talk about culture, generalizations are necessary, and I well recognize that there are exceptions to every rule. Also, I am not talking about particular individuals, although, of course, individuals can affect the culture. And as a further caveat, I have only been the chief counsel of FDA for nine months, and as one of only two political appointees at the Agency, I am confident that the Heisenberg Principle applies to any attempt on my part to measure the culture.

So, my observations are from the perspective of a new political appointee trying to absorb the culture of an agency that has been around for nearly a hundred years and is recognized internationally as the premier healthcare regulatory agency in the world. I hasten to mention and emphasize that FDA is a wonderful place to work, and I really do find it an honor to serve as FDA's chief counsel.

The first thing to understand about FDA is that there is no single culture at FDA. Rather, at the very least, each of the five product centers — centers for drugs, biologics, devices, foods and veterinary medicine — have their own distinct culture. Often, you hear suggestions like, "Why aren't the Centers for Drugs and Biologics merged because they have similar functions?" Well, such a merger was attempted, I believe around 20 years ago, and it failed because the culture and tradition of the drug center, which has always been part of the FDA, differs very much from that of the biologic center, which was part of NIH until 1972. Now, you would think that after 30 years, both centers would look and feel the same, but they really don't. They certainly have more in common than they have differences, but some of their approaches to product approval and to development are distinct.

A second observation is that cultures, even within the offices of the various centers, can vary. To generalize, compliance offices, who are the people who are, of course, assigned to bring legal action against violations, tend to have a more technical view of industry. This should not be surprising. They also, though, tend to have a better sense of, and be a bit more realistic, about the legal constraints on FDA. This is also, of course, understandable, given their law enforcement orientation.

By contrast, the product review divisions tend to have a more cooperative, collaborative approach towards industry, and this cooperative relationship served the nation quite well during the weeks and months following 9/11, when FDA and industry really joined hands to respond to a variety of public health challenges. And of course, people in the product review centers particularly recognize, and all of us recognize, that it serves us all well, it serves the nation well, when companies develop new and exciting products that advance public health.

One area where compliance and product review cultures clash is when we have to decide whether to approve a significant new product or manufacturing change when the applying company is out of compliance with our Current Good Manufacturing Practices, which we know as CGMPs. That is, the product itself could be safer and more effective than products that are already on the market. But, it may be made in a facility that is not up to legal standards. Now, this is a real dilemma. Fortunately, it is one that does not come up too often, but it does come up.

On the one hand, approving a new drug, device or vaccine with beneficial effects can, of course, improve the public health, and in some cases quite dramatically. On the other hand, if companies are making those products with processes that are not in compliance with the CGMPs, then the products themselves are technically deemed to be adulterated by the statute, even if the products can be used safely. Our statutes and regulations actually constrain our ability to approve new products, if the manufacturing facilities do not ensure the safety, purity, potency, quality and strength of a biologic, or the safety and effectiveness of the device or drug.

More broadly, the presumption of the whole CGMPs process or regime, if you will, is that the public health is best served when companies are in compliance with CGMPs. So, what FDA can and can't do in this context and in these circumstances often comes down to a legal question. We at OCC, at the Office of Chief Counsel, frequently have to moderate between the review and compliance divisions, and it's often quite a tough call.

But far more important than their differences, FDA-ers, in my experience — all of nine months — share many, many things in common. Perhaps the overriding shared experience is too much to do in too little time. Practically every employee feels continuously overwhelmed. Now, this may be because we take on too much; it may be because we're assigned too much; it may be because of the simple fact of having approximately 10,000 people try to regulate products that account for close to 25 percent of the American economy. Probably, it's some of each. But for whatever reasons, resources, particularly time, are always at a premium.

This feeling of being hassled and harried, which sometimes allows for too little time for introspection or reflection — not to speak of a healthy family life — is compounded by the challenges of the FDA's physical arrangements. As some of you may know, FDA is spread in about 40 locations in the D.C. area, with many of us at the Parklawn Building in Rockville, which is, to be blunt, a particularly inhospitable building that was named after an adjacent cemetery. The hallways are narrow; it's very long and inhospitable. And the physical environment does not promote a lot of informal interactions. So, FDA staffers really don't have enough opportunities to chat or interact informally with people from other parts of the Agency.

Most interoffice business, and even much intraoffice business, is done via email or in hour-long pre-arranged meetings. Less is done by phone, in my experience, than in other organizations. This can lead to delays because if the matter can't be resolved by email — and email has its virtues but it has its drawbacks — resolutions must frequently wait until a formal meeting has been set up with all of the relevant players able to attend. Scheduling these meetings takes a lot of time, and coordinating everybody's schedules and getting everybody together can push things off and make things slower than people might like. Now, the fact that these meetings do take place and that issues are resolved underscores the highly collaborative nature of the Agency. And I can't emphasize enough, FDA is a very collaborative place.

As you all know, FDA decisions often require a scientific evaluation. But that scientific evaluation, then, has to be refracted through our legal mandate. And so, there's a need to often include a lot of disciplines in the decisionmaking process. And this need is complicated by the distances that we have to travel to actually see each other. So, this need for collaboration, plus the physical challenges, sometimes slows the decisionmaking process. The collaboration does generally make for better decisions, but it is at least one of the reasons why some people think FDA is slower than it should be.

One of the things I have to emphasize is that people at FDA work amazingly hard. We are not talking about lazy bureaucrats, by and large. You might imagine I'm there a lot and the parking lot on a Sunday has tons of cars in it. I mean, I have the misfortune to carry a Blackberry, which some people call a "Crackberry" because it's so addicting. But I get emails morning, noon and night. Of course, I'm responding to emails morning, noon and night. It's one thing for me to do that. The culture of the Agency is a very hard-working place.

I think that one of the reasons for that is that FDA-ers really share a very strong sense of mission, and that is to protect the public health. You've heard that mantra. It really helps an organization when everyone has a shared sense of mission and feels good about what they do. I think FDA functions as well as it does not only because everybody has a common mission but also because the Agency does tend to attract people who are personally committed to government protection of the public health.

Now, this sense of mission is, of course, a plus, but the Agency has to be mindful that balance and perspective is needed as public health issues are addressed. As a government agency, we have to ensure that we accomplish our mission with fealty to the powers that Congress has given to us. As I occasionally remind people, our statute does not end at charging us to safeguard the public health in whatever way we think appropriate. Rather, as you all know, it runs on for hundreds of pages and has been amended — I am told; I have not counted, but I am told that it was amended 99 times, and I guess the Bioterrorism Bill, once it's signed, will make an even hundred.

The statute sets forth not just the objectives of public health protection, but also provides direction on how those public health objectives should be achieved. We must not forget that the definition of our mission, as well as of our powers, is determined by statute.

A related phenomenon that I think I've alluded to earlier, to this public health orientation and this public health mission, is a tendency to take on a great deal and, arguably, on occasion, too much. This may be the nature of every administrative agency, but it is particularly true at FDA, given our sense of mission and our regulatory scope and broad charge to protect the public health. But the problem with taking on too much is that it is really hard for any organization, especially a relatively small one like FDA — in the scheme of organizations, 10,000 people is not that big an organization — to do too many things very well.

Let me give you an illustration. I think that notwithstanding some carping to the contrary, FDA does a pretty good job at approving new drugs. To be sure, we are attacked both for being too cautious and too slow, and at the same time, we're attacked for being too quick to allow untested and unproven drugs to come to the market. Although it is too facile, I think,

that attacks from both sides means we're in the right place, we do review new drug applications in a relatively timely fashion. We have a particularly outstanding record for speed when a truly exciting and important new drug is developed with sound scientific data supporting its safety and effectiveness. Gleevec is, of course, the best example, which was approved in about four months.

Now, some in the drug industry have complained that the review process has slowed down. And, the allegation is that it's slowed down by about two months. I don't want to denigrate two months; a two-month delay in approving a blockbuster drug can mean many millions of dollars and, far worse, untreated patients. But if you compare FDA's performance with other government organizations, I think on this score we measure up pretty well.

There are, of course, by contrast, things that we just don't do anywhere nearly as well. I'll give you just one example on this score. We check maybe one- to two percent of imports. Frankly, it's scary how little we check in terms of imports. This is a resource issue; we don't have enough inspectors to do more. But this constant problem of resources and time and too much to do does lead me to believe that we need to think very carefully about our authorities and resources before we take on major new initiatives.

Now, I hasten to add, it is not always the Agency's fault that we take on as much as we do. Congress expects much from the FDA, but it often imposes additional burdens on us without necessarily giving us commensurate resources, and add to that, pressure from media or stakeholders, administration, the states, industry and others. But it's hard to do everything — especially, to do everything well. And all of us at FDA — indeed, in government generally — have to focus on what we do well and on what we want to accomplish.

FDA's focus on public health has consequences to the legal culture, as well. Before the 1980s, courts frequently engaged in what law professors today call a purposive interpretation of the statute; some others call this the New Deal era of interpreting statutes, or the Landis approach, after a great administrative law scholar who championed very broad deference to agencies. Under this view, Congress has charged expert agencies with a broad delegation — in FDA's case, to protect the public health. And under this theory of statutory interpretation, agencies were allowed to do almost anything that the statute did not clearly prohibit. This view rested, in great part, on trust in Congress and especially in expert agencies to do the right thing.

Since the 1980s, the courts have applied a more textualist approach to reading statutes. They are simply more likely to hold the Agency to the powers that Congress has delegated to it. And I think the courts have become more skeptical of the agencies' assertions of expertise in the interpretation of their enabling statutes. I hasten to add, I don't think courts have become much more skeptical of agencies' assertion of expertise when it comes to things like scientific judgments. As Rich Cooper put it, you may be able to beat FDA on the law, but you can't beat us on the science.

Why is there growing skepticism of agencies' assertions of expertise in the interpretation of enabling statutes. I think it's in part — this is a very long sociological discussion — due to the assault on authority in the 1960s, which is not just of the 1960s but is particularly captured by the 1960s. And in part, I think it's due to the rise in public choice with its attendant skepticism of legislation.

Public choice, as many of you know, views legislation as often the product of interest group pressure because of the collective action problem of the rest of us, if you will, who are not as intensely interested in particular legislative outcomes. And this view often causes courts to read statutes narrowly; for example, as contracts. There's a whole school that you should read a statute as a contract, or rather that you should read it as a charge. But there are those in the academy who champion kind of a purposivist, very broad interpretation. But that is not, shall we say, the regnant theory in the courts.

But some in FDA do still regard the statute as vesting in FDA vast, almost unlimited, authority to protect the public health. Over the years, FDA has from time to time declared a broad category of products or activities subject to its jurisdiction, but asserted that, for now, it's only choosing to regulate a subset of those products or activities. Now, this strategy, to a certain extent, is a corollary of the tendency to try to solve many problems and eschew acknowledgement of limits. There are certainly advantages to this strategy; in particular, it does preserve future flexibility. But it can do so at the sacrifice of credibility.

Also, I think the two frequent declarations that a particular activity is only tolerated subject to FDA's enforcement discretion can lead to charges of our being arbitrary. What is more, such a position may mean picking unnecessary fights. Drawing a line and defending it on occasion can put the Agency in a better position than asserting unlimited authority, which we may be unwilling or unable to defend if it's challenged. Speaking personally, I'd rather stake out the high ground from which I can shoot down on my attackers than to have to spread my forces out so widely that I have to defend every twig and bush.

While I'm on the subject of culture, and I guess implicitly lawsuits, talking about the legal culture, I do want to address a perception about the FDA culture that I hear occasionally. That is that FDA is retaliatory. I hear far too often that people don't sue the Agency or appeal decisions to higher-ups because they're afraid of retaliation against themselves personally or against their companies or on unrelated matters. I want to address this directly because I have not seen retaliation.

In fact, I have to say that, if anything, I have often see FDA consider pulling its punches in one context because of

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a dispute in another, to avoid the perception of piling on. But in any case, retaliation is simply unacceptable. Although we are all human, we all have our likes and dislikes, our emotions and our feelings, we do have an obligation to be professional. But when I ask for specifics on these charges, I rarely get them. I'm not saying that it never happens. But I would say that, personally, I would recommend that anyone demonstrated to be engaging in retaliatory behavior be promptly and severely disciplined, but I think there's more, shall we say, smoke here than fire.

As you may know, I work hard to avoid the agency being sued. Why? Because I don't want to lose control of my legal agenda and my legal resources. I'd rather be offensive and pick the lawsuits I can file, rather than be playing defense. It's not that I'm afraid of being sued, I just think that it doesn't always help us achieve our goals. In order to avoid that, I try to keep an open door to letters, papers and meetings, if necessary or appropriate, to try to reduce lawsuits. And I'm happy that on occasion, we've been able to do that.

But I want to emphasize that if you believe that FDA is acting in a manner that's inconsistent with its legal rights and obligation, I hope you will let me know, and I promise that I will read your letter. I have already read dozens and dozens, and if necessary and appropriate, I may meet with you in an attempt to solve your problem. I may be able to solve your problem without a meeting. I may not be able to solve your problem. But in the event we can't address your grievance, I will recognize that regulatees or others have rights under our law to sue us if they disagree with an outcome. And in that case, we should try hard to disagree without being disagreeable.

It's easy to lose sight of this, no doubt. Sometimes, outrageous behavior on the part of a litigation opponent can warrant a strong response. But generally speaking, our obligation is to try to approach disputes as dispassionately as possible, and at least from what I've seen in the people in my office, I think they do that.

Now, I know that going over somebody's head can be a difficult decision, but I have to tell you, I think a lot depends on how you do it. I don't have trouble if someone tells me that they intend to go over my head, if they say, look, thank you for hearing us out; I respect your decision but I really think this is sufficiently important to me and to my company that I'll tell you what I'm doing. But I feel a need to take this to Dr. Crawford, take it to the sixth floor, etc.

I'll confess, I get annoyed if I hear about somebody going over my head from somebody else, especially if I've gone out of my way to be as courteous as possible to somebody and give them much time and attention. So, I encourage appellants to use common courtesy and keep the person whose judgment they are appealing in the loop. That doesn't mean you should hesitate, if you think the law or facts are on your side, to elevate things in a respectful way to higher-ups in the Agency.

While I'm on the subject, I just want to suggest a few more dos and don'ts for dealing with people at FDA. I have to say, I don't think this advice is specific to FDA's culture, in part because these are sort of personal. Some of these suggestions may seem obvious, but you'd be surprised by how some people in regulated industry have behaved.

First, if you're having a confidential conversation with an agency official, don't issue a press release, not only reporting on the conversation but distorting what was said.

Second, you may be invited to a meeting with an official who had a meeting with a competitor. Sometimes I'll do this. Someone will come in and I'll say, "Well, I really want to hear from the other side." If you get that call to come in and meet with us because I already met with your competitor and you didn't even know about the original meeting, don't call and demand that you immediately be given the material that the competitor shared with the Agency. It's particularly not a good idea to file a FOIA request for the material without first telling the person who invited you that you're doing so. I think that would be common sense.

Third, a lot of this is just conscious common sense — put yourself in the shoes of Agency officials. It's probably not realistic to demand long, written decisions overnight.

Fourth, there are ways to say that you may be forced to take a matter to litigation without threatening to do so. But enough about that. My bottom line is, you shouldn't hesitate to elevate things if you think that truth, justice and the American way is on your side, but you should use common sense and common courtesy in doing so.

I'm going to make one final observation about FDA's culture. I'm not alone in this, but obviously, some of us have been trying to raise the Agency's consciousness about the implications of the developing commercial speech case law for the Agency's regulatory scheme. I want to conclude my remarks by discussing this issue in the context of the Agency's mission orientation and distinct culture.

We do realize that the legal paradigm is shifting, and that we cannot afford to put our collective heads in the sand. If the *Washington Legal Foundation* and [Pearson] lines of decisions aren't a wake-up call in that regard, *Western State* certainly was. As you all know, that case marked the first time that the Supreme Court struck down part of the Food, Drug and Cosmetic Act on First Amendment grounds. What is more, the Court said, in passing — and I really do think this was in passing — "Even if the government did argue that it had an interest in preventing misleading advertisement, this interest could be satisfied by the far less restrictive alternative of requiring each compounded drug to be labeled with a warning that a drug had not undergone FDA testing and that its risks were unknown."

To be blunt, I'm really not sure that the Court meant this literally or meant it for all it says. Certainly, one could envision a world where certain drugs were marketed under FDA's imprimatur, while others were marketed without FDA's

approval, so long as they were clearly marked as such. And some would argue that that's really the regime we have in the dietary supplement context. But that's not the system we have, and it's not the system we've had for a very long time.

I want to emphasize that this is a hypothesis, but I surmise that currently, consumers and healthcare providers alike expect that FDA, or at least some governmental entity who they may or may not be able to name, has assured that at least certain products that they're consuming and prescribing are safe and effective. Accordingly, one could contend this as a hypothesis, as a kind of Burkian argument — this is the Federalist Society; you have to mention Burke — that we could not simply shift over to a two-track, disclaimer-based system. Another way that you could put it is that there may well be, hypothetically, a market failure with respect to information about drugs, at the very least, that makes a pure disclaimer-based type of regime unworkable, at least at this point. Again, I emphasize that this is a hypothesis, but these are the kinds of questions that we hope will be addressed in response to the Agency's First Amendment notice.

We know that there are some who believe the FDA shouldn't have to worry about the First Amendment, and others take a completely opposite view. Somewhere between the Wild West and the complete command and control model lies a balanced, thoughtful, nuanced approach that respects the First Amendment, which serves the public health and FDA's mission, and which comports with FDA culture.

With your help — and I do mean that — and with the help of conferences like this one — and I'm sorry I missed the discussion this morning — I am confident that FDA will be able to develop such an approach. But, I'm not saying the task will be easy. As conservatives — again, this is the Federalist Society — we know that change is hard, and it's at its best when it's done gradually. It will not happen overnight, but I personally am optimistic. After all, look at how much the Federalist Society has accomplished.

* Mr. Troy's remarks were part of a conference sponsored by the Federalist Society's Administrative Law and Regulation Practice Group. It was held on May 31, 2002 in Philadelphia, Pennsylvania.

CORPORATIONS

6TH ANNUAL CORPORATE GOVERNANCE CONFERENCE
CURRENT CORPORATE GOVERNANCE LESSONS*

Professor Charles M. Elson, *University of Delaware Center for Corporate Governance*
Mr. Terence J. Gallagher, *Chief Executive Officer, Corporate Governance Associates, LLC, and former Vice President for Corporate Governance, Pfizer*
Ms. Holly J. Gregory, *Partner, Weil, Gotshal & Manges, LLP*
Ms. Ann Yerger, *Director of Research, Council of Institutional Investors*
Hon. Philip R. Lochner, Jr. *Member of the Board of Directors, Aprea Healthcare Inc., American Stock Exchange, Clarcor Inc., and Gtech Holdings, Inc., and former SEC Commissioner, moderator*

MR. LOCHNER: Our idea for this panel is, rather than have individuals each give 5-minute or 10-minute presentations as is usually the practice, that I would simply pose some questions and issues and have everyone respond.

We would also like your participation and questions as they come up. Obviously, we'd like to let the panelists talk as well, but if you have questions or comments you want to make as we go along, that would be terrific.

I think probably everybody knows our panelists, but just for formalities, from my far right — where I don't think he belongs — Charles Elson, who's the Edgar S. Woolard Professor of Corporate Governance and the Director of the Center for Corporate Governance at the University of Delaware.

Next, we have Holly Gregory, who is a partner at Weil, Gotshal and Manges and has been practicing in the area of corporate governance for quite some time.

To my left, where he doesn't belong either, Terry Gallagher, who is the former Vice President for Corporate Governance at Pfizer and really was instrumental in creating the Pfizer model of corporate governance. Terry is now CEO of Corporate Governance Associates, LLC, which is a consulting firm in this area.

And to the far left, Ann Yerger, who's the Director of Research for the Council of Institutional Investors, which represents — how much are we talking about in assets these days, Ann?

MS. YERGER: More than two-and-a-half trillion dollars.

MR. LOCHNER: More than two-and-a-half trillion dollars of institutional money.

I guess where I'd like to start today is with the question of independence. We keep on hearing about how directors need to be independent. My first question for the panel is what do we mean? After all, directors are paid by companies. Are they all not independent simply on that basis?

Charles, do you want to start?

PROFESSOR ELSON: Sure. I think independence is really a pretty simple concept. I think it means just in its essence no relationship, no financial relationship, to the company or company management other than long-term equity ownership. The theory behind it is that the view is — actually sort of two ways. Number one, independence as a director gives you objectivity in evaluating what the company management is doing. That's your job; you're to hire and fire managers and monitor in between. The only good way to monitor is if you aren't connected to the folks you're monitoring, through some relationship that may compromise your objectivity.

Secondly, independence is important because those within the organization view you as a counter-weight to management, if you will, sometimes. If a problem develops and management doesn't view you as classically independent, then nothing will ever bubble to the top. And I think some of the controversies, some of the failures that we're talking about today — we won't name them, obviously, but we know what they are — came about, at least in part, because of independence issues. Some folks will look not independent, but they might say, "Well, I may take consulting fees, but I'm an independent minded person."

Well, that may be true, but it's very tough to separate out or to compartmentalize all those relationships. And at some point, something from the back of your mind is going to leach its way into the front of your mind, and also, within the organization itself, people will not view you as independent because of those relationships. And you'll never learn all the good stuff.

MR. LOCHNER: Holly?

MS. GREGORY: Well, I'm not going to disagree with anything Charles said, because I think he's right on. It's about the ability to bring objective judgment to the table. The CEO and management need someone who can say that the emperor has no clothes. And while there may be people who have the kind of integrity that, even with significant financial and family ties to the CEO, they can really tell management the honest truth in all situations, the best we have to judge by as outsiders are these objective criteria about director relationships. And so a lot of the definitions of independence are aimed at trying to describe relationships that outsiders can look at and say, "Yes. We think the absence of those kinds of relationships makes it more likely than not that the person could bring objective judgment to the table."

MR. LOCHNER: Well, I've got to congratulate both of you on not really answering my question.

MS. GREGORY: We're lawyers, what do you want?

MR. LOCHNER: Maybe I can pose it again, and maybe a hypothetical would help. Many boards have academics as board members. If directors' fees are a significant portion of a director's total compensation, and that director does not have huge resources, family wealth, or something like that to help him along, isn't that director more likely just to kind of go along with whatever management wants for fear of losing that stream of income? And isn't that a legitimate question to raise about independence? Ann or Terry?

MR. GALLAGHER: Well, I think one of the sort of balancing factors that would off-set that kind of analysis would be the reputation of the individual. One of the reasons people join boards of significant public companies, I think, is because it's a boost to their reputation in the community, and if they are influenced simply by their director's fees to vote a certain way, I think they are in danger of ruining that reputation. And that's a very important thing. Many of the directors who are not academics, poor academics like Charles, would feel that the director's fee was minimal compared to their net worth or their present income from their primary function as a corporate officer of another company or something. So I think that counter balances the possible implication that just the director's fees would make them non-independent.

When we were setting up our first set of corporate governance principles at Pfizer many years ago, probably 11 years ago now, I discussed with our chairman what constituted independence, and we thought about putting a definition of independence into our principles. We didn't do it because we had a lot of questions about what constituted independence. We certainly were interested in all of the objective standards that people would look at in terms of independence. And by the way, we had at least one academic on the board at that time, and we did not consider that the director's fees alone would affect the independence of that director.

But after looking at all the objective criteria, the chairman really said that the independent director, as far as he's concerned, is the person who is willing to basically put his position on the line by questioning management and identifying problems with or raising questions about what management proposes. And that's the real test of independence.

And as he put it, like any good CEO, he said, I want guys who have guts. So that's another way of viewing independence. That's non-objective, and it's a tough way to try to judge independence. But as we went through the years with evaluations of the board, I think the other directors sense that in determining whether or not a director was effective, one of the things they were looking at was that kind of independence of the director.

MS. YERGER: That's interesting. I think independence is probably the most simple concept, but it's the most difficult for us to apply, because the fact is independence ultimately is a state of mind, and no definition can get at that. We at the Council have a very rigid approach to looking at the independence of directors. We look at financial relationships; we look at personal and family relationships. I think that right now there's a significant gap in disclosure. It's very difficult for shareholders to get a clear understanding of various relationships between company directors, the company and company executives. I think that is a problem. We have been asking for four years for reforms to the disclosure rules so that folks have a better understanding of what some of the links are.

Regarding compensation, we don't per se eliminate a director as independent because of compensation issues. I think last week our members met with three of the five chancellors or judges in Delaware, and they encouraged us, frankly, to broaden our consideration, to look at compensation issues for directors. I don't think there's an easy answer to that. I think it's a very interesting question. It's something that the institutional side hasn't really focused on.

Certainly some of the pay packages are extraordinary for directors. And when you're talking about folks who might not make that much in their day-to-day profession, I think it's something to think about. But at this point we haven't made one assessment or another.

MS. GREGORY: May I comment?

MR. LOCHNER: Yes, sure.

MS. GREGORY: Your question assumes that the chairman/CEO or management somehow controls who sits on the board and their ability to stay on the board. And so, if you have a really independent nominating process and you've taken control of board member selection away from the chairman and the CEO, that's another way to support independence. To me, it is a counterweight to the compensation issue.

MR. LOCHNER: Yes, Charles.

PROFESSOR ELSON: Also, too, that explains that a lot of these are pushed towards equity-based compensation for directors. The theory is that the more equity you've got, your interest is aligned with the company rather than appointing management. But of course at any level when compensation reaches such a level that a director fears losing this income stream, even an equity stream, you've got to re-think it.

But that's true of any salary range. When does salary go from being compensation to a bribe? But again, if it's equity, theoretically you've got a lot more wiggle room because your ownership interest in the company and your wealth is tied up, not in the relationship of the CEO, but in the relationship with the company itself. So if he does a lousy job, your wealth goes down. I've discovered that on a couple of occasions.

MR. LOCHNER: We have a question back here.

AUDIENCE PARTICIPANT: Well, at one of these conferences a few weeks ago at Columbia Law School, former Chairman Levitt described something that he said was a culture of seduction. Maybe the panel can comment on this, not only with respect to directors but also with respect to corporate officers. This whole notion of incentivizing through equity somehow or other became the tail wagging the dog, when you've got the various derivative devices created. It was almost a built-in disincentive to look at long-term decisions, and a roping in of the directors and officers into a kind of, to use a phrase from the 1960s, go-go mentality. A company would be growing by making perhaps imprudent acquisitions or becoming a serially acquiring company, rather than concentrating on building a better widget and developing new technologies. How do we get out of this box, if we are in it?

MR. LOCHNER: That's only if an officer or director can sell his equity. I mean, that's the whole point. In other words, the problem comes up if you use short-term informational advantages; that's really what all the controversies lately have been about — people hyped the stock, knew things were terrible, sold it, and said, "Good-bye and gee, it's not my fault." But I think that a lot of people have misread options and misread the use of equity.

Certainly options have been abused. They've become highly dilutive, and the question is how incentivizing are they? But the problem is executives who exercise options and sell the stock, or who take the stock and sell it, or directors who take the stock and sell it. At that point you're right, there is no long-term incentive. And really what that person is saying is, I found a better investment for my money, which isn't a good thing; and perhaps I have an informational advantage that you don't have and I'm trading on it. That's problematic too.

So, I think the chairman is right, it did create problems. But I think he was a little off in the sense that you can clear that up by restricting the re-sale of stock or making it tougher to sell. And I think that then the incentive is realized.

Because I think if you said, we're just going to give you cash, forget about the company's long-term health, I think that's equally problematic. Because paying everyone cash years ago got us into a malaise that led us to the whole governance revolution.

MS. YERGER: If I could make a comments on this, too. I personally believe that executive compensation is just completely out of control. It's been 10 years since the disclosure rules were changed, and you, shareholders, everyone could get a very clear idea of what executives were taking home. And we've had compensation consultants say to us, that's contributed to the escalation, because everyone starts looking at those numbers and saying, well, gosh, my peers are making more.

But 10 years ago, if an executive got an option for 200,000 shares, that was huge. You thought of him as piggy. I think it was O'Reilly at Heinz who got an option for about 200,000 shares and people were complaining about it. That is chump change today. The size of these packages is just extraordinary. And I think it has really shifted focus on the short-term side.

And frankly, I think our members are equally responsible, because institutional investors, I think, have been putting too much pressure on companies for their short-term quarterly results. And so they've been playing into one another. I personally think that the best discipline for options is to require expensing of them. Right now, companies do not have to record them on their income statements. This is very controversial. But the simple fact is, I think, there are directors who think, and we even heard this from Ruben Mark last fall speaking to our members, that these things are free,

and they're not. They're very deluded investors, and I think compounding that problem is the fact that shareholder oversight of these plans has decreased a bit as companies are figuring out ways to adopt programs without any shareholder oversight.

So I think there are a number of factors that could be reformed that might help the situation.

MR. LOCHNER: Let's assume for the moment that options won't be expensed, which is what I read in the newspapers is coming out of Washington, at least in the short-run.

Then what's the sort of ideal package for director compensation? All stock? All cash? I mean, you could make the argument that options, whether they're a great number or a small number, can distort director behavior just like anything else, any other instrument. Is there an ideal package? Does it matter?

PROFESSOR ELSON: The NACD recommends the stock-cash blend with a bias toward stock — 75 percent stock, 25 percent cash — to give you the ability to pay the tax due on the stock and to align your interest appropriately. I don't think that's at all problematic, and I don't think anyone has a real beef with that.

If you go back to an all cash system, you're back to where you were to begin with, which was the problem of alignment. Management appoints you, it pays you cash, you're probably going to be aligned with management. Management appoints you but you are linked to the company in stock, you're probably going to look a little closer — long-term, but the key is you can't sell it. You've got to hold it while you're a director.

MR. LOCHNER: So, Charles, their recommendation — you said the NACD's recommendation was not grants of stock options —

PROFESSOR ELSON: No, no.

MR. LOCHNER: — but grants of stocks.

PROFESSOR ELSON: Straight stock.

MR. LOCHNER: And you're expected to hold on to that until you resign from the board or whatever.

PROFESSOR ELSON: Yes.

MR. LOCHNER: Ann, what do you think of that? What's your ideal compensation package?

MS. YERGER: It's actually very similar to where the Council is. We don't specify whether it should be options or restricted stock or whatever, but there should be a component of cash and equity in a director compensation package.

And we also believe that directors should own a meaningful stake in the company. And obviously, we don't define meaningful, because that will vary based on the resources of each individual director.

MS. GREGORY: I would go further and extend it to executive compensation as well. Why not require executives and directors to hold stock for their tenure? Stock-based compensation is designed to be a long-term incentive. It's something that you can look forward to down the road when you retire and go on to other things — to be your long-term wealth driver. A holding requirement would take away the personal incentive to focus on short-term stock price changes.

MR. LOCHNER: Terry?

MR. GALLAGHER: In the case of Pfizer, we did something slightly different in that we did phantom stock for the directors, which they could not use or do anything with until they retired. So it did align their interests with the long-term interest of the company. It was a little different from actually giving them shares.

As far as the officers are concerned, I think Holly's thought may be a good one, but in my experience, we came up with a lot of reasons why officers had to sell some stock throughout their term. There were family matters, purchase of a home, moves —

MR. LOCHNER: To buy that condo if the company won't.

MR. GALLAGHER: Right. And so there are always things in the officer category that indicated that there was a reasonable argument for selling some of the options. But absent those kind of reasons, I guess it wouldn't be bad to try

to design a program that would incentivize the officer group to hold on to its stock.

MS. GREGORY: I don't buy it.

MR. GALLAGHER: You don't buy it.

MS. GREGORY: I don't buy it, because I think we should be able to compensate our senior executives well enough that they can afford the family home and their children's education without having to sell stock.

MS. YERGER: I would agree with that. We're talking here in the executive officer category about very highly compensated individuals. I have strong personal feelings that there should be very strict, if any, allowances of sale of equity.

MR. GALLAGHER: Well, the argument that was made and the situation of many officers was that the expenses increased to meet the income. And when they began to get more pay, their wives wanted membership in clubs; they wanted a yacht; they wanted their vacations in Tahiti. So there were a lot of expenses that came up that the cash compensation, private schools for children, whatever, did not cover.

MS. YERGER: These people are making millions of dollars —

MR. GALLAGHER: Well, no, no, no.

MS. YERGER: — millions of dollars. In many cases they are.

MR. GALLAGHER: Okay.

MS. YERGER: And I think we also are realizing that companies are paying for increasing portions of executives' lifestyles, country clubs, financial planning, the list goes on. And now obviously after TYCO, we learn about the apartments. They're not even paying for their living spaces in some cases. They're getting interest-free loans to buy — I'm hard pressed as a person working for a non-profit obviously not falling in the highly compensated category and managing to cover my expenses, to have a lot of sympathy ultimately.

MS. GREGORY: I'm with Ann.

MR. GALLAGHER: Well, there are exceptions and there are bad cases, but I still believe that overall the American enterprise community and the officers of those corporations are reasonable people, and people who are not getting into that kinds of excessive compensation. Certainly my experience at the company I was at, Pfizer, was that the company didn't provide anybody a home; we didn't have any country club memberships; we didn't have any apartments. We didn't have any of those kind of excessive compensation arrangements.

Our senior executives were paid well. But at times they also felt they had to exercise options in order to cover extraordinary expenses.

MR. LOCHNER: Terry, can I ask you a question and go back to something you said? You mentioned that you had adopted a phantom stock plan for directors. Why phantom stock rather than options? Or a direct grant of stock?

MR. GALLAGHER: It was just an easier way to compensate the directors, and it was tied into the stock of the company, but wasn't a straight option plan. It was just phantom stock grants that they had to hold on to until they retired. And we felt it was a better way to tie them in. We felt it was a possibility if you gave options — well, I guess you could give options and then require them to hold the stock if they exercise the option. But here they received their phantom stock grant, and they could do nothing with it until they retired.

PROFESSOR ELSON: It's also tax effective too; they didn't have to pay tax on it. It wasn't ordinary income until they retired, which makes sense, because when they retire, their income bracket was lower.

MR. LOCHNER: Yes.

AUDIENCE PARTICIPANT: Related topic, corporate charity. Should corporations make charitable donations to charities with which directors are affiliated? It was an issue with at least two of the Enron directors.

MR. LOCHNER: My guess is you're not going to find much disagreement on that subject, but Ann?

MS. YERGER: Well, personally I would say no. The way the Council's guidelines are set up essentially is that we consider that kind of relationship would make that director non-independent. We've never said that companies can't make charitable contributions. I have personal views about it, but the Council's position isn't one that restricts that.

AUDIENCE PARTICIPANT: How do you define affiliation though?

MS. YERGER: If the company made a contribution of more than, I think, 100,000 dollars or a contribution worth more than one percent of the charity's revenues, then that director would not be considered independent.

I'm sorry, let me explain. The director would have to be an officer of the charity, not simply a director of that charity.

MR. LOCHNER: Ann, going back to something you mentioned earlier, you said that the Council had gone to the SEC and asked for more disclosure which would help you determine whether directors were indeed independent. Inform us what sorts of additional items of disclosure you're looking for.

MS. YERGER: Well, initially we asked for disclosure of professional, familial, and personal relationships between directors, companies, and company officers. We had several discussions with the SEC staff, who at that time were interested in the rulemaking petition. And they said the personal is too difficult to define. I do think it's significant if the CEO's college roommate is on the board. But the fact is, I think there was a lot of debate about that. We withdrew that and amended our petition to ask for details on essentially professional and familial relationships.

For professional relationships we want greater disclosure. It's very difficult to uncover some of these relationships. And so we painted a very broad brush in terms of the kinds of information we wanted. The petition has gone nowhere. The AFL-CIO submitted a similar one in December. We haven't heard a word from the SEC on it.

MR. LOCHNER: Yes.

AUDIENCE PARTICIPANT: The New York Stock Exchange has proposed within a couple of years that listed companies, to retain their listing, must have a majority of independent directors. I was wondering, should that apply to the board of directors of the New York Stock Exchange? Aren't most of the directors on it currently with companies that have a listing on the New York Stock Exchange? I'd be interested in knowing — is that common?

MR. LOCHNER: Yes, they're not a public company yet, at any rate, but yes, my understanding is a majority of that board is made up of CEOs of companies that are listed and pay listing fees and all the rest of it.

MR. GALLAGHER: I've experienced something since I retired, and as Phil mentioned, I started doing a little bit of consulting. One of my clients is a major railroad. They operate in a good part of the country. One of their problems in finding independent directors is that just about every business in their operating area uses the railroad in some way or another, and probably to an extent that they would not normally be considered independent.

So I can see the Stock Exchange problem in that most of its universe of people who are involved in the broker's business are in some way connected with the Exchange. So if they did become a public company and needed independent directors, I'm not sure where they'd find them.

MR. LOCHNER: The other exchanges have the same problem. My recollection is that they have defined a category of so-called public directors, but I'm not sure they make up a majority of any of the exchange boards.

Let me go on to a slightly different subject. You know the press is just full of criticism in general of directors these days. I guess my question is, are we setting our sights too high? Do we have unrealistic expectations of what directors can actually do? You know the press pieces say directors are asleep at the switch, not paying attention — what's realistic? One would like to think that the Enron board, if it had been somewhat differently situated, might have asked tougher questions. But do we really know? I don't mean to focus on Enron, but — Ann, are we being realistic?

MS. YERGER: Well, I think we have very high expectations for directors. One thing that's come out of all of these blow ups, and there have been so many, I think is a realization that directors from the shareholder perspective probably aren't doing the jobs that we think they are doing.

Do I believe that directors can necessarily avoid or prevent financial fraud? I think that's very difficult frankly,

and I don't think that shareholders necessarily expect that. I do think that they expect that independent directors and, an independent audit committee are going to be doing a careful job and asking enough questions that we should feel comfortable with the financials that are coming out.

I don't know what more to say. I don't want us to put too high of an expectation on the board of directors. And I think we all realize there are limitations. But at the same time, they have an important position in the whole process, and we're counting on them to do their diligence and be careful for the shareholders.

MR. LOCHNER: Charles?

PROFESSOR ELSON: I think that unfortunately a director is captive to the information the director receives. And the information the director receives comes from management or from the independent auditors or the internal audit staff. I think that the key is motivating them, once they receive information that troubles them, to act.

Can they go around ferreting out information? Probably not; it's not in their job description. And frankly, if they get too involved in the process, they're no longer monitors but they become managers, and that's sort of a mistake, too.

I think the task is how do you get good information to the board. I think, oddly enough, that's where independence comes in. Because I think that information, bad information, has a strange way of filtering up to people, those within the group feel would side with them.

There's a great story that Nell Minnow always tells. Do you remember this? You probably remember about the Sears Tower and Bob Monks. Bob Monks and Nell Minnow launched a proxy fight at Sears. They were trying to replace the board. The head of Sears agreed to meet with Bob Monks and talk about it. Anyway, he goes to the Sears building, and he and the Sears general counsel get in the elevator. They're going up, and the general counsel is taking him up to see the CEO. Anyway, they're going up, and finally the general counsel turns and says, "Wow, that's amazing." Mr. Monks said, "What?" And the general counsel said, "I just can't believe it; we're at the 85th floor." Mr. Monks said, "So, this elevator goes up by there every day." The general counsel said, "Yes, this is the first time bad news ever got by the 85th floor."

I think the point was that bad news isn't going to filter to you unless people view you as independent.

MR. LOCHNER: Yes, I think that's true. Just going back to one thing you said; you said that if the board receives or a member of the board receives troublesome information, then it's pretty clear about the need to pursue things.

PROFESSOR ELSON: Yes.

MR. LOCHNER: But those sort of red flags, however, don't happen every day.

PROFESSOR ELSON: No.

MR. LOCHNER: They appear to have happened at some companies we could all think of recently, but probably in the vast majority of companies, not. If there are no red flags, is it reasonable to expect directors to be able to really verify the annual audit?

PROFESSOR ELSON: No, that's why you have independent advisors. Your job as a director is to assure yourself that the auditor is capable, competent, and independent. That's the whole point. And I think that's what all these reforms center around.

Now the question is, if there are no red flags, if they don't bring you a red flag, what do you do? Well, you're human, and there's not much you can do, unless something does come up, and then you have to respond to it. The key is, once you do get that flag, how quickly you respond to it.

But again, you need to be, as a director I think, kind of a sponge for information. You ought to be constantly listening, reading, thinking about the thing. Information comes to you from funny sources. It can come from the newspaper, from an analyst report, from overhearing a conversation in the subway. And you have to be receptive and open to it.

MR. LOCHNER: Yes, we had a question in the back.

AUDIENCE PARTICIPANT: One of the issues relates to hiring the auditors. If you have management hiring those people, then the accounting partners are going to be more concerned about what the CFO thinks about his last bill, or what the CEO thinks about what he's actually going to save, than about the audit committee. It seems maybe part of the solution is to have some independent directors, and they are the ones who ought to be hiring the independent advisors. I think to a large extent that that's probably not happening today, and that's a good part of the problem.

Engage

MR. LOCHNER: I agree with your point that it ought to be the audit committee that hires and fires, or the board as a whole that hires and fires the auditor. My impression is, and the panel may have different views, that is more and more the practice and has been over the last couple of years.

MR. GALLAGHER: And the proposed New York Stock Exchange rules that came out last week mandate that the audit committee hire and fire the auditors, so that will come about, I think.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: Professor Elson mentioned monitoring, and isn't that really part of the issue here, whether the corporations have had autonomous committees that have sufficiently discharged their duties to monitor?

MR. LOCHNER: Go ahead, Holly.

MS. GREGORY: When we talk about the expectations placed on the board in this monitoring function, there is an awful lot that boards can be doing to ensure that Caremark-type compliance procedures are in place. The other thing that we can expect boards to do, which they are fully capable of doing, is to judge the credibility of members of management and the internal audit staff and outside auditors.

We can also expect directors to ask really good questions, to ask the CFO or the outside auditor, "What do these footnotes mean? Do these financials really give a clear picture?" And they can ask themselves, "Do I understand what these financials mean?" They can ask these kinds of questions.

I agree with Charles that the audit committee doesn't create the numbers. And there are issues about just what information they really have access to. Too often boards get fed information. A management team works very closely a few weeks ahead of a board meeting trying to determine what information goes to the board. Too rarely do boards really get involved in telling the management team what the information is that they expect.

MR. LOCHNER: Yes.

MS. GREGORY: That should be a regular part of the board and management dialogue. At every meeting they should be talking about what information they expect.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: Just a comment — I've sat on boards on and off for about 16 or 17 years in troubled and untroubled situations. I think the best defense the board has, whether it's an academic or a medical practitioner coming in from left field, is to institute processes that guarantee the kinds of questions an individual who is unsophisticated in the area can easily raise. So, the former president of the YWCA can be on a board and ask — as we all know, there's no such thing as a stupid question, and there really isn't — the key questions and feel comfortable in the environment, and set up processes whereby that comfort level is available.

To answer another question that was raised just now, I'm quoting Warren Buffet, when I was first put on the audit committee of X, I called in a court reporter to the audit committee and the lead relationship partner from the accounting firm. And I asked him on the record, with full knowledge that his answer would be filed with the minutes of the corporation, if he were in charge of running the books of this corporation, would you be doing them the way they are now being done, or would he have some suggested changes.

MR. LOCHNER: Let me ask the panel. Two specifics — I guess the question would be, are the directors adequately doing their monitoring job? That is, are they keeping their antenna up for hearing about bad news, if the company does not have a 1-800 anonymous call-in number for employee complaints, concerns, whatever, or if the company does not publish the email addresses of the directors to its employees? What do you think? Ann, are those minimums? Are those required to be really doing your job?

MS. YERGER: I don't know. We believe it's very important that there be a mechanism for shareholders, and I think probably also for employees, to contact directors. It's a huge problem that we can't fix at this point. So I don't think right now it's easy at all for folks to contact independent directors, give them feedback, whether it's anonymous or whatever, or for shareholders to contact them to talk about substantive issues, governance issues, governance concerns. So it is a problem.

MR. LOCHNER: I guess an alternative would be simply publishing in the annual report or something like that the mailing address of the directors. Terry?

MR. GALLAGHER: I'd be surprised if most corporations didn't now have a compliance officer or some sort of compliance mechanism and a mode for employees to contact that compliance officer with questions, problems, things that they see that they think are wrong. I think that accomplishes what you're after.

As far as the independent directors are concerned, it's more problematic. But one of the methods that we used was my own position as Vice President for Corporate Governance. I went out proactively to the institutions, and also the religious shareholders, the ones of both sets who were active in making their views known to the corporation. I assured them that if they told me something that bothered them — some program that they thought was wrong at Pfizer or whatever kind of information they wanted — that that information would be conveyed to the senior management and to the board.

We had a corporate governance committee of the board that we used as a mechanism. I would meet with the corporate governance committee and the board, and they met six times a year, and I would advise them of what I was hearing in the field from the institutions. I think that's a good compromise way to get through to the board whatever the concerns of the shareholders are. It worked fairly well, I think. I think the major institutional shareholders were satisfied that their concerns were getting through to the Pfizer board.

Now, the New York Stock Exchange proposals of last week mandate that a company have a nominating/corporate governance committee of the board made up of independent directors, so the mechanism will be there. What I would suggest or urge is that every corporation have somebody in its corporate setup who is designated as the corporate governance officer and will be the contact point with the institutional and other shareholders who want to say something to the board. And that person should have the mandate to convey those concerns to the corporate governance committee of the board, and through them to the board.

MR. LOCHNER: Terry, what you suggest, I think, makes a lot of sense. That is, having somebody proactively out there talking to the major shareholders. But how about the whistle-blower or the potential whistle-blower? Employees are naturally concerned about confidentiality, exposing themselves, getting fired, but may be seriously concerned about something not being right. What's the right mechanism for discovering that?

MR. GALLAGHER: Well, I think that's the compliance officer set up. I'd be surprised if most companies didn't now have some sort of set up in order to be concerned about whistle-blower situations where an employee could contact an officer of the corporation who was designated as the compliance officer. My experience has been that the person designated as compliance officer is very sensitive to receiving that kind of communication, absent a fraudulent situation such as we've had recently.

But in the normal run of the corporation's business, a compliance officer who receives that kind of letter, complaint, phone call, what have you, acts on it. He starts an investigation. He tries to find out what the situation is. He may call in an independent outside counsel to do the investigation, or he may call in an outside auditing firm to take a look if it's in the financial area.

Those kinds of things get paid attention to and I think are raised to a level at least of the senior officers of the company, if not to the board itself.

MR. LOCHNER: Holly?

MS. GREGORY: I would add to that. I think that the board needs to have a relationship with that compliance officer. There need to be regular — meaning at least annual — presentations by that compliance officer, maybe without other members of senior management present, where the board can freely ask the compliance officer about the nature of some of the kinds of issues that were investigated and weren't investigated. And, why weren't things investigated?

The other thing that the board can do in this field relates to employee whistle-blowing issues. The board should develop relationships with senior members of management who are not on the board, so that a channel of communication is developed. That's why it is so important for managers to be in board meetings and to make regular presentations, so that the human relationships develop that allow information to come to board members through informal channels in a time of crisis.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: I think the problem that directors have in looking over the millions and billions of dollars of

affairs of a corporation is that it's a very part-time position. I always thought that it's sort of pennywise and pound foolish that directors don't, as you were saying, have a good source of information about what is going on. I assume that it would be useful for corporations to give each director some kind of a research assistant, because one of the things that happens is that you're just inundated with a tremendous amount of information — either too much stuff or not enough stuff. So that person could be like a full-time helper. I think that would be very, very helpful.

MR. LOCHNER: Go ahead.

MR. GALLAGHER: My experience was that since most of our directors were involved in other corporations, their research assistants were their own staff at their corporation. We sent out a board package, and it was basically a mini annual report every month that we had a meeting, and we sent it out a week before the meeting. Our directors would either go through it themselves, or more likely, their general counsel, their CFO, their personnel person, would go through it. I would get calls from those people saying, well what do you mean by this? Where are you going with that? So there certainly were the resources available to those directors.

Now in the case of directors who were not officers of a major corporation, they had to do it themselves. Or at least in one case we had a president of a major university, and I would get calls from his staff at the university, so he had the resources as well. So there were very few who did not have the resources to analyze and question issues that were going to come before the board.

MR. LOCHNER: Ann?

MS. YERGER: We don't really think of it as staff, but we have always felt that directors and the committee members should be able to hire their own advisors. I think that sort of a relationship can solve that issue. If you hire an expert to look at the financials or whatever, I think that can be a big help.

MR. LOCHNER: Yes, Charles.

PROFESSOR ELSON: I would kind of caution, though, against having board staff. You know there was, I guess, a proposal — I think it started with Arthur Goldberg, I guess this is probably 30 years ago now — that you have like sort of a professional staff assigned to the board, sort of a directorate group. I think the problem with that — while in some respects it's an appealing idea — is you don't want a director to become full time. You don't want a director to think of him or herself as full time, because then they become management, then they lose the monitoring.

Good directoring, I've always thought, is nuance. It's appreciating nuance; listening to the explanation that just doesn't sound quite right; or the number that you recall from an earlier meeting that suddenly disappeared from the balance sheet. That in and of itself is really what makes an effective monitor.

I think if you begin to create staffs and whatnot, you begin to lose a little bit of what you're really looking for. You need as much information as you can. But again, remember, it's nuance. And the nuance is, when do I get a funny feeling when I keep getting a strange response to this question? And that then means you just call another director and ask him, gee, what did you think about this?

Phil, you've been on a couple boards. I think you've sort of experienced that as well.

MR. LOCHNER: Yes, I don't disagree at all, Charles.

Yes, Holly?

MS. GREGORY: I don't disagree either. But I do think that there is another board role that is important to think about. There is this important role in monitoring and understanding nuances and judging credibility, but it is not supposed to be an adversarial relationship. The management benefits from having a tough board as a real resource and as a sounding board.

The board should be a place where management can test out and hone and shape an idea so that when they roll it out more publicly, the idea is well firmed up. We shouldn't lose focus on this other important role in all the talk about monitoring.

I don't know that staff could add to that aspect of what boards do. You really want those smart directors in the room largely for the judgment that they bring to bear. To have a separate staff out there ferreting out information rather than having the directors talking honestly to management about the kinds of information they'd like and the kind of support that they'd like, I think, places the wrong emphasis in what the relationship is.

MR. LOCHNER: Yes?

Engage

AUDIENCE PARTICIPANT: Holly, I agree with you in part. It seems to me that if you're in a situation where the company is doing well and it's prospering and management seems to be doing a good job, then being more collegial is appropriate. But if you're in an environment where things are troubled and there are problems cropping up and maybe issues that suggest that there might be something disturbing lurking under the surface, then you have to be even more aggressive, more hard-nosed, and frankly, less collegial. In this kind of relationship, it's a difficult balance.

MS. GREGORY: I wasn't meaning to suggest that collegiality means that at appropriate times the board isn't hard-nosed. A board really needs to be tough-minded in acting as a monitor and as a sounding board, specifically in the boom times.

Retrospectively, one of the things that we can see happened in the 1990s relates to this great boom. There's a kind of psychosis that goes with a boom. But the board is supposed to be the entity that questions whether the emperor has clothes, and it should be asking in boom times, "Are these results really based on fundamental good business or on something else?" I think that the challenge for boards is to be really tough in the good times. It's kind of easy to be tough when the red flags have all gone up. But how do we maintain that tough-mindedness in what appear to be really good times?

MR. LOCHNER: Yes, we had a question.

AUDIENCE PARTICIPANT: That's a good point, because in one example, they had to restate back to 1997. For a number of years, at least five years, there was this appearance that times were good and everything. We were all led to believe things were good, and that's really a picture often on financial statements and things like this. You swallow the propaganda that is spun by the White House or whoever's propaganda you're swallowing. And without really posing the hard questions, and Joe Mogul made a great point, I think — well, it's difficult to put this into accounting standards or in governance standards — but really is an issue.

MR. LOCHNER: Well, can I go back to something Charles raised, which is an important point? You said, gee, if you are at a board meeting and something doesn't quite look right and you read about it later on in some report you get, you call up another director, and say, gee, how did you react to this? And maybe that process raises the question which has been debated seemingly endlessly about the non-executive chairman, the lead director, and now what the New York Stock Exchange proposes, which is when the directors meet independently, somebody's in charge of the meeting.

Can I get the panel's reaction? Ann, do you think it's a good idea, and if so, would you prefer a full-time non-executive chairman or just a lead director or something else?

MS. YERGER: We actually don't advocate splitting the chairman and CEO roles. This is an issue that's actually controversial within our membership. We have some folks and institutions that feel strongly they should be separated, and others that do not. We do believe that it's important that there be a contact director — we didn't even call him a lead director — but an independent director essentially who would call and organize executive sessions of the independent directors and be the person that other directors would call and say, I think there's an issue, we need to talk about this.

PROFESSOR ELSON: See, I guess I agree with the percent of your membership who doesn't like splitting. I never thought they should be split. Put it this way. Sometimes there's a good argument for splitting them, but generally I've always seen them really not work. You create two sources of authority within the organization, and it makes for a mess.

I think also what happens is, unfortunately, it causes the other directors to sort of shirk on their duties a little bit, because they feel, oh, well, so-and-so's the lead director or the head of the board, let him worry about it. That's not very good either, because every director ought to be thinking and ferreting, if you will.

If you have a lead, there's a natural tendency amongst people that if someone else is doing it, they'll let him do it. Even though their legal duties are in fact the same.

I'm delighted with the Stock Exchange proposal on executive sessions. I think that's terrific; that's very important. But I'm not so wild about the lead director concept just for that reason.

MR. LOCHNER: Holly?

MS. GREGORY: I think the New York Stock Exchange hit just the right tone. They don't call for a lead director. They simply call for executive sessions of the non-management directors, and then recognize that somebody needs to be responsible for convening and chairing those sessions. And so they call for disclosure of a presiding director. It's a fine balance.

The lead director concept is very problematic if, as Charles points out, you give that person the authority or

perceived authority as some sort of super director. There shouldn't be a super director, but certainly somebody needs to take on the responsibility for convening the outside directors so that in times of crises there is a way to get together and take action.

MR. LOCHNER: Terry, did Pfizer have a lead director?

MR. GALLAGHER: We didn't have a lead director. One of the things I discussed with the institutions over a period of time when they were pushing for lead directors was basically our program. At Pfizer, it was understood within the board when there was a need for an executive session of the board, and we had one standard executive session of the board each year without any management directors present, including the chairman. So there was that standard meeting. But if there was need for another meeting, it would be chaired by the head of one of the three committees. We only had three committees. We had the compensation committee, the audit committee, and the corporate governance committee. Whoever's jurisdiction the problem fell in would convene that meeting and would chair that meeting.

That was the understanding of the board, and that's what I told the institutions. Basically, or for the most part, they bought that as being a good program. So when I read the New York Stock Exchange proposals, I was just wondering whether you could name three people as being leaders or conveners of those meetings, depending upon what the issue was. It seemed to work at Pfizer. It seemed to be acceptable to the institutions, so we'll find out whether the Stock Exchange will buy that kind of approach.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: We keep circling to this proposal from the New York Stock Exchange, and the reason I'm asking this question is because of the *C.S. First Boston* case. The *C.S. First Boston* case was the first time the SEC had stated exchange rules as even a partial basis for enforcement. So my concern is, if these become rules of the New York Stock Exchange and are followed and imposed, is there any real threat that the SEC may at some point in time decide to make these rules the basis for enforcement action?

PROFESSOR ELSON: Sure, Delaware certainly will. The Delaware courts have really basically adopted most of these principals and the way they view board conduct. Effectively, they have become legal rules, I think.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: I think this really boils down to a fundamental issue, with all due respect to Delaware. Aren't there certain areas where corporate governance, which you've all been talking about today, is so intimately related to the nature and quality of things that governance is regulated by SEC security forms — annual reports, proxies, financial statements? Ms. Gregory's partner, Harry Olstein, has a panel about best practices. The problem I have with it, and certain former Commission officials and leaders have with it, is that we always wind up going back to the Exchanges. We have this voluntary system of, well, you know, we have to rely on the Exchanges, or that panel relied on best practices disclosure, so that these corporations will be shamed into saying something.

Since the whole concept of interstate commerce is commerce across state lines, why can we not have a corporate law that will further federalization?

MR. LOCHNER: That's a terrific question and a great lead in to the next point I had on my outline, which is we have a lot of activity going on in Congress, a variety of laws being considered. I am uncertain which ones, if any, will pass, at least in this session. But I'll state the question two different ways, and the panelists can choose how they want to respond.

Is there some law that, had it been on the books, would have prevented Enron? And secondly, is there any law, such as the one suggested just a moment ago, which ought to be on the books, whether or not it would have prevented Enron? It just is something that needs to be covered?

Charles?

PROFESSOR ELSON: I think it was Bill Carey years ago called for a federal corporation code, federalizing the corporations. I have some problems with that for a lot reasons. I'm from Delaware. I'm a taxpayer. I find a federalization of corporation law problematic for a lot of reasons, ignoring the Delaware point.

I think that there is an argument that, well, interstate commerce shouldn't this be subject to regulation. Suppose we took these corporate governance guidelines and standards, and enacted them into law. Let's just say there was a federal law that says thou shall have independent directors. Would that have necessarily stopped Enron? I don't know. I think management fraud is always going to exist, whether you have law or not.

The question is, how do you respond to it? Had the board, let's say, in Enron been independent, maybe they would have reacted sooner. Would they have stopped what happened? Maybe, maybe not. On the other hand, certainly there would be the better chance for that had you had independent directors. But again, is it best to have the law itself define independence, or is it best to have those that invest capital to define independence?

And this comes back to Ann and the Council of Institutional Investors. Really, what it comes down to is, will people contribute their capital to organizations that safeguard that capital? And those who contribute can always get, from those to whom they provide capital, assurances that it'll be protected — a la, independent boards.

I think that's why you've seen these things as listing standards as opposed to law. I sometimes find that when we codify things, we tend to create form over function to respond to law rather than to respond to the nuance of the law. What troubles me about federalizing all this stuff is that we'll end up creating a check-the-box culture that in the end does no one any good.

But I'm interested in everyone else. This is a good law school point.

MR. LOCHNER: Ann, does the Council have a view?

MS. YERGER: I'm scared because I think I'm the only non-attorney up here, so I'll give you just my practical view of this. I just think our current system is ridiculous — the state laws. We've got the listing standards; there's federal securities laws. It doesn't make any sense. And I'll tell you, the fact that the Council is holding on to the New York Stock Exchange as being the reformer in all this is extraordinary.

We have never been pleased with the job of the New York Stock Exchange in terms of protecting investor rights. It is proposing changes to rules that have been in place since the 1950s and some since the 1930s, and we have been pushing for reforms for all these years. The New York Stock Exchange brings the straight thing out. NASDAQ has nothing essentially; that's a disgrace. I don't think they're interested in the least in moving forward.

I think the New York Stock Exchange will be under terrific pressure from its vested interest groups to back off significantly. It will. And investors are left essentially with a system that does not work, and which I do not think is offering adequate protections.

But look at Congress. It's not doing anything either. We're in an election year, and I don't think anything's going to come out of that. So investors are sort of left begging for somebody to help us out here. I think, personally, it's ironic that it looks like now it's the New York Stock Exchange.

MR. LOCHNER: Holly, do you have a view about federalization?

MS. GREGORY: I have to disclaim, I'm a bit at a disadvantage because I can't talk about Enron at all. We are bankruptcy counsel. We were not counsel to them before —

MR. LOCHNER: Good disclaimer.

MS. GREGORY: But we are counsel, and so I cannot speak about Enron, nor do I want any of my remarks to be interpreted as being about Enron.

You've posed a great question. It's one that, as Charles pointed out, we've been struggling with for decades. This notion of federal chartering and federalizing corporate law comes up every 20 years or so when we get involved in a great debate. There was a great debate in the 70s. The American Law Institute's *Principles of Corporate Governance* were a reaction to the calls for federal chartering that came out of a series of bribery scandals — *Penn Central* and those cases. These were also the cases that led to the formation of audit committees, the New York Stock Exchange requirement that companies have audit committees, and the first requirements that at least some members of the board must be independent –- for audit committee purposes.

Approximately seventy-five percent of listed companies on the Stock Exchange now have a majority of independent directors, even though there is no requirement at all that they have that. This has come about through a combination of listing rules requiring independent directors on audit committees and recognition that independence helps protect boards and directors from lawsuits due to a series of cases that have come out of the Delaware courts.

It's been interesting to see it evolve. We have a very unique system. I'm somebody who thinks it works. It's interesting how it's been formed. I don't like the notion of heavy, heavy regulation in corporate governance, because I think we have different needs at different times.

Recent events show that we react to failures in some very positive ways. Look at some of the high profile corporate failures in the last nine months and think about what the reaction would be if this were in Japan or in France or in Germany. The first reaction would be denial — keeping it quiet — with the cross-relationships of companies enabling them to transfer assets to make everything look okay. And then government would come in and try to make everything

look okay. And Japan is still in that mode.

Here in the United States we have a very, very different system. At the company level, we have bankruptcy, which is fairly quick. And at the system level, everybody starts to analyze how we can fix it, how we can change it. We go through this great self-study, and then we improve. And then, yes, there'll be another scandal in five years, and we'll tinker with something else. But wholesale change, I think, is overblown.

MR. GALLAGHER: I would agree with Holly in that the American enterprise system, I think, needs the freedom and the flexibility of the present system. I think a federal incorporation would mandate too much, put us into too much of a box. We really have a system that has produced the great advances in the United States economy and the productivity in the operation of businesses, and the discovery of new products. The pharmaceutical industry, with the discovery of new drugs, is really a unique United States phenomenon.

There are very few countries around the world that allow the freedom to their corporations that would produce those kinds of results. So I favor the present system as an endorsement of the American enterprise system.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: Many years ago in a burst of irrational exuberance as a young lawyer, I actually read the entire legislative history of the '33 and '34 acts. And I have to tell all of you that if you go back and read that history, it's really an eye-opener. The reason we have the '33 and '34 acts is that there were a series of huge scandals that rocked Wall Street prior to the enactment of those laws.

They were so serious; there were massive pyramid schemes and massive fraud everywhere. And what happened as a practical matter is the American public lost confidence in the markets and stopped investing its money. The Douglas Commission, of course, came in and recommended these reforms, which entailed enacting this legislation and the subsequent regulatory scheme, to get the public back to the markets.

We've got a hiccupping market in the midst of an economic recovery because of the current scandals. And the issue is, will the public come back to the markets?

One other point: the vote in the Congress of the United States for the '33 and '34 acts, which stunned me when I read it, was unanimous. The entire Congress unanimously voted for these regulations. The reason was Wall Street went to Washington and said, rescue us. We can't get people to put their money in the markets.

So my point is that it's the American public that's going to be the ultimate determinate of whether there is significant additional federalization and reform. If they'll come back to the markets under the current system, despite these scandals — because what's been challenged here is the notion that the independent board system and the public accountancy system are supposed to be protecting the public. If the American public has lost confidence in these major safeguards, we have a problem. And we're going to need more legislation; that's my point.

MR. LOCHNER: Yes?

AUDIENCE PARTICIPANT: Thank you, I appreciate that you've brought up that point. My experience was doing recap work on sick banks and thrifts back in the late 1980s and early 1990s. To perhaps give you background information, I think you're actually talking about a lot of the propaganda that's been disseminated. The whole repeal of Glass-Steagall came about in part because the economy pretty much cratered during the Newburg administration and the Fed was lending money to Britain.

Roosevelt had closed a significant number of banks and they selectively chose which would reopen. It really wasn't an issue that the public was afraid of what was happening in the markets. And you didn't have a great participation of the American public in the markets at that point.

And the fact that he selectively chose which would reopen really left a lot of the American public pretty much on the skids in part, because if one's banks didn't get reopened and he didn't have access to his money, it was gone.

Having said that, that meant that there still had to be a level playing field and you couldn't have insiders enriching themselves.

MR. LOCHNER: Well you've both raised a very important point, which is attracting investors into the market and driving investors to participate in the market as opposed to put their money in CDs.

A related issue is, and I've heard this everywhere — from search firms, from companies — that it is increasingly hard to find people who are willing to serve as directors. If you want the directors to be the watchdogs and the activists on behalf of the shareholders, where are those people going to come from?

Among the changes suggested probably at the moment of the highest confusion about Enron was doing away with directors and officers insurance. Surely, you would have very few directors after that move. But I guess I'd be

Engage

interested in a couple of things from the panel. One: is the perception I have that it's harder and harder to find good directors, correct? And if that's true, what do you do about it? Is this a public policy issue that needs to be addressed? Is it a compensation issue; are we underpaying directors for what they're being asked to do?

Charles?

PROFESSOR ELSON: I think there is a real fear for directors, who say, "Do I really want to subject myself to these problems? Do I want to subject myself to the embarrassment? Do I want to subject myself to the financial risk of going on a board?"

The danger of being a director is not what you know, it's what you don't know. And you have no control over what you don't know, unfortunately, in many circumstances. What is going to happen is you're going to get people eventually who go on boards who have no assets to protect and no reputations to protect. And that's exactly who you don't want as a director, people who don't care about their reputations and have no assets.

MR. LOCHNER: Sounds like my dog.

PROFESSOR ELSON: But I think that that's a real problem, because I think you really want people who are talented and who value their reputations and who have been successful in life to go on these things. I think they make the best monitors. But I think you can create a climate where they say, "I can do nothing right," if you will. The two most thankless jobs in the world, in my view, are being on the board of a country club and being on an audit committee. Nobody ever says anything nice to you, and no one ever says, "gee, thanks." It's a lousy job.

I think because there's no upside. It's all depressing. No one says thanks for the good job; it's always, "Here, let me tell you what's going wrong."

MR. LOCHNER: So what can we do about that? How do we change that?

PROFESSOR ELSON: With respect to the liability system, I'm sort of more of an equity bug. I believe in private incentive rather than external incentive to act appropriately. I'd rather see a liability system that protects against self-dealing, which I think is pretty easy to stop. In other words, stealing from the company, sort of the things we've seen a lot lately, versus just plain old slothiness; how do you protect against it?

D & O doesn't protect you from self-dealing transactions anyway.

People who steal aren't protected by D & O. D & O is really just there to protect the slothy action. The question is what is slothy, what isn't, and is litigation the best way to prevent slothfulness? I've always felt it has to do with equity and retooling the duty of care to be more equity-based, a la stock base, that is.

And I think beyond that, if you don't remove the fear factor, you're going to have a tough time recruiting good folks. Now we've said that all along, and you had these big things in the 1970s and 1980s where there were a lot of suits. People said people won't serve as directors. And there was, after Van Gorkum, a bit of a falling off.

On the other hand, I do think that today the crisis is real. I think it's a very different story. You didn't have directors hauled before Congress in the same manner that you did recently. I think it's becoming sort of a dangerous job. I think you're going to prevent the really strong people from going into it.

There's no way that a former accountant will go on an audit committee these days, or at least admit that he was a financial expert, for obvious reasons.

But I don't know. Ed, what do you think?

AUDIENCE PARTICIPANT: I believe that equity is an important factor, but it can't be the only one. There are lots of people who have lots of equity who want more. And they want to get it the wrong way. I don't want to prejudge the McNulty case, but they even borrowed money to invest in their company. They borrowed without telling anybody about it in the company. But they wanted equity.

The range of directors runs from Vic Depose on the one side to Warren Buffet on the other. In between there's this huge bell curve. In that bell curve there are people who will be incentivized by equity. They'll be people who'll only not do something wrong because they will be punished for it. And you have to have sufficient safeguards and sufficient tools in place to reach out to those directors.

And particularly in the last 10 years when we've had a tremendous number of young promoters and young entrepreneurs having no real knowledge of the system in control. They have to know that if they do something wrong, bad things will happen to them, whether it's financial or criminal. But there has to be some disincentive to doing the wrong thing, and those disincentives have to be financial, and possibly criminal under certain circumstances, but certainly financial. It has worked reasonably well up until the last two years in terms of disincentive.

PROFESSOR ELSON: And I agree with you, Ed, vis-à-vis self-dealing. I totally, completely agree. But I just think care's a little tougher.

AUDIENCE PARTICIPANT: I think it's more than self-dealing. You look at the headline of who was arrested yesterday for maybe self-dealing. You also see the disregard for the importance of transparency in transactions. Even without that, you have to have a serious disincentive to people not making full disclosure of their doing.

MR. LOCHNER: Ann, does the Council have a view as to whether directors ought to be paid more in order to attract the right people; whether they ought to be subjected to greater liability than they are now? Where's the Council on these issues?

MS. YERGER: We haven't taken a position on these issues. We've never set a dollar amount that we think is appropriate that directors need to get paid. I think companies have to make that decision on a case-by-case basis. Having said that, shareholders and investors have high expectations of directors, and I think they need to be paid appropriately. I don't think a $20,000-a-year retainer is probably adequate for what we're expecting of our directors.

I think investors are pretty reasonable. I don't think they get very upset when you see director compensation packages, unless they seem to be completely out of whack.

In terms of liability, I think we don't have a formal position, but I think there's a clear sense, having read all these headlines, that people need to be liable. Someone should be liable for some of these activities.

I'm not an attorney, and I wanted to pose this question because we keep hearing directors concerned about liability. When has a director ever had to pay money out of his or her pocket? Has that ever happened?

PROFESSOR ELSON: Only if they've been stealing.

MR. GALLAGHER: Yes, Al Dunlap and Sunbeam.

MS. GREGORY: Not as a director, he was a CEO.

MR. GALLAGHER: That's right, he was CEO.

MS. YERGER: It's just rare, I think, that ultimately a director has to pay out money. What happened there was just outright fraud. Who has sympathy for someone who has to pay in those cases?

MR. LOCHNER: Terry?

MR. GALLAGHER: Does anybody think that the director education programs that are being proposed would help to solve this? My personal view is that they probably won't, that they probably won't make much difference. The New York Stock Exchange and some of the others are feeling that directors, or the people who will become directors in the future, because of having to reach out past the CEO of other companies or the CFO, need to have a director institute or a director education program.

Charles, you might have some self-interest in that.

PROFESSOR ELSON: Totally. I think it'd be great.

MR. LOCHNER: Let's hope it's more effective than continuing legal education in the legal profession.

Yes, Holly?

MS. GREGORY: The emphasis by the Stock Exchange on director education is important because it helps send the message that being a director is a real commitment. I don't know that actual director education will add a whole lot, but it's important for directors to understand that they're really taking on a commitment and there's time and effort and expertise that's involved.

Going back to the issue of the difficulty in recruiting directors, we continue to look at the same small pool of potential directors. However, there is great value to be had if we stop looking only at other CEOs as the directors everybody wants on board. This focus on other CEOs causes some of the cultural difficulty in getting boards to activate, because every CEO on the board wants to treat the CEO of the company as he wants to be treated.

In truth, we have a huge amount of untapped talent in this country and in other places, below the CEO level. Look around this room. There are a lot of people here who aren't CEOs but who would make mighty fine directors. These

people are not yet really being tapped.

MS. YERGER: I agree.

MR. LOCHNER: Yes.

AUDIENCE PARTICIPANT: I've been the general counsel for 20 years and on three boards, and I can give you some observations that we're talking about 80-20. Eighty percent of boards are good, and the 20 percent that are going to steal and commit fraud are never going to get trapped anyway.

Number two, disclosure is critical because I have sat through board meetings where directors don't want to disclose something because it's embarrassing and they've changed behavior. In fact, the SEC went the other way in the last five years; they reduced the amount of filings for activities of insiders consciously. Our filing level went down. So the SEC actually reduced the burden on most insiders over the last few years. If they had escalated, I think Enron might not have been as disastrous, nor might Tyco have done what they were doing. They were selling back to the company, and they didn't have to disclose it for a year.

Number three, I think the process has to change. I think boards are intimidated by domineering CEOs and chairmen. I've watched it. I was on one board where the majority was a football team from the chairman's college. It was not disclosed because football affiliations weren't required.

MR. LOCHNER: I want to know whether the CEO was the quarterback or what?

AUDIENCE PARTICIPANT: He was the linebacker.

MR. LOCHNER: Good, good.

AUDIENCE PARTICIPANT: The chairman of the conflict committee was the quarterback. Those are all true facts.

Then I was on a board where the chairman, his brother-in-law, his son-in-law, and his brother were all on the board. Everything was disclosed; it didn't make any difference; the chairman drove the board. He dominated those people. And I watched it. Even into bankruptcy and in reorganization, he still dominated. And it didn't make any difference who the CEO was. So, I think you really need separation between the independent directors and the CEO, regardless of whether they're good people or not good people. They have to have a chance to communicate. Because the domination in that room, if they're all sitting there at the same time, is just human nature.

I've never seen most board directors raise a whole lot of questions in a group setting with the CEO sitting there. It just isn't going to happen. The third thing is, you're going to have to change some laws. Because frankly, unless you mandate certain things, they're not going to change. You need to reduce the amount of theft potential. But the reality is, it really gives everybody a little more comfort. How much control have the institutions been able to exercise over two-and-one half trillion dollars the last 10 years? About zero.

We're all victims of the situation until people decide it's gotten so bad that we're going to have to make some changes. I'm not a big believer in regulation. I don't think federalization is the solution. I think 80 percent of the time people try to do the right thing. Most directors really don't know exactly what their job is. That's what general counsels do, they educate boards, they give them a lot of material to read. Directors try to read it, and they try to be conscientious. So 80 percent of them aren't doing a bad job. Incompetence is happening. Companies fail because they're just bad companies.

What we've seen a lot of lately is companies failing because they're crooks. That doesn't get you to the real problem with corporate governance, where you need some independence on boards. Board members need to have the feeling they can talk among themselves. It's process and disclosure.

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CORPORATIONS

6TH ANNUAL CORPORATE GOVERNANCE CONFERENCE
SECURITIES MARKETS AFTER GLOBAL CROSSING AND ENRON*

Mr. Uttam Dhillon, *Policy Director, U.S. House Policy Committee*
Hon. Edward H. Fleischman, *Linklaters and Former SEC Commissioner*
Mr. Edward Labaton, *Goodkind Labaton Rudoff & Sucharow*
Professor Richard Painter, University *of Illinois College of Law, moderator*

PROFESSOR PAINTER: Good morning. I'm Richard Painter, Professor of Securities Regulation and Lawyers' Ethics at the University of Illinois College of Law. I'll be moderating this panel as an information discussion and roundtable type of panel, very similar to what we did in the previous panel.

I want to very briefly introduce our speakers. To my extreme left is Edward Fleischman, who is a senior counsel to Linklaters but formerly a Commissioner of the Securities Exchange Commission.

Sitting next to him is Uttam Dhillon, who is the Policy Director for the Republican House Policy Committee. He also has had extensive experience both in the private sector with Milbank, Tweed, Hadley & McCoy, and also with various jobs in government.

Over to my right is Edward Labaton, who is a very well-respected plaintiff's lawyer with the firm of Goodkind Labaton Rudoff & Sucharow. He will discuss many of these questions from his extensive experience representing plaintiffs in class-action and derivative suits.

I am going to lead off with the observation we've seen from the last panel that there is a perception out there of a loss of investor confidence. That's certainly what you hear a lot about in the news. Is there really a loss of investor confidence, question number one? If so, what principal factors would you see behind that loss of investor confidence.

Those are two questions I would be most interested in, but there are other issues as well, and I want to allow each of our speakers, perhaps starting with Commissioner Fleischman, to give us some of their thoughts.

MR. FLEISCHMAN: Nobody's called me a commissioner for 10 years, and I don't feel like one. I'll take advantage of the fact that you've asked two questions to give 10-second answers to each. Maybe that'll start the discussion going.

I hear everybody say there's a lack of investor confidence. So far nobody has shown me anything that demonstrates it. I haven't seen a huge flow of redemptions of stock funds or a huge flow of sales of stocks. I mentioned to Eddie Labaton a moment ago, "I don't understand what the market's doing at 9,500," but that doesn't mean I don't have confidence. I didn't understand what it was doing at 6,500. It's not my game; I'm a lawyer.

I'd like to put what we're going to do into some kind of perspective, at least the way I see the issues that we'll be talking about for an hour. We're not talking about, in the words of the Preamble of the Constitution, the establishment of justice, the insurance of domestic tranquility, the provision for the common defense, or the promotion of the general welfare.

We're not talking about depriving anybody of life, liberty, or property without due process of law, and, with an exception I'll make in a moment, we're not talking about laws abridging the freedom of speech. What we are talking about is a series of statutory declarations making it unlawful to offer or sell a security without complete and accurate disclosure. That is, we're not discussing fundamental constitutional provisions, but rather a statutorily provided right for participants in the nation's securities markets to have a seat at an honest table.

I don't abjure or diminish in any way the key role of capital markets in the economy that makes this republic great. I do want to convey some understanding, however, of relative importance and to point out that, in fact, regulation of the capital markets in the manner chosen by Congress and the President 70 years ago derogates from, to some extent, and is an exception into the rights to free speech that are fundamental.

We have been listening for the last hour to the panel talking about corporate governance, and the growth of various requirements put on the corporations that are the issuers of securities in this country. I think it was appropriate that somebody who has served both as general counsel and as a director said toward the end of the discussion, that at least four-fifths of the people who serve in governance positions in fact try to do their best along the way.

I also think it appropriate for Eddie Labaton, with whom I will disagree on most issues, to say that liability, that not only greed, but fear, is a necessary motivation to implement the Congressional determination. A very important part of our problem, however, has been that both the private litigation process and the aforementioned institution that Mr. Blackburn talked about and disclaimed speaking for about three-quarters of an hour ago have spent the last 35 years trying so to blur the threshold of what does create liability for disclosure, nondisclosure, and maldisclosure that directors and other participants in the securities markets today really don't know that it makes a difference whether they go out and lie or just fail in an

after-the-fact determination to have performed their job. One way or the other disclosure will be found to have been wrong.

PROFESSOR PAINTER: Okay, thank you. And let's turn to Mr. Dhillon.

MR. DHILLON: Well, the question is, "is there a loss of investor confidence?" I don't have any empirical evidence that would compel me to believe that, but I have seen evidence in the sense of the market's performance that would make me think that might be true.

To me, it's a funny question. I don't think we should be particularly surprised that investors, if they have lost confidence, have done so. One looks back at the history of Enron and we realize that analysts, even after all the problems had become public and known, were still recommending Enron as a buy. After a lot of the bad news about Enron had come out, the credit rating agencies — even when Enron was trading at three dollars a share — still had Enron maintained at an investment grade status.

If you look back at 1994, the credit rating agencies also missed the largest municipal bankruptcy ever — Orange County, California. If you add all of that up with the bad news that comes out on a daily basis — and if you watched any of CNN-FN or CNBC yesterday, you can hear this at the top of the hour — it's just not surprising to me that people are less than enthusiastic about pouring their money back into the stock market.

Congress has addressed this issue in April. On April 24, I believe, Congress did pass a bill, H.R. 3768, the Corporate and Auditing Accountability, Responsibility, and Transparency Act. I should say the House of Representatives passed that bill. It was a bipartisan vote, 334 to 90. CAARTA, which is what we call it, actually goes to the heart of a lot of the problems that are affecting investor confidence. So Congress is addressing this issue.

There is, although I said not any empirical evidence that investors have lost confidence, a lot of circumstantial evidence. I was a former assistant U.S. attorney in a past life, and I would feel somewhat confident making the argument to a jury that there's an awful lot of circumstantial evidence here of a loss of investor confidence.

Congress is doing what it can do; the President is certainly doing what he can do. The SEC no doubt is doing an awful lot. I would say that corporate America probably needs to step up to the plate, too, and realize that they've got to clean out their own house. They have to — it's really on them to convince investors to come back to the markets.

PROFESSOR PAINTER: Thank you. Mr. Labaton?

MR. LABATON: Thanks, much. As you properly introduced me, I am generally a plaintiff's lawyer, but in other lives I've acted differently. In fact, I did a fair amount of corporate work representing the same client that Ed Fleischman represents. He's such an old friend of mine, and you can tell he's an old friend, because only my old friends call me Eddie.

I can't answer whether there's been a lack of investor confidence. There are reasons to believe why investors might lose confidence, and that's what I'd like to address.

I think there have been serious erosions in the protection of investors, not primarily, although I would say partially by the Private Securities Litigation Reform Act – the PSLRA, which I think has some serious problems in terms of the huge safe harbor — Al Sommer called it the safe ocean — for forward looking statements, which I think contributed to some of the bad things that happened in the technology industry between 1995 and 2000 when it started to collapse.

But I think there was one good thing in that statute — the lead plaintiff rule, which brought institutional investors into the litigation arena, recognizing that they had the greatest loss, and in effect, taking out the race to the courthouse element, which I think was bad for the system. It was bad for us as plaintiffs' lawyers. It was bad generally.

But the biggest fault of the PSLRA is what it did not do. It didn't correct what the Supreme Court invited it to correct in the *Central Bank* case. It didn't have any provision for aider and abettor liability, civil liability for aiders and abettors, and in effect, by not doing anything, perpetuated the wrong that was done by the Supreme Court, giving a free pass in effect to the persons who are most responsible for protecting the market, what Jack Coffee, in a recent article in a *New York Times* op-ed piece, called the gatekeepers: the accountants, the lawyers, and the investment bankers.

There is virtually no civil liability unless they actually sign off on a statement. That's true in the Second Circuit; it might not be true in the Ninth Circuit; we don't know what it is in the Fifth Circuit. But we will find out; we'll find out in the Enron case ultimately whether there is civil liability — probably on motions to dismiss. There have been motions to dismiss by all of the "gatekeeper" defendants, the banks, the law firms, et cetera. Arthur Andersen signed off on statements in which they had, I think, three restatements in a period of five years. There's going to be no motion to dismiss as to them, if they're around by the time the litigation gets resolved.

Without that gatekeeper accountability, there is a huge protection missing from the market, and I suspect that that lack of gatekeeper accountability was a partial cause for some of the things that happened, for example, among the analysts. Jack Coffee in his article noted that during the 1990s analysts lost their skepticism. In 1990 they issued six buy recommendations to every sell. By 2000, the ratio was nearly 100 to one.

We know what happened starting in 2000. There's no accountability there. Unless there may be something in terms

of what the Attorney General is doing in New York, but that really doesn't protect investors that much. It's too late; it's too after-the-fact. It doesn't take out the huge profits that the companies made with pretty reckless analysts' reports.

In terms of the other gatekeepers, there's certainly virtually no accountability in the Second Circuit for lawyer misconduct in connection with the issuance of securities. So until and unless we start getting to that area of protection, we're going to have, if not a loss of investor confidence, a damn good reason for investors to lose confidence.

PROFESSOR PAINTER: I would suggest that the Private Securities Litigation Reform Act of '95 did have a provision allowing the SEC to go after aiders and abettors, which brings us to the fundamental philosophical issue of "who is best positioned to enforce the securities laws?" The Securities and Exchange Commission? The private plaintiffs bar? Or both?

Throughout the 1990s we had an enhancement of SEC enforcement powers against insider traders and a variety of statutes, including the Aider and Abettor Provision of the '95 Act and a cutting back of the powers of the private plaintiff's bar, although it's shown by the statistics there's still plenty of private securities litigation. Which is the most effective enforcer of those two of the securities laws?

MR. LABATON: I would say that they're both essential. Certainly the SEC is essential. But so is private enforcement; it's what the Commission has said time after time after time. SEC Commissioners, when asked to speak on this, have emphasized the importance of the private bar as an essential supplement.

There's a piece in the program materials, something I did in Stetson Law Review, with a quote from Richard Breeden when he was the NSEC commissioner and what he said about the importance of the private bar. There's the SEC brief in the *Borak* case. There are SEC briefs elsewhere, *amicus* briefs in a number of cases, Commission statements in a number of cases.

There is a staff report of the Congressional committee that was chaired — the PSLRA was really first proposed in a very slightly different form in a Democratic Congress. It was then called the Dodd-Domenici Bill. The staff report on that, which supported virtually everything that is in the PSLRA, emphasized the importance of the private bar in this.

Certainly the private bar by itself is not enough. No one is suggesting that the SEC has no major role. But you have the SEC being understaffed to take on all these cases, sometimes being interested only in the highest profile cases, susceptible, perhaps like many other regulatory agencies are, of being captured by the people whom it purports to regulate. That's happened in times past with other federal agencies. Some of us were concerned about that being the case shortly after Harvey Pitt was confirmed, when he spoke about a softer and gentler SEC.

I think Enron changed that attitude, but there is certainly a risk. There was certainly a risk that when the Pitt administration took over that it might be, at least to some degree, captured by the accounting industry. Those are concerns that you need safeguards against. You need the supplemental role. You need the history of the fact that it has worked. At least one can assume it's worked.

I will confess that we have more litigation in the United States than anywhere else in the world. We have more access to courts. We have a better class-action remedy. At the same time, in words I heard by Paul O'Neill at the meeting of the Council of Institutional Investors, it's the deepest, most honest, most transparent capital market.

I don't think those things are unconnected. I don't think it's the principal cause; I don't think it's the principal reason, but I think it's an element. One doesn't build confidence or transparency on one little building block. It's a whole bunch of things. One of them is the access to courts and the availability of the litigation remedy for misconduct.

MR. FLEISCHMAN: Professor Painter, yesterday morning, about 10 blocks north from here, Professor Grundfest from Stanford Law School made a very interesting presentation on the PSLRA.

Two of the matters that I think Ed Labaton would be interested in, in the arena since the passage of the PSLRA, is that of the dozen, and there is an exact dozen, of settlements at 100 million dollars or greater since the PSLRA, the gatekeepers, the auditors specifically, have contributed something in excess of 500 million dollars to the settlements in money, not in securities, not in paper, in money.

There has to be something left, it seems to me, despite the aiding and abetting decision by the Supreme Court, to make the auditors believe they have to contribute an amount in that size in a dozen cases.

The other thing that I think that you want to know that Joe said —

MR. LABATON: I'm always interested in what Joe said.

MR. FLEISCHMAN: — is that the profit maximization motive of the plaintiffs' bar has been one of the key elements in the implementation of the securities laws in the United States. It has to be seen for what it is. It is very important and beneficent in what it accomplishes. It does not stem from pro bono motives.

MR. LABATON: I don't think anybody ever suggested it did, but I think that statistic might be misleading in that incentive

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itself, which Ernst put up, I think the number was 350 million dollars —

MR. FLEISCHMAN: You're close, you're close.

MR. LABATON: — Yes, so that there's 150 million from other accounting firms. I might say that although the accountants have, in some cases where they haven't signed off on financial statements, been taken off the hook in effect by *Central Bank*, it's really the other gatekeepers who have not been held accountable at all. Accountants do sign statements, and they are liable generally for securities laws violations where the statements are restated or otherwise fraudulent.

PROFESSOR PAINTER: Question from the audience.

AUDIENCE PARTICIPANT: This is really not the thing to investors that plaintiffs make it out to be for the simple reason that they want to see the safe harbor law; the plaintiffs' bar proved well able to plead its way around it by pleading more cases as accounting firm cases. There is no provision in the safe harbor laws with any notion of accounting fraud. So I'm not really that persuaded by that point.

More importantly, it seems the investors and the markets are well aware of the existence of safe harbor laws and fraudulent statements, since poor looking statements are usually identified, and it seems to me that reliance on poor looking statements at this point might arguably be unreasonable.

The second point is that the Lee-Plant provision is a good thing. Milberg Weiss' market share now is over 15 percent. What you have is plaintiff firms racing off to the courthouse to follow these lawsuits. Then, they get involved in something that looks akin to a proxy contest to collect up as many investors as they can, to say our guys lost a million and your guys lost 500,000, so our guys should be the lead plaintiff.

The fact of the matter is, institutional investors, by and large, are still a very rare animal in the contest for lead plaintiffs. You just don't see them. They have other things to do than to bring securities fraud actions.

The last issue is this notion about gatekeepers, and the fact that lawyers have now been found liable is beginning to change. As far as what accountants have paid out, to date accountants have probably paid out something closer to a billion. Ernst & Young paid 335 million and Arthur Andersen just paid the last installment of the 217 million in the First Baptist case, and the list goes on and on and on. Accountants are being held liable.

As far as the other gatekeepers, if you want to call analysts gatekeepers, I don't think it's fair to say they're not being held liable. CS First Boston paid a 100-million dollar fine. Merrill Lynch paid a 100-million dollar fine. The New York Attorney General made clear he's going to go after others. I'm not certain that some of the points that were made are quite as accurate.

PROFESSOR PAINTER: What are you going to do about Milberg Weiss's market share?

MR. LABATON: I certainly would like to get a bigger portion of that myself.

PROFESSOR PAINTER: Well other than correcting that problem —

MR. LABATON: The one thing I'd like to correct at least is the sense of what the law has developed in terms of and aggregating the largest investors. Yes, that was done early on after the PSLRA was adopted on the assumption that you get a group of persons, a disparate group, and have them as a group of lead plaintiffs. The courts have been pretty clear now that they won't allow that.

AUDIENCE PARTICIPANT: Some courts have.

MR. LABATON: Most courts have not; most decisions that have been litigated in that have not. I know we don't do it. We do try to go out to the institutional investors and meet with them. We've represented institutional investors in a number of high profile cases. I think that is the better way to go.

In terms of the projections and the safe harbor, what that did was encourage a lot of pretty reckless projections. It was kind of a terrible cycle that developed. You'd have the projection, and then you'd have the analysis and the Wall Street expectations based upon those projections. Then you'd have the fraud committed to protect the projections.

Then you had the totally absurd provision in the statute that says that you're protected if you knowingly make a false projection provided that you have meaningful disclosure. Now what is meaningful disclosure if you know the projection is false? "It's a lie; it's not true; we don't believe it." I don't know what it is, but the statute says that if you have meaningful disclosure, you can have a safe harbor for knowingly false statements.

I won't debate numbers with you on accounting fraud and recoveries. I know that there have been relatively few.

I also know that, since the PSLRA, the number of restatements has tripled and seems to be going up. I don't know the full reason for that. I know that that has happened. It's gone up from an average of 49 a year to most recently better than 150 a year, and going up and up and up. That's not good.

AUDIENCE PARTICIPANT: Per the comments about investment bankers being considered gatekeepers, they're really not. They're only really required to maintain certain standards with regard to the trading activities. So the broker dealers are more directly regulated and more accountable for market purposes, SEC, NASB, et cetera, but those are also self-regulating. In other words, there's a lot of self-regulation here that we shouldn't really also forget. Back to the assumption about the investment bankers.

Perhaps there has to be some sort of oversight; perhaps a point where, within the IPO process, there's an independent auditor that's brought in by the exchanges to audit whether or not what's disclosed in a prospectus is transparent and accountable, to see whether it's credible. There isn't any of that, because really the underwriters are taking a risk themselves with their capital. They're really pretty profit driven.

Going back to what's going to mitigate all the self interest that's involved, not only with the owners who want to cash out, but those who were business school buddies with the investment bankers, you have another whole other daisy chain here that people haven't accounted for.

Your concerns about the gatekeepers — we have to truly identify them. Perhaps the public itself, because they're left with few opportunities now for their wealth to grow. The 1986 Tax Act changed that you could own two and three and four houses and write off the interest on your mortgages. The markets have become pretty much the only game in town. People treat them like the track.

You have careless investors, reckless investors who don't really respect the companies that they're investing in, so they don't do the due diligence. It's the difference between an owner and an agent/manager, and most people think it's negative.

PROFESSOR PAINTER: Let me ask, Uttam, what is going on up on the Hill on the various proposals to amend parts of the Private Securities Litigation Reform Act? Have those stalled? Where are we on those bills?

MR. DHILLON: I believe there have been seven or eight bills proposed. Excluding CAARTA I think it's seven bills proposed. Of those, five would amend the PSLRA in significant ways.

One bill that we're waiting for right now is one that Senator Sarbanes is apparently in the process of putting together. He intended to introduce it last month as I understand it, but delayed that because of objections by the Republicans on the committee. The expectation is any day now the bill will be introduced if it hasn't already, and there'll be a mark up next week.

We don't know what that bill will say. My expectation is it will be a combination of things. It'll be changes in PSLRA, also increased transparency, but I don't know what it will actually say. I don't know how far it will get. The expectation with the composition of the Senate right now is that CAARTA may not even be considered in the Senate given its present composition.

MR. LABATON: What's the likelihood of its being reconciled with any House bill?

MR. DHILLON: Without having seen the Sarbanes bill, it's hard to say, but my best guess would be that if the Sarbanes bill passed the Senate, they would be very, very different bills and that reconciliation by the end of this Congress would be probably a difficult thing to achieve.

PROFESSOR PAINTER: One of the most talked about provisions was the one appealing the stay on discovery with respect to accountant defendants. Under the '95 Act there is a stay on discovery pending the resolution of a motion of dismiss, and a proposed provision would make an exception now for accountant defendants. The way I look at that is then you might as well open up everything, because the accounting work papers have just about everything there. The accountants might be more frequently named as defendants in suits in order to get to discovery. What's your take on that? Is that provision part of most of these bills?

MR. DHILLON: Yes, Congressman John LaFalce's bill I believe is the one that makes that provision for auditors only. I believe there are other bills; one by Congressman Ed Markey actually just wipes out the entire provision. But that's correct. I think it's just a foot in the door. Once you eliminate it with respect to one area, it's probably going to disappear all together.

PROFESSOR PAINTER: And how important is that discovery?

MR. LABATON: It's very important in terms of speeding the case up. It's particularly important in light of the very short statute of limitations that is, not in the statute, but by law under the *Lamp* decision of the Supreme Court. The statute of limitations now is one year from the date you discovered or should have discovered the fraud. Most courts have applied the should-have test rather than actually-discovered test, or a maximum of three years. The absolute outside limit is three years.

Notwithstanding what people have said, it is very, very difficult to plead a case against an accountant without substantial discovery. The accountants don't have the ordinary motive to defraud that insiders have. You have very, very high pleading requirements in every circuit. Some people would like them to have higher in some circuits than they are, but they're still very high. We will not bring an accounting case in the absence of very, very strong evidence.

Generally that evidence comes out of discovery. If you have the stay, what's happened in the process is you have sixty days after the first action filed before the lead plaintiff motion is made, then that issue is litigated. It could be anywhere. In the Waste Management case, I think it took six months to decide that. We ultimately prevailed in that.

Then there's a motion to dismiss, which there was in the Waste Management case, and the judge can take another six months to decide that. In the meantime, the case is entirely stalled. You can't do anything.

PROFESSOR PAINTER: And someone's turned on the shredder.

MR. LABATON: Well, either turned on the shredder or the memories have gone, or the memories have faded, or people have disappeared. Fortunately in Waste Management the company itself had new management. They really were anxious to get the case resolved. So they gave us discovery even though they could have had the stay. They gave us at least document discovery, and we were able to resolve the case within months after the motion to dismiss was decided.

I might dispel the suggestion that has not yet been made, but I heard it the other day in another program by an accounting representative, typically you get 25 or 30 percent. The fee off the Waste Managment case was 7.9 percent.

PROFESSOR PAINTER: Question?

MR. COCHRAN: I'm Andy Cochran of the U.S. House Financial Services Committee. I don't think there's anything in the PSLRA which is probably good because nothing would pass in the House on PSLRA. It's not going to happen.

MR. DHILLON: Not in that. There may be another proposal that Senator Sarbanes is working on.

MR. COCHRAN: A separate proposal.

MR. DHILLON: Yes, because that bill does not. Yes, you are right.

MR. COCHRAN: The response of CAARTA. I'm going to talk about it on the accounting side this afternoon on a panel. I think with the help of Mr. Cox, there was an amendment to CAARTA proposed to privatize action which is not really exclusive. Elsewhere CAARTA would beat back decisively at the committee level. I would be very surprised to see anything come out of PSLRA at all this year. I can talk a little bit about the accounting side.

PROFESSOR PAINTER: Yes.

MR. FLEISCHMAN: Professor Painter, as you well know the Congress isn't the only place that there are steps being taken in response to Enron. Just yesterday the SEC proposed two new rules. One, which is also included in the New York Stock Exchange proposals that we heard about earlier this morning, is to have CEOs and CFOs essentially certify that they don't know about anything the matter with those financial statements that they are filing with the SEC. And the other to speed up the reporting on Form 8-K of events that presumably would have had to be reported anyway at the next filing, whenever the next filing was.

Commissioner Glassman made a speech a couple of weeks ago in which she detailed all the things that the SEC has been doing. It's a fairly slim list peculiarly. Some of the things kind of work against one another.

You will remember, Professor Painter, that they have proposed to accelerate the filing of periodic reports, and at the same time they've proposed substantial new disclosure that would be difficult to accomplish in the present filing period, and even harder in the abbreviated filing period.

The Chairman of the SEC has spoken about lawyers. If we can turn the discussion to that for a moment. He has said that corporate lawyers represent the company and its shareholders even though management may hire and fire them. They must be satisfied that objectives management asks them to pursue truly are intended to and do further the interests of the company.

I've been practicing for more than four decades, and I would find it very difficult to determine what truly furthers the

interests of any company. I can give the company advice on what may violate the law, but as to the interests of the shareholders, I don't really think that many lawyers are in a position to live up to Harvey's high expectations.

Which brings me to your proposal. You have proposed, if I read it correctly, that the SEC expressly impose on lawyers a requirement to tell clients' directors when they are violating the law, and, through 102(e), to make the omission of that a part of the corpus on which the SEC may deprive a lawyer like me of his license to practice before the SEC.

Your proposal, while fascinatingly analogous to Section 10A of the '34 Act imposed on accountants, makes me make a determination of black or white in what is very often middle gray to dark gray. At my stage of life I have no objection to go into my board of directors above management and saying you're in a gray area. Management's probably told you this already, but I'll tell you you're in a gray area.

That's not what you're asking me to do. You're asking me to tell them when they violated the law. I find that quite an easy thing in one sense, and a very difficult thing in all the practical senses.

PROFESSOR PAINTER: In circumstances where you know that they are violating the law, what we are saying here, and we had over 40 law professors sign this, is that the lawyer for the corporate client is required to tell the client, in fact the governing body of the client, the board of directors, that they, the lawyers, believe the client is in violation of the law.

Yes, there are going to be gray areas where the lawyer is not that sure; the lawyer is worried about it. Then some judgment calls have to be made. That's what the practice of law is about, making these judgment calls. If you do believe your client is violating the law, our fundamental premise here is that the client's governing body ought to know, and that if you're getting resistance from senior management, you don't just stop there. You do have to go up the chain of command.

PROFESSOR PAINTER: The ABA has consistently resisted this. We made proposals to amend model rule 1.13 of the Rules of Professional Responsibility. They refused to incorporate into model rule 1.13 a mandatory report to the board of directors. They just said that's one of the options.

Even worse, the ABA took the position that a lawyer should be prohibited from disclosing outside the client organization. Only eight states out of 50 states have bought into the ABA's position on this. The majority of states like New York permit you to disclose to the SEC if there's going to be a fraud. Some states require it, New Jersey and Florida.

The ABA has taken the most extreme view of client confidentiality, not shared by very many states at all, and the question is, is this creating an environment in which lawyers are seen not only as inadequate gatekeepers but as aiders and abettors of fraud? Or that they can be?

MR. FLEISCHMAN: They certainly can be so perceived if one is of the mind to do so. The problem in this area of securities law is that yesterday's problem, which I've discovered today, has created a liability for omission, which is tomorrow's problem. In other words, I cannot, as I may when my client comes to me with a gun, make the distinction between when she tells me she shot him yesterday, and when she tells me she's going to shoot him tomorrow.

It's an indivisible rainbow. Once my corporate client comes and says, or I find out through diligence, that there was an omission of something that I really think was a material fact yesterday, what I want to do is preclude it from being repeated tomorrow. I can't do so with out saying to the SEC the law was violated yesterday.

PROFESSOR PAINTER: I'm speaking about that letter of prospectus, future violations.

MR. FLEISCHMAN: I'm trying to suggest to you it's very difficult in the securities practice to make that distinction the way Stan Sporkin used to stand up and say, clear as a bell. It's not clear as a bell. About 99 and 44/100th percent of the time it involves a violation yesterday that I just found out about that I don't want to have repeated tomorrow, because I don't want to involve the board of directors or myself under Section 21C of the statute without your new proposal as a contributor to tomorrow's fraud.

PROFESSOR PAINTER: Of course, accountants and many other collateral participants would argue the same thing. These are difficult judgment calls, and we're going to be held liable. Well, are you willing to go after the lawyers?

MR. LABATON: I want to go after the lawyers where they participate in the fraud, where they know of a disclosure where, for example, they're responsible for preparing documents and they don't do any diligence at all, and they're the persons responsible for the diligence. As a result, a prospectus or other offering statement which omits material facts is offered.

There was a recent decision which the court withdrew after it was granted *en banc* and settled in the third circuit. What's the name of the case? (*Klein v. Boyd*) It is the case in which the issue was whether there was primary liability for a law firm. On the basis of the facts stated, Larry Fox tells me that those really weren't the facts, but you assume that they're the facts.

PROFESSOR PAINTER: Drinker Biddle was the defendant, yes?

MR. LABATON: Yes. The facts there were that it was an offering where the principals had been found guilty of securities fraud in several jurisdictions and were barred from offering securities in those jurisdictions. One had been involved in a cocaine conviction of some kind. The lawyer knew it. The lawyer prepared the private placement memorandum and omitted those facts. Sure enough, the investment was a total failure.

I think that the investor perceives that the lawyer is responsible for preparing the offering documents. If that lawyer either doesn't do some level of diligence or ignores facts that should be known to him or her, then there ought to be culpability on the part of the lawyer.

PROFESSOR PAINTER: Primary violator? You've got to prove they're primary violators.

MR. LABATON: The Ninth Circuit and the Second Circuit are split on those issues. The Ninth Circuit, in a number of cases, including one that I litigated, the ZZZZ Best case, held that, as long as there's substantial participation in preparing of the documents, there is a primary violator. The ZZZZ Best case dealt with the accountants, and it was an interim statement, so they hadn't signed off on it, but it was plainly fraudulent.

The Second Circuit has had a bright line test. If you didn't sign the documents that the investors saw, you're not liable as a primary violator. And the Third Circuit was going to decide that in that case, Klein against Boyd.

Klein against Boyd is the name. They decided that the law firm, at least in the facts pleaded, although it did not sign the document, had substantial participation in its preparation, and if the facts as alleged were proven, the firm would be a primary violator under the '34 Act.

There have been very few cases at the Circuit Court level, since these things ordinarily come up as a motion to dismiss. If the case hasn't been dismissed, it won't go up to the Circuit. So the Ninth Circuit has had only a number of district court cases. There's no interlocutory appeal jurisdiction ordinarily, so you don't get it unless there's been a dismissal. That had happened in the *Klein* case. The Third Circuit decided they were primary violator as pleaded. The Court took the case *en banc*, and then the case was settled it.

PROFESSOR PAINTER: I've seen more and more litigation just in the past few years against lawyers. Getting back to this letter, my approach is I'd rather have the SEC trying to do something about standards in the profession rather than the plaintiffs' bar coming after us. That's my own bias.

Let me go with one more question here.

AUDIENCE PARTICIPANT: The problem with substantial participation is that it is such a vague standard. In fact, way back in I think it was a Section 12 '33 Act case, *Pinter v. Daws*, the Supreme Court rejected it. One of the reasons they rejected it is that those words aren't in the statute. I'm pleased to tell you that the SEC has abandoned the substantial participation test in its Section 5 cases and has submitted amicus briefs in the kinds of cases that Mr. Labaton is talking about, these accounting cases, that also reject substantial participation and argue for something that one could probably call a co-authorship test.

Substantial participation is something which is likely ultimately to be rejected by the Supreme Court anyway. It seems to me the lawyers need to formulate a better test than that.

PROFESSOR PAINTER: Yes.

MR. LABATON: Well, the whole body of 10b-5 law is essentially common law. It is a body of law which is developed out of the one sentence rule adopted by the Securities and Exchange Commission in about 30 seconds. The whole body of law, which is the entire basis for open market fraud in the securities area, is judicially developed. It has worked reasonably effectively. It's a necessary aspect of the American corporate law. There's no reason why courts could not develop a standard that would hold those people who actually participate substantially in a fraudulent document liable for that, particularly when the investing public, whether or not it knows that that person was responsible, knew that a lawyer had prepared the document. I know the facts in the ZZZZ Best case, which was as brazen a fraud as one can imagine. To not have held the accountants and the lawyers accountable for what they did and didn't do in that case would have been a travesty.

They ultimately settled. They were very lucky they weren't subject to sanctions by the SEC for what they did do and what they didn't do. But to simply say that the test is difficult and in the absence of Congressional action to specifically provide for aiding and abetting liability is to leave a huge, huge gap in the law protecting investors.

PROFESSOR PAINTER: This is all true except for 1934, when it seems quite clear Congress did not intend a private action under Section 10(b). The courts brought that in later. So we have all this case law based on an implied right of action that

E n g a g e

Congress really did not intend in 1934. Is that indeed part of the problem that this has all been case law? We of course now have the '95 Act and a lot of playing around with different parts of the system, but no going back to fundamentals of: should there be a private right of action under Section 10(b) or should this be something under state law? What are the parameters of that, defining that in Congress instead of having the Supreme Court decide aiders and abettors are not liable but primary violators? We don't even know what the standard is yet for certain.

MR. LABATON: We're pretty sure.

PROFESSOR PAINTER: Pretty sure, but wouldn't it be better for Congress to have done something more? Perhaps in 1934 it should have, but it didn't. It wanted to leave securities frauds to state law and use Sections 11 and 12(a)(2).

MR. LABATON: I think in American law, as opposed to the civil law societies, we have done much, much better where we've had organic development in the law. I much prefer 10(b)(5) and the organic development of 10(b)(5) to what would be the equivalent of the Internal Revenue Code. That's all statute; that's all regulation. Do you want to live with that in the securities area? I wouldn't.

The courts have very effectively been able to deal in an organic way, organically developing a body of law necessary to meet the needs of markets that have exploded since the law was first developed. It started to develop in 1948. The reg was written I guess around 1941.

PROFESSOR PAINTER: '41, yes.

MR. LABATON: The first case that held that there was a private right of action was in 1946, *Kirkpatrick*. The Supreme Court did not approve it until what, 10 years ago?

PROFESSOR PAINTER: 1970?

MR. LABATON: No, later than that. Later than that.

PROFESSOR PAINTER: The 10(b) private right of action?

MR. LABATON: The 10(b) private right of action came 10 years later. In that whole period you had a whole body of law which lawyers understood, which clients understood, by which you were able to explain to your clients what your responsibilities were under the law, by which people were able to enforce rights under the law. Sure, there were gaps. I much prefer that solution to codification, with the laws being frozen without the ability to develop, without being able to have some experience in different circuits with different approaches so that you can understand what the implications are.

The system really works.

PROFESSOR PAINTER: I'm going to be a cynic. I'm going to say that codification is clear, makes clear rules, and case law makes unclear rules. I've certainly seen *Central Bank*, the *Gustavson* case under 12(a)(2), a bunch of very unclear decisions. Of course, unclear rules are very clear for lawyers.

MR. FLEISCHMAN: Professor Painter, there is nobody more insightful or more humorous in his insight than Joe Grundfest. Yesterday when he talked about exactly that point he passed around copies of his new Stanford article on ambiguity in statutory draftsmanship. He talked about the strong inference test in the PSLRA. He broke out approximately 100 cases. He showed that the judges in about 25 of the 100 said, no matter what the interpretation is, this case doesn't make it. Another 25 they said, no matter what the interpretation is, this case exceeds the highest possible strong inference interpretation.

Then in the 50 cases that remained, they broke into three groups, essentially: the Ninth Circuit and the Silicon Valley, something that is essentially motive and opportunity, and something that's in between. He pointed out beautifully that if you simply put the 100 judges in a room — because there are 100 district court decisions before there's an appellate interpretation in the various circuits — with a law clerk, give each judge a quarter, it essentially comes out as though you've flipped coins.

PROFESSOR PAINTER: Yes, half were Second Circuit, I think, and half were split between the other two. It's an excellent article in the Stanford Law Review that just came out, with Joe Grundfest and Adam Pritchard going through this well.

Okay, we have a lot of ambiguity. Is it good? I think we've heard very powerful arguments for perhaps why it's good.

MR. FLEISCHMAN: It comes with a real cost. It comes with what somebody once called a tax on the markets. There's a huge

litigation cost that goes into the system. When it goes way off the tracks, and I would tend to agree with Ed Labaton on this one, when 10b-5 has gone way off the tracks, the Supreme Court ultimately has granted cert and has made the decisions.

This can't be something that you simply say I would have bought or sold had I known. The rest were eliminated. The standard on materiality in *T.S.C. v. Northway*, something that is more than a gossamer mite, the gossamers got eliminated.

When it really went off the tracks, the Supreme Court did find a way to take *cert* and to eliminate that. As Ed Labaton said, I think it was now Chief Justice Rehnquist who called 10b-5 an oak tree from an acorn.

PROFESSOR PAINTER: The judicial oak that has grown from a legislative acorn.

MR. LABATON: There's another aspect, too, that's unsaid. One of the things that we have is an incredibly good bench in the federal system. There are a couple of judges that all of us would prefer not to appear before for one reason or another. But on the whole, it's a bench of great integrity — very hard working. As often as not, in many of these cases, they apply that ancient judicial standard, the smell test.

Is it really bad? They're going to find whether it's bad no matter how high the standard. They're going to find some kind of exposure.

PROFESSOR PAINTER: There's different gradations of smell.

MR. LABATON: But still, the point of it is, in securities law in areas of disclosure and fraud there needs to be some degree of flexibility in terms of exposure and in terms of interpretation. It is, I think, too complex an issue, too changing in the area for us to freeze it into a code.

PROFESSOR PAINTER: Yes?

AUDIENCE PARTICIPANT: One of the issues that just was raised is materiality. That's really the heart of what you need to tell your clients, you're going to have to disclose this. I think part of the problem is that it's now increasingly unclear what is and what is not material. This is a two-edged sword. I think it's so, because under SAD99, the SEC made very clear that it should be away from quantitative rules of thumb. One percent is not material; two percent is not material. Well now, what is material? It's anybody's guess.

The other side of that is, in the *City of Philadelphia v. Corning Companies*, the 10th Circuit came out with what looks like a new standard almost as to who had to know. Basically, they have to have known that this was a material fact.

PROFESSOR PAINTER: I co-authored a report with Scott Adkins and Megan Farrell of the Jones Day firm, the Pittsburgh office.

We provide a lot of statistical data, part of it from Joe Grundfest's site at Stanford, but also from the insurance carriers and from a variety of other sources on the amount of litigation which we see has been quite healthy and robust since the '95 Act, although I think the argument can be made that the amount of fraud has increased, and that issue is still open, but that the number of suits is substantially up. Indeed, last year, 2001, it doubled.

Yes?

MR. LABATON: That's misleading, because I think the —

PROFESSOR PAINTER: The IPOs, yes.

MR. LABATON: — the IPOs. That's one category. You take that out and —

PROFESSOR PAINTER: We do stress that. Last year a lot of that was from IPOs. We go through that and the size of the judgments, which have been quite substantial. We roughly saw about a 30 percent increase in controlling for the market capitalization of the issuer, at least from some of the studies.

This is the statistical data. There's going to be statistical data showing other things. I'd very much like to see what other data there is out there. I think that this report should give some interesting insight into what's going on.

We're critical of some of the proposals currently on the Hill with respect to the Private Securities Litigation Reform Act. We felt that enhancing SEC enforcement was the better route to go, not to eliminate the private securities litigation system. But if we're going to make the steps to increase enforcement, we ought to try it with the SEC first.

This ties a little bit into the pressure I myself independently have been putting on the SEC with respect to lawyers.

Comments on anything we've said so far before we continue?

AUDIENCE PARTICIPANT: What are going to be forces at work that are going to attempt to thwart what it was that you

E n g a g e

were describing, keeping in mind that the SEC's still under the executive branch? Although we have some aspect of campaign finance changes, the practice had been to make large campaign contributions and then pretty much get what you want if you're really shrewd, unfortunately in the executive branch.

So where are we going to have again revisiting independence, disinterested third party, the sum ability to keep self interest out of this? Who do you see as the ones who are going to tend to thwart the reforms that we're discussing?

PROFESSOR PAINTER: That's an excellent question. Let's hear from the Hill.

MR. DHILLON: I'm sorry, the question is thwart the reforms?

AUDIENCE PARTICIPANT: — thwart the reforms that you're discussing today in terms of materiality, codification of what's considered material in an attempt to eliminate the murkiness within these guidelines.

MR. FLEISCHMAN: I think that there's a real incentive on the Hill to fix the problem. The refrain is "we must prevent another Enron." I think that there is actual incentive at the SEC and in the Administration and on Capitol Hill to do that.

You had asked the question earlier, who should keep everybody honest, the SEC or private rights of action? I'm actually a believer in private rights of action. I think they're very efficient. I think that private attorneys can probably spot something and raise that issue very, very quickly, possibly more efficiently than the government.

I think that missing from that was a third element, and that's criminal enforcement. I think one of the things we need to really focus on and think hard about — and I'm not talking about criminalizing corporate behavior, it's a different issue — is whether criminal behavior has occurred within the corporate world. We need to seriously prosecute that. That may take a reorganization of the SEC. It may require the SEC to alter its priorities. It may require the SEC to cross-designate enforcement attorneys or the Department of Justice to cross-designate SEC attorneys as special assistant U.S. attorneys.

I think that, if you get right back to the theme here, which is investor confidence, and if investors saw more crooks — and that's what we're talking about here — going to jail, they would feel more confident in the markets.

AUDIENCE PARTICIPANT: I just wanted to add right off your point that if you think about it, well the Wall Street firms pay the fines; they just pay the fine. They pay without admitting or denying guilt. None of these organizations really admits guilt. Perhaps that's why the prosecutors against Arthur Andersen, given how they obstructed justice forced them to admit guilt. The Wall Street firms get to slough off this whole issue. The investors don't really have a standard by which to judge what has been egregious conduct right now.

MR. DHILLON: I really believe that if lawyers, accountants, and CEOs knew that a U.S. attorney's office was going to come after them if they committed a crime, if this was a serious threat, if they weren't just going to be dealing with civil remedies, that would go a long way in convincing people and creating transparency, voluntary transparency, and creating more confidence in our markets.

PROFESSOR PAINTER: I've talked to several U.S. attorneys around the country about this. A lot of them don't even have staff who have substantial experience in the securities laws. That's not true obviously in the Southern District of New York, but you go to some of the regional offices in major cities and they don't have the funding for that slot. The commitment from the Department of Justice is not there to provide that kind of funding outside of the major financial centers where, of course, these cases are brought with some frequency.

MR. LABATON: A lot of these cases really would make a jury's eyes glaze over. The ones that we think of as headline cases wouldn't clearly. Most of the cases would make a jury's eyes glaze over. There's very little incentive for a U.S. attorney around the country to bring that case, to devote his resources to it, and try to first educate a jury before he persuades it about what's going on.

The chap who was in yesterday's paper or today's paper who essentially got indicted — it's a newspaper report, so it appears to be a clear jump ahead of the release of public news. That one's easy for a U.S. attorney or for a jury. When you get into these so called financial cookbook cases, you can demonstrate the damages fairly quickly if you're the prosecutor. But to construct the theory of liability and educate the jury is a very different kind of question, it seems to me.

PROFESSOR PAINTER: The Arthur Andersen case in point.

MR. LABATON: I agree generally there has not been enough criminal enforcement. I think that where the criminal law changes in the last year, particularly the sentencing guidelines and the resultant power of the prosecutors to force plea bargains as a result of that, you get a fair number of guilty pleas to some offense. Arthur Andersen obviously couldn't, but

many could.

There's a certain irony in the decision to prosecute Arthur Andersen, because I think that may have really resulted in ultimately failing to adopt basic reforms in the accounting industry itself. I think you'd kill the Volcker plan, which was very good. It took the heat off all the other accounting firms. It focused on one relatively narrow aspect of what was going on in Enron and the accountants. It's made it much easier for the accounting industry to lobby against some basic reforms.

I read a piece in the paper the other day. They spent four million dollars so far in trying to prevent certain legislation from going forward that would have essential reform in it. Unfortunately, while in principle it's a good idea to prosecute criminal wrongdoing, in the case of Andersen I think it may have backfired in terms of what's going to happen as a result and what will not happen as a result.

PROFESSOR PAINTER: Sir?

AUDIENCE PARTICIPANT: Several years ago there was a proposal to regulate energy trading. Congress, as I understand, was heavily lobbied by the interests, including Enron, to leave the energy trading unregulated. It mentioned political contributions and so forth. They did so, and of course, the unregulated energy trading was the primary cause of the Enron situation. Now we find other companies involved.

So Congress didn't act because of its, you might say, political contributions and so forth. So Congress is not free of guilt.

PROFESSOR PAINTER: Doesn't this raise an interesting question about the federalization of corporate law. One of Bill Carey's complaints in his Yale Law Journal article several decades ago was that Delaware was in the back pocket of the corporations and their lawyers. We see a lot less going into the Delaware legislation by way of campaign contributions and so forth, than we certainly see in the Federal system.

Does it not make sense to at least have some of our law governing these issues be under the law of states where there's some jurisdictional competition, rather than giving the Federal government a monopoly that would make these problems even worse? Of course, the plaintiffs' bar makes campaign contributions, but there are contributions from both sides. Congress ought to be making all the rules in this area.

AUDIENCE PARTICIPANT: Four or five years ago I went with a client of mine who had been basically a victim of a securities crime to senior Federal law enforcement officials here in Manhattan for a meeting about the situation. He was told at that time that, since he had only been a victim to the extent of about 20 million dollars, that we were small fry. The Feds wouldn't even look at it and said that we should go instead to the state office and get the state involved.

There's a de facto division between the Feds and the states based upon the volume of the crime.

PROFESSOR PAINTER: And the states seem to be looking for an opportunity — if there's a vacuum to be filled and a reputation to be made, front page of the *New York Times* and so forth, it will be billed by state attorneys general. That may be a good or a bad thing, but that is certainly the way it works.

AUDIENCE PARTICIPANT: It's de facto that that seemed to be the way things were operating here a few years ago.

PROFESSOR PAINTER: Scott?

AUDIENCE PARTICIPANT: Before we infuse collective guilt to the Congress, I think we should focus on what the problems in an Enron really were. One, there was a corporate governance problem. Two, there was a disclosure problem. Three, there was an accounting problem: ground tripping, market to market accounting. Those were the problems. It wasn't really necessarily energy trading per se, but it was the accounting practices and revenue recognition practices which are a violation of existing law, at least allegedly. I don't think that regulating energy trading would at all be responsive to the problems that caused Enron.

MR. FLEISCHMAN: The point that it was all a violation of existing law is the fundamental point to be made, I think, when you consider the market after Enron, after Global Crossing. Without ascribing motivation, intent to defraud, or anything to any particular individual, without saying where the failures were, certainly it's clear to us all in retrospect that these people maldisclosed. They not only misdisclosed, they not only omitted, they had every possible combination of maldisclosure in what they put out to the public.

PROFESSOR PAINTER: They lied.

MR. FLEISCHMAN: They lied. It doesn't take a Congressional reform of present law to deal with that. It doesn't take a top to bottom reform of the SEC and its regulations to deal with that. One has seen, I think, throughout the history of markets and of non-market human activity, that if somebody sets out to lie, it's going to take a while before he or she trips and everybody else realizes that he or she is a liar.

What's on the books would have been enough had there been some clue. In fact, following up on what the gentleman just said, the clue was not the disclosure so much as it was that market participants in that energy trading market refused to deal any longer with Enron and it choked. Had it not choked in its operations, it might have been able to go on with the game.

PROFESSOR PAINTER: So the market worked?

MR. FLEISCHMAN: In that sense, a lot of what we are seeing post-Enron is the market working.

PROFESSOR PAINTER: Now what's with all these hearings up on the Hill? How many Enron hearings have we had up on the Hill?

PANELIST: The accounting standards were also enormous. The relationship of Andersen as both the consultant and an auditor, as I understand it, permitted the partner in charge to overrule the national office on key accounting issues. That would have been unheard of 10 years ago. Absolutely unheard of. Those kinds of things are things that I think have to be corrected at an accounting level.

I know later on there's another part of the program on that, but I think that is perhaps the most critical aspect of Enron.

PROFESSOR PAINTER: Yes, sir?

AUDIENCE PARTICIPANT: I share an alumni membership to the same club as Ed Fleischman, although at best at different levels. I'd like to hear Ed's view of what the conditions responsive thus far give to Enron, and whether he shares my skepticism that they're not doing anything meaningful. Concerning the idea of requiring the CFO and CEO to certify financial statements, does anyone think that Mr. Pascal and Ken Lay would not have signed those? I view this as regulating for the sake of regulating. The Commission is out there trying to look like the official regulator, but in effect it isn't very effective. I don't know if Ed shared that view or not?

MR. FLEISCHMAN: Going back to the very first point that Professor Painter made about the public's loss of confidence, just from reading the newspapers, the SEC must demonstrate that it is a vigorous regulator right now. The way it does that so far, according to Commissioner Glassman, is by putting out all these proposals, only one of which holds water, but none of which really addresses what was going on. Because what was going on, it seems to me, is going to be an enforcement problem.

Bob Blackburn and his staff at the SEC's New York office are going to have more say on preventing future Enrons than are a whole bunch of new rules.

PROFESSOR PAINTER: I'm going to throw out one other rule that I have not seen yet from the SEC. Jesse Freed, professor at Berkeley, suggested another 16(a). You ought to be required to file your report prior to making the trades, like two days or so before the insiders have made their trades so the market can find out.

MR. FLEISCHMAN: But most of those people do have to file on Form 144. Although they don't have to report the trade, they have to report the intention to trade if they are directors or CEO officers before they trade, and then report afterwards what the trade has been and what the price was.

So there is information out there. A lot of people file Form 144 filings.

PROFESSOR PAINTER: But everybody isn't filing those. It depends on whether it's applicable.

MR. FLEISCHMAN: It is required for anybody who is control of the company.

PROFESSOR PAINTER: Yes.

MR. FLEISCHMAN: Certainly the senior officers, perhaps not the independent directors, but many directors are counseled to file, to treat themselves as controlling persons anyway for the purpose of filing a Form 144.

PROFESSOR PAINTER: Anybody who hasn't asked a question?

AUDIENCE PARTICIPANT: I'm interested in your reaction to the question of whether the audit committee's independence and willingness is important.

If the audit committee met with the auditors alone without internal financial management and really asked some hard questions, would that have changed any of the Enron situation? Is that the kind of thing that might make a difference?

MR. FLEISCHMAN: I chair an audit committee of a public company. We're not New York Stock Exchange listed. I don't think I would pass the New York Stock Exchange proposed new test of financial management experience, so I may be relieved of this responsibility soon. I won't miss it. It seems to me that the answer to your question is, yes and no. I can easily construct a set of circumstances in which the right questions would have gotten such answers as to put the audit committee on notice that there was more to ask. That would be the lesser piece of the pie, it seems to me, because I would have to have both the insight to know the exact right questions and the luck to ask the questions that were particularly germane to what Duncan knew about.

That doesn't happen very often. It happened to me once, nearly 40 years ago. I was a tad of a lawyer, and somebody offered me a board position in a new company from the garment district. The partners of my then firm were fool enough to let me accept. But I got lucky. I asked to talk to the auditors myself before the statements were published. I was promised, and I asked again, and I was promised. I asked a third time, and I was told perhaps I'd better not. Then I said then you don't want me as a director.

I was very lucky. Not that I had any idea what I would ask, but it turned out later the old Touche Ross firm had let them count units for dozens, and the company went down. Would I have ever found that? What question could I have asked that would have elucidated the fact that somebody didn't audit right, that somebody let them count units for dozens?

AUDIENCE PARTICIPANT: Thank you. The comments about how Enron committed fraud and what I'm asking are different questions, because I actually think that the Enron issue goes right to the White House. So the potential for something really being done to prevent or to address the fraud that Enron management committed, and I actually am —

PROFESSOR PAINTER: Where's the connection?

AUDIENCE PARTICIPANT: Well, with regard to Enron or improvements to be made in the market because of Enron, actually — I wouldn't say that they colluded with their banks, but the typical process would be bankruptcy. I think they declared bankruptcy to shed shareholder lawsuits. Because the senior management had emerged themselves with the stock, had it remained a public company, they would have been on the line for shareholder litigation. When you declare bankruptcy, you share the shield of the company in a relationship either by debtor in possession or by creditor figures.

Having said that, there was a level of collusion, no doubt, between the accounting firm and the banks and the other parties on the steps by which they would eventually create a liquidity crisis and declare bankruptcy. With this being the scenario, and I'm fairly certain this is really what happened, I'm interested to hear the thoughts on how this process is going to be remedied. Now all the shareholders that were left holding the bag of Enron stock were the last to know the truth. Everybody else, obviously the investment banks, trust funds, and everything else, Deutsche Bank, and I think a number of these other companies, perhaps they sold these shares. See what I'm saying?

PROFESSOR PAINTER: Well, it's a mess. One of the problems is you seem to have a lot of guilt by association. You see the President before he became President drinking a beer with Kenneth Lay, and suddenly the White House is wrapped in it. Of course, Arthur Andersen has so much money all over the Hill on both sides. Maybe there is too much money in politics, but I think we have to clarify what exactly was the problem with Enron. You have the energy trading side and that issue, and then the securities fraud side.

I'm not so sure you can link Enron's political campaign contributions to any governmental action on the securities side in terms of the fraud. Now Arthur Andersen, you could debate that one. So it's a terrible mess with lots of different strands coming out of it. The problem is, and we've had endless hearings up on the Hill, more of the energy seems to be going into the blame game than into how it affects what went wrong and if any fixing is required. I think that needs to be stressed, perhaps we don't need so much fixing.

MR. FLEISCHMAN: A partial answer to the lady's question is that the insurers for the banks and the banks are engaged in litigation in which each side is pelting the other. The issue of whether the banks did collude, I think was the word she used, is in litigation. We will get at least some kind of answer to that issue without regard to securities litigation.

AUDIENCE PARTICIPANT: If I can get away from the legal part of it for a minute and just talk for a minute about how modern

E n g a g e

technology has changed our fathers' security market. For example, one of the most popular trading vehicles now are the QQQs, which are exempt from the optic rule when making insured sales.

Coming up, which you're very familiar with I'm sure, are the so-called single stock futures, which have been fostered by the Chicago Futures and Options Exchanges, which will bring in certain elements of futures markets into trading stocks.

PROFESSOR PAINTER: I heard Judge Easterbrook give a lengthy lecture on that at the University of Chicago, of course suggesting that that not be regulated, which would open up some very interesting opportunities we might say.

One more question.

AUDIENCE PARTICIPANT: To go back to the focus of what the paper says this about, is there a crisis in investor confidence? I think one of the reasons that there's a lot of storm and fury about appearing to do things and very little action about really changing it is that there really isn't a crisis of investor confidence.

There is a crisis of some public confidence. However, one of the interesting footnotes of Enron is the degree to which a lot of market participants do not actually actively control their investments. How many of them had vast amounts of money tied up in Enron stock and for inertia or lack of information reasons didn't do anything about it?

Most of the people out there today participate obliquely or opaquely in the market. They've got money tied up in pension funds which are being managed by the real investors, the pension funds. Or they've got money in mutual funds who couldn't leave the market if they wanted to, because the fund prospectus says we're going to be invested in X, Y, Z type assets.

So because of that fundamental lack of mobility in the market, a lot of so-called investors, the beneficial interest holders, really aren't in the position to act if there were a crisis of their confidence. The market players have put all this in perspective and said, okay, we've got some accounting irregularities and some violation under current law in the regulations. Would you see the hiccups of the real investors?

Every time that there's another one of these little accounting bubbles, bang, they're out of that market. But are they wrongly out of the market? Are they broadly suffering in lack of investor confidence? No. That's why there isn't any real impetus to fundamentally change the system.

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CORPORATIONS

6TH ANNUAL CORPORATE GOVERNANCE CONFERENCE
AUDITING AND ACCOUNTING IN THE WAKE OF GLOBAL CROSSING AND ENRON*

Mr. Andrew Cochran, *Counsel, U.S. House of Representatives Committee on Financial Services*
Mr. Scott Univer, *General Counsel, BDO Seidman*
Mr. Roy Van Brunt, *D.C. Director, Ten Eyck Associates*
Hon. Edwin D. Williamson, *Sullivan and Cromwell, and former Legal Advisor U.S. Department of State*
Mr. J.P. Donlon, *Principal, Dilenschneider Group, moderator*

E n g a g e

MR. DONLON: Good afternoon. My name is J.P. Donlon. I'll be the moderator for this afternoon's panel. I'm a Principal with the Dilenschneider Group. We're a strategic communications firm. But before this, I was Editor in Chief of *Chief Executive* magazine. It's somewhat intimidating being the only non-lawyer in this room, but then I did try to moderate groups of chief executives, so I've had some practice with trying to tame the lions.

We're going to self-introduce our distinguished panel. They will speak for six to eight minutes, presenting some ideas and information that will be helpful to us. I think it is very clear from your discussions thus far that investors in the general public have not only lost patience with Corporate America's greed but also its inability to cope with what is going on.

You may have seen this quotation from Stanley O'Neil, the co-head of Merrill Lynch, in the current issue of the *Economist*, with the headline, "The Wickedness of Wall Street". O'Neil said that "There is a certain air of cynicism surrounding every institution that underpins our capital markets." I think he was thinking, among others, of those in the auditing and accounting profession.

But more to point, this cynicism has gone beyond reasonable questioning and could easily turn destructive. What should be done to divert this potentially destructive force? I think beyond the establishment of a degree of trust and confidence is a need to somehow deal with these destructive forces. I think it will be the core of our discussion.

I would like to turn to our first panel speaker, Roy Van Brunt, who will introduce himself, talk, and then I'm going to ask each panelist to move in succession so we get all of our ideas out on the table. Then, we'll entertain your questions.

MR. VAN BRUNT: When I came in this morning, Andrew Cochran stopped me and asked me how long I had worked at the SEC. I told him it was a two-part answer; the first part was "too long" and the second part was "16 years".

I was a member of the SEC accounting staff in corporation finance, and in the Office of the Chief Accountant for 16 years. I left in 1996 to join Ernie Ten Eyck's practice of accounting, consulting and litigation support, which is where I've been for the last six years.

I'll limit my introduction to those comments. Some of your firms may have experience with Tenike, and some may not. We do expert witness and investigative forensic type accounting and consulting. With that in mind, my comments this afternoon are going to be offered in the context of putting historical perspective on what is likely to happen to accounting regulation in the post-Enron era.

I think most people would consider, now, that something is going to transpire with respect to regulation of the accounting profession, whether modifications of its current state of self-regulation or government intervention. To do that, I'd like you to keep some historical perspective in mind.

The gentleman this morning who examined the legislative histories of the '33 and '34 Acts synopsized my opening comments a little bit, but I'll add to what he said as a reminder. The '33 and '34 Acts were put together to solve the greatest economic calamity that the country had experienced until that time in 1930.

The follow-up to what he said is that the '33 and '34 Acts also gave birth or legitimacy to what heretofore had been just a small industry of auditing. That is, when the Congress established those two Acts, unanimously as they did, they were burdened with the problem of defining who would ensure that the information that they were requiring to be filed would be meaningful, accurate and representationally faithful.

There was some consideration that the government would do the auditing itself, and the people from what would become the American Institute of CPAs actually appeared before Congress and proposed the idea that they could do a better job than the government. That probably wasn't very hard to sell.

But there was some skepticism. One of the Congressmen asked at that time, "well, who will audit you, if you're going to audit these companies?" The immediate response that was given, sold and accepted, was the term "our conscience". That is how the accounting profession got its legitimacy, and why it has enjoyed its inherent popularity for the past 68 years.

I would remind you that the SEC is 68 years old. As with most persons who reach that advanced age, our memories

are of a younger person in the vigor of health, the bastion of all protectivism and the best thing going. But I would suggest that you think of it as someone who is 68 years old and a little stooped, with a few warts here and there and things that don't work as well as they used to. You will find that to be a better description of the SEC as it exists today.

For about 40 years after the Act was passed, the accounting profession seemed to enjoy immense credibility and the faith of the public without much question. About the mid '70s, that fabulous post-Vietnam flower-power, truth and justice era, the business community underwent significant calamities in the financial statement area. There were remarkable audit failures and massive questions about how the auditors could have missed these types of things. Is auditing working or not?

Stop me if this begins to sound very familiar. Many questions were posed as to whether this cottage industry of auditing was capable of regulating itself, or whether it needed to do something different. At that point in history, the American Institute of CPAs proposed a series of changes to its self-regulation that seemed to satisfy most critics and vacate the need for a move towards federal regulation of accountants. Accountants, remember, are state license holders. Federal regulation of state licensing is, in the first place, tricky to think about and, in the second place, hard to execute.

The AICPA, in 1977, posed serious changes in its own internal structure:

It created an SEC practice section to which the large firms who audit public companies would have to belong;

It established a program of peer review, where the firms would review other firms every three years, at their internal controls, and make sure that things were working the way they were supposed to;

It created a quality control inquiry committee, where any civil litigation that was filed would automatically trigger an examination of the audit failure in an effort to make improvements and avoid similar failure.

The public oversight was formed: a quasi-independent agency that nobody seemed to pay attention to. It was funded basically by the AICPA, and was composed of five very respected, very well meaning people, all of whom did their jobs in terms of regulating the accounting profession on a part-time basis — it had no full-time employees.

Since then, from 1977 until now, the profession has had a 25-year holiday to try to prove that it is able to regulate itself. And I think the point where we find ourselves today, post-Enron, is a scorecard or a review book on whether or not the accounting profession has been able to do that, and whether or not it can do it or has the will to do it. And if it hasn't, what should be changed in order to bring about regulation?

The problems that we've encountered are problems that relate to auditors' independence. I found it somewhat amusing that the primary standard by which an accountant or director is judged to be independent or having no financial interest in his client whatsoever is that they should have no interest in their client other than an equity interest.

Perhaps with respect to judging independence, someone who holds an equity interest might not really be considered truly independent of what he is supposed to be looking at. The problems with auditors' independence have centered largely on the growth of consulting and other services that are provided in audit practices to the extent that they actually seed the revenue base of the auditing that is done for a given client. And this raises questions with respect to whether or not the auditor will be willing to take difficult positions, hard stands, and tell his client he won't give a clean opinion on a set of financial statements if doing so puts him at risk of losing that client.

If the client will go someplace else, and take his consulting and auditing budgets to another firm, the accounting firm has a harder time finding feet of concrete instead of feet of clay. I don't think that situation is going to be changed by any of the proposals that are currently circulating their way through Congress, or by most of the proposals that are currently circulating through Harvey's commission. I recognize that the SEC needs to be proposing things and looking like they're trying to get a handle on this.

I'll close my comments with what I think is a far simpler method that could be enacted in the space of two or three days and would solve a lot of invested emotion on this subject. The simplest system would be one that says a company can choose its own auditor. That is not different than it is today. The fee for that audit, however, would not be set by the accounting firm or the company; a reasonable fee for doing an audit of this company would be set by the SEC. They will tell the auditor and the company what the fee is.

If there was a dispute between the company and the auditor over the adequacy of that fee, given what had to be done and the cost of the audit, that dispute would be arbitrated and settled by the Enforcement Division of the SEC.

The important point is the next one. And that is, unlike the current environment where a company can change order at its own whim and simply notify the SEC that it has changed accountants, I would say that a company can't change accountants. A company would not be permitted to change auditing firms without the previously getting the permission of the SEC. That is, they can change if they want to; if they have a reason to. They go to the SEC and explain why they want a change, and the Commission decides whether to allow it.

However, the SEC can change auditors for a company, if in the course of their review of registration statements and exchange of comment process with the company, their view is that the accountant has moved to a position lacking sufficient independence. I can't tell you how many times as a staff member, an accountant would come in with his client to explain in a difficult and technical accounting matter and speak for the entire meeting in the first-person plural — "we". The accountant can't be "we". The accountant is an "it" that is separate from the company, if he is independent. If the staff perceived a lack of independence, the Commission could just unilaterally change the accountant.

And the last point would be that no non-audit services could be provided by the accounting firm without the pre-approval of the audit committee.

MR. COCHRAN: I'm Andy Cochran. I'm the Senior Counsel for Oversight and Investigations for the House Financial Services Committee. I've practiced accounting — I was a CPA in Ohio; a Reagan Official; I've spent some time practicing corporate law in the Washington area; and I joined the Committee in March 2001.

In November, as we were working on the after-effects of September 11 and the news broke about Enron, Chairman Oxley asked me to review what was going on because, blessing or curse, I was the former CPA amongst the senior counsels. I was asked to take a look at the accounting guidance on special purpose entities and try to explain it to members and staff. That's kind of like being the pathologist at the first autopsy in med school. You cut open the body and you say, "Oh boy, here's what I found," and see who runs to the door first. I helped to draft Sections 2 and 6 of the Carter Bill: the sections on the Auditor Oversight Board and on the improved disclosures of off balance sheet items.

We're proud of what we've done so far — I am speaking personally, and not necessarily expressing the views of the members and staff and Chairman. But we were the first to really have an Enron hearing; the first to have a hearing on Global Crossing; the first to introduce into the *Congressional Record* the actual accounting guidance on special purpose entities and indefeasible rights of use. We were the first to talk about the S&P's concept of core earnings, and to contrast its treatment of stock options with GAAP and compare it with the International Accounting Standards now being discussed, and to talk about the convergence.

We still think — and I think many people do — we still have the best capital markets in the world; overall, the best corporate governance in the world. But we've seen some cracks in confidence. It's interesting to note that the reactions to the market crash of 1929 took five years to build. I think the reactions to the Enron and Global Crossing accounting scandals are going to take about one year to really get through it. I think that at the end of this year, the regime for accounting, for corporate governance, and for financial disclosure, will be very much different than the regime we saw at the end of the last calendar year.

The SEC is very close to releasing proposals on a public accounting board similar to the oversight board we have in Carter. Chairman Pitt is going to say something about that very soon. We've just seen the SEC put out guidance on what to put in the MBNA: a lot more items, a lot quicker. We've seen more talk about the NYSE rules. So much has happened in just the last four days.

But we are very pleased that though the multi-tiered system of oversight created in the '33 and '34 Acts did not react well in the '90s, it is now working to correct these problems and build for the future. We passed Carda in April, and we're looking forward to seeing something come from the Senate that we can reconcile.

There are elements of the Sarbanes Bill that would specify certain auditing standards: a fee for the oversight board to be paid by the issuers, even the numerator and denominator; what foreign accounting firms would have to do, which will be an interesting congressional jurisdictional matter. I really think this goes way too far.

There will be some mainstream conservative groups who speak often about excessive big government coming from the Democrats that are very concerned and will probably opine on this bill in the next few days, if they haven't today. I think that's going to surprise some people because they're going to get into this debate and possibly even threaten to put a vote on this bill into the rating for senators who vote for the Sarbanes draft.

One of the sorriest legacies I think we take from this debacle has been the fact that the SEC really failed in its oversight responsibilities during the Clinton-Levitt years. The SEC under its own rules was supposed to review Enron several times after 2000. The SEC didn't fight for funding and didn't fight for more disclosure. It chased what I think is more of a smokescreen to auditor independence, instead of going after the meat and potatoes of real disclosure.

Roy's proposal, though interesting, seems somewhat close to the Sarbanes bill in that it is anti-competitive in many of its aspects. Whoever sets the fees, controls the money and makes the decisions really runs the industry. All the proposals I've seen not only cut non-audit services, but would end up federalizing auditing and consulting, however you want to define it. And that will be thrown into the courts. What we do in Carter is specify two areas of consulting using rather specific terminology, which the market is accepting. That will be barred, and we're pleased with that.

Now, I want to make the point that law is no substitute for good character. The short-term mentality that helped produce the '90s bubble is now turning around and demanding a quarterly response, a complete response in one-quarter, to the problem.

We should take the longer term view of a year and see where we're going to be if the SEC has demanded certain things; MDNA, as it should, has demanded more disclosure of the balance sheet information; if what Harvey calls the public accountability board is well on its way to being in place.

I met twice in the last week with Ed Jenkins and Bob Hertz, the current and future chairman of FASB. All of a sudden, FASB is turning around a project on revenue recognition. They hadn't done anything official in 27 years. In early 2001, FASB gave up trying to do something on special purpose entities. They announced it. And this is another case where the Levitt SEC didn't do anything. FASB basically released two little letters 11 years ago on special purpose entities, creating this now

infamous three-percent rule. And now, after the Enron debacle, all of a sudden FASB is getting re-energized.

We want to see a more stable source of funding, for FASB that is not driven by politics. If it is tied to the SEC and the congressional bill, it is going to be tied to politics, and we don't think that is going to help. Again, that is driving the process towards excessive regulation of the market. So, FASB is going to have a proposal on special purpose entities by the end of this month. They are going to have something final by the end of the year. Those are announcements from their website.

I want to see the glass as more than half-full and filling up. By the end of this calendar year, we will have a much different regime for financial disclosure and accounting oversight than we did a year ago, all without the excessive heavy hand of legislation that can do more harm than good.

MR. UNIVER: Thank you, J.B. My name is Scott Univer. As a general counsel of an accounting firm, I have been asked to speak at a number of programs recently, and I have to tell you, in my position I generally feel like the token Christian at the lion convention. But it is my hope that this audience will be kinder and gentler, with due acknowledgement to Chairman Pitt.

What I would like to talk about is the Enron success story — all right, now you can call for the guys with the white nets and the jackets that tie in the back.

Enron has been trumpeted in many places, not least here, as being an example of the failure of capitalism, of the failure of government deregulation; not least the failure of the accounting profession, which I represent — at least one firm of which I represent. However, I would like to make the timid and modest point that we really ought to put this in perspective. We can realistically look at Enron as a success story because the company collapsed and the market did eventually catch up to the clear fraud that was going on. The numbers ultimately could not be evaded, although they could be evaded for a while.

By the way, let me get serious here for a second. I do not mean in any way to minimize the fact that there was fraud, illegality, and a great deal of injury and damage done to the many people who have lost their jobs, their savings and their investments. In the case of Arthur Anderson, it is a very fine firm that has apparently been driven into extinction. I think quite unjustly. All of this is the cost of what has gone on at Enron. I don't mean to minimize that at all.

But I would submit to you, respectfully, that the damage and the great injury that have occurred were caused by delay in discovering the fraud and delay in the market catching up to the fraud; not ultimately by the fraud itself. In any system, good laws, no matter how well shaped, cannot substitute for good character. Ultimately, there is always going to be fraud. There is always going to be dishonesty. The question is, can we fashion a system that will detect fraud and, to the extent it can be done, prevent fraud in less time or in real time? That is the way of evading or avoiding the kind of injury that happened here.

After all, with respect to Enron, the stock in the company declined over 80 percent during 2001, when the bulk of the misstatements took place. I think they took place mostly during three quarters of 2001. During that time, the stock went from $80 to $10. Clearly, the market was picking up signals some place, even if the SEC and other regulatory agencies weren't. The market was figuring out that something was going wrong — not as it should have been; not disarmed and hampered by the lack of disclosures, by the fraud and concealment. But the market was figuring out that something was going wrong.

The lockdown of employee sales of their stock in qualified plans, which has also been trumpeted as a tremendous failure of the regulatory system, has also been exaggerated. When looked at in perspective, one must take into account the fact that there really were only 11 days when employees could not sell their stock in the company. The lockdown was caused by a changeover in the qualified plans, which had been announced well beforehand so that employees who wanted to sell before that time could have. So that was not a symptom of the failure of the regulatory system.

Finally, the collapse of Enron itself was caused by the demise of the stock price. The special purpose entities were set up with guarantees for outside investors, or so-called outside investors, some of whom weren't so outside, and guaranteed them against loss. If the stock price was to fall below certain triggers set in the $45- and $50-per-share range (this at a time when the stock was trading at $90 or above and nobody foresaw a problem), Enron was obligated to issue more stock to put into the special purpose entities to safeguard the outside investors from loss.

Enron stock fell partly because of lack of confidence in the market in general, because of problems in the telecommunications industry, the bursting of the dot-com bubble and other environmental factors. But, it also fell because of specific lack of confidence in Enron. As the stock price fell, these triggers were hit and the company was obligated to issue new stock into these entities, further driving down the price and bringing down the house of cards.

So ultimately, there is an argument that can be made that the market did catch up to these people, and the fraud could not have been sustained indefinitely. Should it have been sustained as long as it was? No. Obviously not. The question before us today is, can we devise a system where that period of delay is minimized? That brings us to how can we fix the problems that we know about. That requires that we know what is broken before we fix it.

I'm afraid that government efforts to fix problems in the economy, in the market, often suffer from the rule of unintended consequences. They cause more problems than they fix. We have to keep in mind that the S&L crisis was actually the result of the government's effort to prop up the S&L industry, which had become the victim of hyperinflation in the '70s which was initially caused by inappropriate government monetary policy.

Engage

What kinds of problems has it been proposed we can now fix with government remedies? One is a common feature of several of the bills that have been proposed in Congress, as well as the Administration's ten-point plan: the insufficient personal responsibilities of directors and officers. These people are not sufficiently on the hook. This is one of the perceived problems. I would suggest to you that existing audit committees are very well on the hook as it is.

I recently saw a study that indicated that 10(b)(5) litigation, class action securities fraud litigation, is up to a new record high and that there were over 484 such lawsuits filed in 2001. This is up from 164 in 1991. And this is despite the passage of the 1995 Private Securities Litigation Reform Act, which was intended to make it harder to file such suits, and which in many respects did make it harder. Notwithstanding the impact of the '95 Reform Act, such 10(b)(5) claims have more than doubled, and officers and directors are almost always defendants in such suits. It is something of a mystery to me how you can get people to serve on boards anymore.

On top of that is the increasing criminalization of civil conduct, making it possible for directors on boards to face actual criminal prosecution for conduct that was only a few years ago viewed as, at worst, negligence.

What is another problem that government could possibly fix now? Another issue raised in many of the forums convened about Enron is the insufficient rotation of auditors with clients, or audit personnel within an audit firm, on a given client — something that Mr. Van Brunt's proposal addressed a moment ago.

I would suggest in response to those kinds of criticisms that most frauds occur early in an audit relationship. It so happened that Enron did not. Arthur Andersen had been Enron's auditor for a long time, or a relatively long time. Statistically, most frauds occur early in the audit relationship, so mandated turnover or rotation would not address that. What mandated turnover might conceal, however, is opinion shopping, which is the phenomenon of companies not liking the answers they're getting back from the auditors with concrete feet, and therefore looking for auditor with lighter or looser footwear.

Another thing that the mandatory rotation of public company audits would do among the audit firms is strip the remaining large public companies away from the non-Big Four firms, one of which I happen to represent. That is, the BDOs, the Grant Thorntons, the MaGladreys of the world now have a fairly large number of public clients, although not nearly as large as the Big Four. Those clients would basically be stripped away from the non-Big Four firms, and we would therefore see an increasing concentration, even beyond what we have now, of the public company audit from being handled by only four firms, assuming that all four firms survive.

The newly elected chairman of KPMG said recently that he thinks what happened to Andersen could happen to any of the remaining four. So, we could have even further concentration.

What about the influence of non-audit revenue? This has been completely accepted by the press and by most of the commentators on the subject, that auditors are unduly influenced by non-audit consulting revenues. I submit that this is a complete red herring. There really isn't any evidence of that. Arthur Levitt looked high and low, far and wide, for such evidence during his administration and couldn't find it. Now, he's been quoted recently as saying, "a-ha, you see — Enron, I told you; there really was such evidence; there is undue influence." But I submit to you that Enron is not an example of that. Many people quote the fact that $27 million in consulting fees were paid to Arthur Andersen.

If you're willing to sell your integrity for $27 million — and I do not suggest that that's what happened here with Andersen; I don't know what happened with Andersen and I have no inside knowledge. If you're willing to sell your integrity for $27 million, you're probably willing to rent it for $25 million. Those are big numbers. If the dollars are enough to influence your integrity, independence objectivity, then big dollars will do it, whether they're for auditing or for non-auditing fees. So, I don't think that's the issue there.

It's interesting to note, although not many people know it, that Andersen's total fees in 1999 were $47 million, $42 million of which were audit fees. That was the year during which most of these decisions were made. There is not yet, and Andersen is not, an example of undue influence on audit judgment from non-audit fees. If that's not the problem, let's not fix that either.

There are several other suggested problems and remedies, but I think the point that I'm making is getting across. My generalized point is, let's be very careful about fixing something before we know what it is exactly that's broken because most of the remedies that have been proposed pose the danger of causing problems at least as large as what they set out to solve.

MR. WILLIAMSON: I'm Edwin Williamson. I'm a partner at Sullivan & Cromwell. I think I'm around most Federalist Society events. I'm probably more known for my 2-1/2 years of professional existence that were not at Sullivan & Cromwell. I spent 2-1/2 years as the legal advisor in the State Department in the first Bush Administration.

At Sullivan & Cromwell, my bread and butter practice has very much been the public offerings, mainly representing underwriters, but also representing issuers. I've probably done 50-plus IPOs and many other sorts of public offerings. So, I'm sort of living down in the bowels with the short strokes of accounting rules and disclosure rules and so forth. That's where I've spent most of my life.

I find that I agree with many of Scott's observations, and I want to try to avoid repeating them, but maybe giving the

nod particularly where I agree. I was going to address four issues that I think are suggested by our program outline.

The first is what compromises independence. I very much agree with Scott that the additional fees that a firm gets from consulting is not what tips the scales. The auditor that can be bought or that does not have the adequate stiffness in the spine can have a problem with the size of auditing fees alone. In any case, I think the solution is that the market is working this out. Boards are seeing a need to separate these functions. There are plenty of people who can make up their own minds on this. Directors with an acute awareness of their potential liability can get around to asking the right questions.

A specific delineation of what accounting firms can and can't do will lead to just another sort of regulatory imbroglio that will have to be sorted out at some point. A version of the Sarbanes Bill has very specific restrictions on what auditors can do. While that may come close to working within the public arena, I gather that there are attempts by states to also impose similar restrictions. This would be a terrible damper on the growth of small businesses; not only the small business non-public clients of the small auditing firms but those auditing firms themselves.

On the question of PRO, Professional Regulatory Organization, I'm skeptical that somebody's going to come up with a great new idea here. At the end of my comments or during the question and answer point, I would like to address some of Roy Van Brunt's suggestions. But, I want to address the question of how we got here.

First, I think that we have seen an increasing trend towards very precise accounting rules, a cookbook approach. In other words, you add two eggs, you beat for 30 seconds, you add a half-cup of cream. If it produces a lousy cake, too bad. You followed the rules and you didn't think about beating for 45 seconds rather than 30 seconds. Nobody steps back and takes a hard look at whether or not what has been produced is actually the right picture; whether it really makes sense.

I probably should preface my comments with a disclaimer. Our firm, like most firms, has been in various aspects of the post-Enron/Arthur Andersen case. We're representing Mr. Duncan and there are other aspects of Enron that we're involved in. We represent the Financial Accounting Standards Board. I don't do any of that work, so I can easily say that these are all my comments and not those of the firm.

To return to my point, I think what you ended up with — for example, the three-percent rule — is an approach to accounting that is very much like the approach to taxes. There is a bright line out there and everybody engages in avoidance as opposed to evasion. And avoidance is legal, as long as you don't cross the bright line. This, again, is following the bright line and not stopping to ask whether the picture makes sense. Again, while the auditors express an opinion that the financials fairly present the results of operations and so forth, it seems to me that stepping back and looking at the forest is generally done.

Secondly, I would criticize the SEC, particularly during the Levitt period, for focusing on the wrong thing. There was a lot of effort spent on the plain-English rules. What it boiled down to were questions of taste. I can remember specific comment letters that ignored the saying that systems should be described as simply as possibly but no simpler. There are some things that are complicated. We also saw some increasingly complex accounting rules applied in unexpected ways.

In this period of intense focus on what was happening and the review of the dot-coms and so forth, those still happened. The SEC should face the fact that the Corporation Finance Division is not a merit regulatory body, and focus on making sure that a good picture gets out.

Part of the accounting rules and, to some extent, the disclosure rules have been an attempt to get into merit regulation, an attempt to slow down access to the market.

Our basic, statutory documents have become primarily defensive documents. With the courts adopting the "bespeaks caution" rule, the lawyers have not objected to this at all. So, we're as happy as anyone else to write across the face of a prospectus that it is all junk and you'd have to be a fool to buy this stock.

In some of the areas, the accounting rules have appeared to me to be attempts to screw up financial statements. The idea of running stock options through the income statement makes no sense in trying to figure out whether or not a company is profitable and what it makes. The dilution aspect of stock options is obviously material to investors, and that is shown in diluted earnings per share calculations and other disclosures as to the amount of potential dilution.

To run the fair value of an option on the date of grant, which may or may not be the fair value, through the income statement, even though that option is never exercised, seems to me a distortion of basic accounting. The requirement of amortization of good will — whether it's necessary or not. This mistake has been rectified in connection with the blanket outlawing of poolings, although a pooling really might be the correct way to describe a merger between two companies.

The result of this is that people really must go to other sources for information on which they base their investment decisions. I think the legal profession is guilty to an extent because we play defensive ball, and statutory documents have become defensive documents. Therefore, you really end up with a greater reliance on analysts.

I'm echoing what Scott says — I really don't think you need more rules. Plain English is not enough; I think we need a little more common sense.

MR. DONLON: I want to exercise moderator's prerogative, focusing our first question. What I see is that the investor community feels that this is a rigged game. So, the question is, what is going to change their mind? It's been advanced that what's needed is more disclosure, whatever that means, and better disclosure.

Do any of these proposals that you've been talking about address the fundamental issue of trust and confidence with respect to the average person, a person who carrying a 401(k), who does not read the proxy statement assiduously? Certainly, the Vanguards and Fidelitys are not going to get the boost. The Schwabs aren't, and neither will Merrill Lynch or anybody else.

MR. VAN BRUNT: If people don't read the disclosures that are out there right now, I'm not an advocate of the argument that more disclosure will solve it. For the four years that it tried to regulate auditors' independence, the late and unlamented Independent Standards Board paid to have studies done with respect to what investors actually consider before they made investments. The vast majority never read a 10-K or a 10-Q. So, any disclosure rules that simply force more disclosure into disclosure documents is arguably foolhardy.

MR. DONLON: But Roy, aren't they relying on the professionals to do some of the due diligence for them?

MR. VAN BRUNT: They're relying on better, and they are relying on professionals, but they're not relying on more. The problem with Enron is, those notes on the financial statements run six, seven, eight, nine pages for a given note. Nobody could read them and nobody could understand them. Having more disclosure crammed into that note is not going to solve the problem.

MR. COCHRAN: One of those notes we introduced in the record, footnote 16 in one of the quarterly statements, and footnote 7 in the Annual Report didn't explain relationships, they didn't have all the numbers and they didn't have any effect on the balance sheet. I think there would be a beneficial impact for the professionals in having those items disclosed, and that is what's coming now.

The whole result of Enron and Andersen going down is that it forces people to pay up. This is where there are some good things coming out of the trial bar, even for hardcore Federalists. Some well-placed criminal prosecutions might be beneficial. It's fascinating that the first prosecution sure looks like it's going down.

All that system and what the NYSE is doing and what institutional investors are doing; the multi-tiered system of regulation and enforcement is now reacting. I had a conversation with a very visible commentator in late April about testifying for us. I thought he was a free market guy, and he just reamed us. Last night,, it was the same thing with Harvey Pitt. I'm not going to bring up his name; you probably see him every once in a while. Last night, he was far more optimistic than he was six weeks ago. The real thing here is corporate governance for the future, and the market is already seeing that 50 to 80 percent of the battle is being fought and won, and will be won eventually, by the multi-tiered system. So, I'm more optimistic.

MR. UNIVER: Let me chime in with my agreement with Andrew. I'll even say a good word for plaintiffs lawyers that we face from time to time. The ecosystem needs vultures; that doesn't mean you want to sit down and dine with them, but they are necessary.

My apologies to any of you who are in the audience.

MR. DONLON: John Bogel, the former chairman of Vanguard, made the remark in a very excellent piece in the *American Spectator* about a month ago that there were more corporate earnings restatements in the first 11 months of this decade than the entire decade of the 1990s. I'm not sure whether that's true or not, but that suggests to me that this goes far beyond Enron, Global Crossing and others.

AUDIENCE PARTICIPANT: Mr. Donlon, I think you have this exactly right. I think it's a question of structure; not policy or laws. The first thing with the structure that's really wrong is that GAAP accounting is hopelessly corrupted and should be thrown away wholesale. In the interim, publicly traded companies reveal their tax returns because the accounting for the tax returns is a lot more stringent than that required for debt. And in the long run, you need new standards. Those standards should not be created by the companies, the accountants or the government, but by the investors. People like Warren Buffet know what they need and they can set the standards.

The role of the SEC and government should be to ensure with felony penalties that these standards are kept. And in the long run, to make sure that you have a level playing field and everybody does what they're supposed to do, you have to get rid of all of these limited liability laws. Everybody has to be responsible for what they do and for what they don't do. And then you'll get good governance.

MR. COCHRAN: FASB is actually moving toward a two- or even three-tiered process of financial disclosure standards or allowances. And with Key Metrics, we had two hearings on the credibility of GAAP; what we called the GAAP gap. I don't

know if you followed any of the value reporting initiatives pursued by Price Waterhouse and other theorists.

You have to be careful here because, what is going to be standardized? One of the problems we saw was the forward-looking statements and pro forma releases. The market is now punishing all those, and I think we're going to see the end. This isn't coming from me but from other market participants: Abby Cohen said in the FDIC conference last week that we're going to see the end of a lot of these pro forma releases.

So, we have to be careful with what this non-GAAP information's going to be. But there ought to be some metrics for reporting company information. If GAAP isn't eliminated, at least it goes beyond GAAP to a wide range of performance measures. I think we're moving in that direction. But I'm concerned that it won't be standardized in the professions and the money managers won't agree, so I hope they get involved.

MR. UNIVER: Let me agree in a very restrained and timid fashion with the questioner. I think there's a valid point to be made there. American accounting and the GAAP rule system is what is known by the accountants as rule-based, as opposed to much of the often principles-based European accounting system. That is what I think many advocates are now suggesting the U.S. system needs to turn towards. The principle behind revenue recognition being X, Y and Z, you figure out the rules that apply in this specific situation.

I agree that U.S. GAAP has become far too fine-textured and fine-grained. The rules have gotten too numerous, too complicated and too specific. There is a corresponding danger, however, in rushing too far in the other direction, towards a principles-based system. That is the increasing subjectivity of the accounting system, so that each accountant can look at the forest and not pay attention to the trees, coming up with his or her own impression of what the earnings for the company were. That isn't a good system either, and I'm suggesting moderation in our retreat from rules-based accounting so that we do not go too far toward pure principle-based.

MR. VAN BRUNT: It's far more complex than that because when you move from a rules-based model to a principles-based model, you do not build more credibility of into the work of the accountant. I'm not the world's greatest defender of it because I think the idea is the world's worst creation. The accountant has two clients, both of whom apply the same principle: I have assets; the principle is they need to be depreciated. The question is over what life they should be depreciated and how quickly over that life.

Client A says I believe the life for goodwill or any other intangibles should be 20 years. Without a rule that says it should be 40, the accountant has no basis to object to that and say that the statements don't fairly prevent. The next client down says five; the next client down says 50. There's no rule by which to hold anybody.

So then, you're in the position of asking the accountant to opine on a series of financial statements, all of which operate under different rules. But because they generally apply the same principle, they'd be in conformity with some standard. It's a meaningless disclosure. No one will benefit from it.

AUDIENCE PARTICIPANT: GAAP was an invention of the accounting profession. It's not something that came down from Mt. Sinai. They owe their allegiance to the companies. The companies are the ones who pay their bills, and it's not a question of ancillary services. The accountants' interests are the companies' interests. Who are these financial statements supposed to serve? They're supposed to serve the investors. So, why not let the investors determine what goes into them. Let the investors determine the standards.

MR. COCHRAN: GAAP is a creation of the historical cost-based manufacturing economy. At a time when, increasingly, intangibles are the basis of a company's value of the last 10 or 15 years, intellectual property, software, etc., it is impossible to value the company's assets and its net worth and its whole worth to people.

MR. DONLON: Good point. What you're saying is that it was creaking well before this.

MR. WILLIAMSON: Well, a couple of things. One is that I agree. There's no doubt that the rules about what should be disclosed ought to be made and formulated by those who use those financials. But, I see absolutely no evidence that the financial community has been able to get its act together and having meaningful input in this. I'd be happy to see it.

One of the things I do is represent a lot of the foreign issuers. One was a biotech company that had about $13 million in revenues. It was an English company that did a U.S. IPO. It spent over $1.5 million reconciling its UK financial statements to U.S. GAAP. I would be willing to bet that not a single investment decision was made on the basis of that reconciliation.

The client kind of liked the result, because in its great focus on revenue recognition, the SEC has all these little rules as to when you can recognize revenue from your collaboration agreements. The clients had to back out some revenues. I said, "Doesn't that sort of bother you?" They said, "Oh, no. We've already announced them once and now we'll announce them again."

The only thing I'm satisfied that one can generalize about the Enron situation is that it all proved that half of what

Lincoln said was correct: that is, you can fool all of the people some of the time.

My broker said that on October 22, 2001, he called the 11 top analysts who followed Enron, and every one of them said that Skilling's resignation was for valid personal reasons; Lay was back in charge the problems were over; all of the questionable accounting had been corrected; the questionable practices were over and done with and it was a great buy at 15. Fortunately, he decided to be a contrarian and sold.

AUDIENCE PARTICIPANT: There's a lot of hyperbole flying around here now. I'm not an accountant, but I understand there's something like 80,000 pages that compile the proposal we now call GAAP, and I think the suggestion that you throw the baby out with the bathwater in getting rid of it is just silly, frankly.

The problem corporate lawyers then have is telling their clients what to do. We have to have some rules in place to at least define what the boundaries are because if we don't, disclosure statements are going to look like the Manhattan Yellow Pages.

AUDIENCE PARTICIPANT: Addressing FASB, I believe there is an emerging issues task force that's attempting to determine the information that's going to be put into a press release, and institutionalize some sort of press release format because what the dot-coms were doing was releasing any information in an effort to build up the market perception that the company was doing better. It's not as if they reported better earnings.

I've been in FASB meetings where they'll convene with not only FASB directors and accountants but they'll also have representatives of other personages in the private sector in which they're dealing. Or perhaps on a derivatives issue, they'll have a broad constituency of representation in those FASB meetings.

What ends up being the case is there's a huge amount of corporate pressure on FASB to low-bar and drive down to the lowest acceptable, credible guidelines so that management can really report the highest revenue possible. If options are only reported at a point in dilutive earnings, then the non-management shareholders are at a disadvantage compared to management, shareholders and directors' ability to exercise options.

Meanwhile, they're reporting the fattest earnings possible that were probably tweaked, or perhaps even fraud. At a minimum, they should be accounted for. I personally think they should be impacting reporting the income, the same way that old goodwill used to impact net income. I don't think —

MR. WILLIAMSON: Would you run the revenues from proceeds from stock sales through the revenue line? If you're trying to figure out the value of an entity or the future performance of an entity based on its historical net income, putting in an artificial charge that doesn't have anything to do with its profit is misleading.

AUDIENCE PARTICIPANT: Respecting your point — I don't mean to cut you off — that, however, is a management —

MR. WILLIAMSON: There are tons of places to disclose the amount of options that are granted. It's all over the proxy statements and notes to the financials. What are you doing to the bottom line? I think you're actually making it a less valuable number and it's driving people to other sources.

AUDIENCE PARTICIPANT: I have two observations. One has to do with the notes, the financial statements, which are actually more important than the schedules because they tell you what they came from. If you find any notes that are puzzling or opaque, it should be to throw them away. It's just a matter of having some kind of public process to ask an issuer what the note means, and to have that information added to the record.

Secondly, how do you get auditors to do the right thing all the time? I think the most successful mechanism would be to make all the partners in a firm want to have all the other partners do the right thing. It used to be that CPA firms were general partnerships, where everybody's personal assets were available to pay out. But ten years ago, they gave them limited liability partnerships. Therefore, if you have a firm with 4,000 or 5,000 partners, each of which is arguably a millionaire, that's $5 billion that's not available for recovery in any action. I think on the plaintiff's side of things, it's very important to have those assets available, so that all the other partners are very wary of what any one partner can do to the rest of them.

MR. UNIVER: I can respond on behalf of those poor partners, none of whom that I know of are millionaires in their own right, at least not from the practice of accounting; although there may be some at Andersen. If reducing personal liability, eliminating the personal liability of the general partnership as a legal matter, by instituting an LLP causes a problem, then I don't think that explains what happened at Andersen. Those people are out of jobs, out of their capital accounts, they have a problem going forward with their careers; some of them were retired and had nothing whatsoever to do with this, they've lost their retirement checks, or will. I don't think that's a practical answer.

You can't, as a real matter in a firm that large, have everybody looking over everybody else's shoulder. It doesn't work. Every firm has quality control procedures. Ours does; the others do. Hopefully, those things work. I don't know what

went wrong at Anderson. Something did, but it wasn't the personal liability of the partners that was the guarantor of good work being done there or not.

AUDIENCE PARTICIPANT: I've done quite a bit of work in Germany on the European Union corporate takeover law. One thing I see is that there's a lot less disclosure in European Companies than in American companies. This standards-based system may have some advantages, but it is easily manipulated to the will of management. And it is not necessarily a system that institutional investors have a lot of confidence in. I'm not so sure the United States should think about abandoning a system that we have used and has given us what is perceived around the world to be the best disclosure system in the world, without looking at what's happening in other countries. Look at Japan and you see that there has been a great deal more concealed than in the United States. How many of the S&P 500 have had serious problems with restatements of earnings of a substantial magnitude? It's not that many. And so, yes, there's a problem, but I wonder whether politicians in particular are blowing this out of proportion.

MR. DONLON: Professor, you're aware that the Europeans are laughing in their cuffs over what they see as our hubris, as having dictated to them the superiority of GAAP, when we're the ones having the Global Crossings and the Tycos.

AUDIENCE PARTICIPANT: And they have the Deutsch Telecom and all the acquisitions they've been making that investors really have not understood what has been going on with some of the major European companies. There's been no way to valuate these acquisitions; management talks big; and it turns out the stock ends up being —

MR. DONLON: So you're suggesting there are many Global Crossings and Worldcoms in Europe that have yet been undiscovered.

AUDIENCE PARTICIPANT: That are being discovered.

MR. COCHRAN: International Standards are weak around the consolidation side. The important thing is that we're supposed to move toward convergence in 2005. We eliminated the pooling method. And the stock option issue is going to be a very big, sore point. There's still a large body of thought on the Hill that stock options should not be considered a compensation expense and run through the revenue statement. That is going to be a very interesting feature.

And the S&P core earnings concept — expense of stock options — on the international side, is something to think about in corporate practice, along with convergence and the supposed end of those reconciliations.

AUDIENCE PARTICIPANT: It doesn't have to be all one way or the other. We don't have to either expense stock options or just treat them as a footnote. There are intermediate approaches.

AUDIENCE PARTICIPANT: I'm interested in comments on how to take the Andersen model: a firm that had a reputation for having an excellent national practice control, to the point where back in the '80s when we did some cases against Rob Andersen and named certain Andersen partners, we wouldn't have dreamed of naming the firm simply because these were people who clearly failed to follow the direct advice from their national practice people.

What incentive did a firm like Andersen have to abandon this model and apparently to descend to a level of practice where the client was able so readily to dictate these choices? I think this notion of fair presentation is one of the best things that's been said all day. GAAP started out as a principles-based system. That's what the "P" stands for.

But we live in a complex world. So the interpretations have got to be more and more complex. But even today, the auditing firm, presumably through its national practice group, is supposed to be able to say that taken as a whole, these financial statements fairly present the condition of the company. So even if you are filing a check-the-box rule about three percent, if the final thing is that you have 15 special purpose entities, and every one of them is only three percent and hiding X amount of debt, even following the rules, it seems to me the result would have been absurd and that someone should have come up with some opinion or idea. And they couldn't do this. So, how does the system disincentivize this kind of thoughtfulness?

MR. VAN BRUNT: I think it's a two-part answer, and I need to disclaim somewhat because Andersen is a client of our firm, although not in this matter. So, I'm going to talk generically about my understanding of what would have led to the decision.

I think there's an ample body out there to indicate that the accounting that was in question was run through the firm's national office, and that the advice that the national office gave to the local practice office was not necessarily advice that the local practice office followed with respect to reaching their final conclusion. That brings me to the first part of what I think is a proposed answer.

The profitability and the distributions to partners in the big firms are not on a firm-wide basis as much as they are on

the profitability of the local practice offices where the decisions are made. So, you've lost, in the last 15 to 20 years, over my experience at the commission, that centralized national firm authority over what a local practice office does, they're now more advisory sometimes than they are automatically.

The second dimension of your answer is because of the rules-based system that we have. I was pretty critical of EITF in my comments earlier; I think it's the worst thing that was ever created because what happens under it is the client says "show me where it says I can't do it this way" and the local partner who's trying to sign off on the account has no ability to do that without something in writing that's been discussed in the profession.

So, rather than decisions being made on the personal view of the partner or the practice office, now issues get floated in a non-due process method to the EITF, where they get consensus from 15 of the 17 members. And then, there's EITF 00-23A subparagraph 92 that says you can't do it this way in this situation. That's where I think the answer is going. That's what drives the rules-based accounting system: the need to come back to the client and say, "here's where it says you can't do that", as opposed to, "I say you can't do that." It doesn't make any sense.

MR. UNIVER: First of all, for the benefit of the audience, EITF stands for Emerging Issues Task Force. It was an attempt by the accounting profession to set up a group that could address these kinds of emerging issues more quickly than FASB and other conventional standard-setting groups. It was recognized that some of these debates were dragging on year after year without resolution, and clients needed answers. Obviously, that process has had its own problems.

This debate reminds me about what has been said about the difference between Russian Communism and Chinese Communism. It was said that in Russia, everything that was not forbidden was permitted; and in China, everything that is not permitted is forbidden. That is the kind of difference we have here. The rules-based system, as it gets more complex, more dense, more fine-grained, tends to create opportunities for a lawyerization of the accounting profession.

As the rules get more intense, accountants are not only prompted by clients but also by their own incentives to look for ways, within the rules as they're stated, to present accounting statements in the light that is not objectively most clear or disclosing but in the light that's most favorable to the client's position. The rules permit them to do so. Again, I'm not in favor of a principles-based system; that has its own danger.

In general the rules have to be pruned back. And I don't know what the mechanism is to do that, especially since a lot of them grew to the thicket that they were in, in the effort of the accounting profession not only to answer client questions but also, frankly, to shield its members from lawsuits.

If accountants can point to a specific rule they follow, it's very hard to hold them legally liable. That is another aspect of the lawyerization of the profession.

MR. DONLON: The SEC needs a good accounting gardener.

AUDIENCE PARTICIPANT: How do the panelists feel about Chairman Pitt's proposal to have a panel that would not be dominated by people in the accounting profession to assist in accounting regulation? Is it necessary? Irrelevant? Misguided?

MR. COCHRAN: It is necessary and it is going to happen. He is going to do it himself. It is en carta. It is going to be in any bill that passes Congress. It is going to have five members; two of whom are not going to be in the profession at all.

Actually, it will be a big improvement. The problem with the Public Oversight Board and the Securities Practice Section of the SEC was that it had no oversight or enforcement capability. It was underfunded. There wasn't a staff. It wasn't permanent; it was part-time. That was wrong. You know, it is unfortunate, the way that developed. They quit, and there were some really good people on that board.

But, I think Harvey Pitt and the Congress are very intent on having a real oversight enforcement function. Is that function going to take over FASB and do all the accounting standards under very specific guidelines established in law by Congress? I don't think so. Not this year. That is the part in the Sarbanes Bill that I don't like, and I don't think it is going to become law. But, oversight and enforcement with recommendations as in Section 2 of our bill has got some real teeth.

MR. WILLIAMSON: I think that it is a good idea. I think the accounting rules have gotten lost in minutiae did they become so because they were developed solely by the accounting profession?

What I'm worried about is the attempt to use the accounting rules to accomplish other objectives. That is what is present in the stock option proposal, for example. There's such anger about what is perceived as overcompensation that we're going to punish these guys by decreasing their earnings — I think that's the wrong approach. The focus should be on what is really good disclosure and fair presentation — that would be a good step.

MR. WILLIAMSON: On prohibiting accounting firms from being limited liability entities. We are a general partnership, but I don't see that we get any credit for it in the market. So, for all of you who are proposing that we continue to keep our necks

in the nooses while our professional colleagues do not, please stand up and say what good boys we are.

I want to switch to a couple of things that Roy raised and his five proposals. One, I'm curious about how this proposal that audit fees would be set by the SEC would work. On what basis? Hourly? Quality? Value? Size of the deal?

MR. VAN BRUNT: The premise of that part of my point is, *arguendo*, in the accounting profession the audit fee has been cut back and minimized as much as possible so that we don't risk losing a client to somebody else. In the course of doing that, the way that audits are conducted is vastly different than they in the '70s and '80s when I got out of school and got my certificate in the first place. That is, there's a suggestion that there's not enough actual auditing being done, and the reason why it is not being done is that we can't get a bigger fee. When you go in this year, your idea is to hold the line on the budget, have a minimal expansion; you're paying your people more to do it. If you do that division really quickly, that comes out to fewer hours and lower costs.

So my feeling is, the SEC has got a lot of people on the staff who have experience in public accounting and could tell you, given a public company the size of Monster.com or Phillip Morris, a reasonable audit fee would be X. As I said, you can argue from that, but my third step would be to go to the SEC to arbitrate.

MR. WILLIAMSON: Well, that was the second question I had. Where does the Enforcement Division get the expertise on this to be the mediator here?

MR. VAN BRUNT: The Enforcement Division claims expertise to arbitrate every dispute that I'm aware of that's outside.

Charlie Nemeyer* would be more than happy to get involved in an argument between his clients and your auditor as to how much auditing was appropriate to do, and how much it would cost to do it.

MR. UNIVER: My respectful response to anybody who would suggest government-set auditing fees is that no one would make it who has ever attended a rent stabilization hearing here in New York.

AUDIENCE PARTICIPANT: Scott said that the audit committees were really doing a pretty good job. Look at the audit committee charter for the top hundred companies, all of which say that the audit committee will make recommendations annually about how they could improve their job.

No audit committee this year has any recommendation that I'm aware that says if conditions are any different now or that they should do anything differently now — and at least 68 of the proxy statements out there say something to the effect that we've only looked at what management told us. We haven't looked at anything beyond management, we're not experts, we don't claim to be. So, in the context of whether or not footnotes are comprehensible, are the audit committees doing a good job?

MR. UNIVER: I don't think I said that I believe most audit committees are doing a good job, although for all I know, they are. I think I said that I don't know how you get anybody to serve on them. There are some reforms going on, and I think those reforms are good.

The stock exchanges have set new standards for financial sophistication of audit committee members, the number of meetings that have to be held, other kinds of rules — and rules are not necessarily the answer here. I think this is another area where the market is taking care of the problem because of the threat of the class action litigation that I mentioned; 483 suits last year. If you're on a board, especially on an audit committee, you've got to be aware of that factor.

I've noticed many law firms that have gotten into the business of providing special advisory services to audit committees and are happy to hold seminars, provide private counseling and draw up plans suggesting what these people should be doing just to keep their shirts.

PANELIST: Ollie Gregory at Weil Gotshal.

MR. UNIVER: Many fine lawyers will tell you exactly what you should be doing on an audit committee. I think the market is taking care of that, too.

AUDIENCE PARTICIPANT: I'm unhappy about this resistance to the notion of throwing out GAAP.

One fellow said, "throwing out the baby with the bathwater". Here we have a situation where major companies report that on Tuesday, they have a $50 billion asset on the books; on Wednesday, that asset is gone, and they have followed the rules. How can that be? An investor sees a $50 billion asset and invests, thinking they have that asset and the next day it turns out there's no asset there, how can the rules be okay, and how can the rules possibly be salvaged?

MR. COCHRAN: It's because we're in transition. You know, you can fool some of the people — one of my scholars has a

saying about that. It says, you can fool some of the people all of the time and all of the people some of the —

PANELIST: All of the people some of the time.

AUDIENCE PARTICIPANT: — and that's good enough.

MR. COCHRAN: I just think we're in transition and this is part of the transition and paradigms to it. Maybe the last transition into the information age, is the accounting. And I don't think we can throw out GAAP at this point, but you add another tier of information disclosure and see what happens in the next 10 or 20 years. By the way, the next Chairman of FASB, Bob Hertz*, until this past couple of weeks ago a partner at PWC, was co-author of the book *The Value Reporting Initiative*, and contributed to the sequel that's coming out in July. He's going to take that to FASB, and it will be very interesting to see what happens there.

He's good friends with Bob Herdman, the Chief Accountant of the SEC, who also agrees with some of this. We're very much in transition in the economy and in accounting. These are going to be rather interesting times for attorneys counseling their clients on what to put in. We are going to see the AK go from 30 pages to I don't know how many pages, unfortunately.

PANELIST: — in less time.

PANELIST: One last close, just to demonstrate the maturity of growth since the '33 and '34 Acts were passed. One of the first accounting series releases that the SEC published in its infancy stages on the subject of accounting said, "Good disclosure does not cure bad financial statements." What I'm hearing suggested right now is that good disclosure will pretty much cure bad financial statements, and that, I would suggest, is a 180-degree turnaround.

MR. DONLON: I promised I'd close it off, and we're only a few minutes past our stop time, but I need to ask each one of our panelists to respond to a sort of summing-up question. I hate to be a Johnny One-Note, but if the Federalist Society convenes this panel a year from now, is the average investor who got burned not just on Enron but all the other companies we've been talking about going to be more or less confident and trusting than he or she is today?

MR. UNIVER: He will be more confident because that's not saying much, according to a survey, which I've got right here in my folder, ESTA ranked the biggest challenges to the U.S. investment climate. Eighty-four percent cited the accounting controversy, compared with 61 percent last year. So, being confident does not help much. What I think is more important than that is that the average investor will be richer because we will overcome these problems. That's my answer.

MR. DONLON: Andy?

MR. COCHRAN: Same answer.

MR. DONLON: Ed?

MR. WILLIAMSON: I don't know. I think the investor will be confused because I think we're going to see things coming out of both Congress and the SEC that will promise them solutions and that aren't really solutions. Whether it will be obvious by this time next year may not be so clear. But I say the investor's still going to be scratching his or her head.

MR. DONLON: Roy.

MR. VAN BRUNT: I think if the changes that are being discussed are going to eliminate the self-regulation aspect of the accounting profession in favor of a public accountability board, then one year from now is not a sufficient passage of time in which any change in investor confidence will be perceived one way or the other. While the PAB or the proposals that are in legislation are certainly well grounded, there are very many down-to-earth, practical problems with implementing them.

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Criminal Law & Procedure

The U.S. Response to the International Criminal Court: What Next? Will the ICC Provide Adequate Procedural and Structural Safeguards?*

Lee A. Casey, *Baker and Hostetler*
Professor John McGinnis, *Cardozo School of Law and former Deputy U.S. Assistant Attorney General*
David Stoelting, *Morgan Lewis and Vice Chair, ABA Working Group on Rules of Procedure and Evidence for the International Criminal Court*
John L. Washburn, *Convener, American NGO Coalition for the ICC*
Tom Gede, *Chairman, Criminal Law and Procedure Practice Group and Executive Director, Conference of Western Attorneys General, moderator*

MR. GEDE: Ladies and gentlemen, on behalf of the Federalist Society for Law and Public Policy Studies and the American Bar Association's Standing Committee on National Security Law, welcome to a timely and informative program on the International Criminal Court, posing the question, the U.S. Response to the International Criminal Court: What's next.

I'm Tom Gede, Chair of the Federalist Society's Criminal Law and Procedure Practice Group and will open the program and moderate the first panel. My day job is as Executive Director of the Western State Attorneys General, and I previously served as a deputy and special assistant attorney general in the California Attorney General's Office.

Two practice groups of the Federalist Society are presenting today's program, the Criminal Law and Procedure Practice Group and the International Law Practice Group. The program is in two parts. Panel 1 will explore whether or not the International Criminal Court will provide adequate procedural and structural safeguards, and Panel 2 will be moderated by Stuart Baker and will discuss whether the International Criminal Court can be effective on the world stage.

As you know, the Federalist Society does not take positions on issues, but merely provides an opportunity for debate and discussion on key legal, constitutional and policy issues.

By way of a very general background, you may know that in July 1998, nations attending the Diplomatic Conference in Rome adopted a Statute for the International Criminal Court, which we all call the ICC, independent from the United Nations, which will have its seat in the Hague and will have jurisdiction over individuals who commit genocide, crimes against humanity, war crimes and aggression. The United States voted against the Statute, citing concerns over sovereignty, jurisdiction and due process.

Since the announcement of this program here today, and in April of this year, the Statute of the Court agreed to at the Rome Conference was ratified by the 60 requisite nations, and it will become effective July 1, 2002. Although President Clinton signed the treaty in December 2000, the United States recently announced that it will not in any manner be bound by the terms of the ICC, has communicated that point with the United Nations, and is initiating non-extradition agreements with countries around the world.

Our first panel brings four highly distinguished panelists together to answer the first question, will the ICC provide adequate procedural and structural safeguards. We'll take a break after this panel. This panel will go until 10:30, and then the second panel will begin after a short break and we'll proceed on until noon with the second panel.

This first panel will examine the due process questions, the criminal law questions. Will the well-developed Anglo-American doctrines concerning jury trial, the rights of confrontation, speedy trial and to trial in place of the alleged crime be preserved by the ICC provisions, or will it be interpreted to allow anonymous witnesses, hearsay evidence and undue prosecutorial discretion in procedural matters.

The panel will address the right of the prosecutor to appeal an acquittal. The ICC permits its prosecutor to commence an investigation without a referral from a party state or the U.N., and to involve himself in a primary state's proceedings. Does this constitute unacceptable second-guessing of the primary state in the course of that state's criminal proceedings, or does the ICC represent a needed compromise to achieve a necessary end?

Our very distinguished panelists today include John Washburn, Lee Casey, David Stoelting and Professor John McGinnis. I will give you a brief introduction of all four of them first, and then proceed with the program. In the program, each one of them will present their either background on the ICC or state a case with respect to their perspective on the ICC, and then I'll pass a few softball questions their way, then they can ask each other questions. Then you, as members of the audience, can throw questions at them, as well. We'll hope to have this done by 10:30.

Let me introduce all four of the speakers first. Our first speaker is John Washburn. He's currently the Convener of the American Non-Governmental Organizations Coalition on the International Criminal Court. I think that has an acronym, but I'm not going to try. He's the Co-Chairman of the Washington Working Group on the International Criminal Court, as well.

He has an extensive career in diplomacy, in governmental and non-governmental organizations. He was a member of the Foreign Service of the United States from 1963 to 1987, and a member of the State Department's policy planning staff,

responsible for international organizations and multi-lateral affairs. He was assigned to India, Iran, Indonesia and such places. He left the State Department, and in 1988 became a Director in the Executive Office of the Secretary General of the United Nations from 1988 to 1993. Thereafter, he was a director in the Department of Political Affairs of the United Nations, until March 1994.

He has a very impressive, I think, background that includes — he was the Nightshift Chairman of the Iran Hostage Task Force in 1979 and received a special commendation from the Secretary of State for his services. I asked him whether he kept a cot in his office; obviously, it was a job that involved a night job after a day job and very little sleep.

He is a graduate of the Harvard College and the Harvard Law School. He belongs to the American Society of International Law and the Council on Foreign Relations.

Lee Casey is with us today. Lee is a partner at Baker & Hostetler, and prior to that time was an associate with Hunton & Williams practicing an international, environmental and constitutional law, election, regulatory and other issues, and international humanitarian law, as well. Lee is a graduate of the University of Michigan School of Law and undergraduate at Oakland University.

He served from 1986 to 1993 in various capacities in the federal government, including the Office of Legal Counsel and the Office of Legal Policy at the U.S. Department of Justice. From 1990 to 1992, Mr. Casey served as the Deputy Associate General Counsel at the U.S. Department of Energy. Previously, he had served as law clerk to the Honorable Alex Kozinski, then Chief Judge of the United States Claims Court — currently, of course, on the 9th Circuit. He is a member of the California, Michigan and D.C. Bar Associations. He served in the past as an adjunct professor of law at George Mason University and has written extensively on the International Criminal Court.

We're also pleased today to have Professor John McGinnis, Professor of Law at the Benjamin Cardozo Law School, where he teaches courses in constitutional law, international trade law and economics, and law and biology. He is a graduate of Harvard College, Balliol College, Oxford and Harvard Law School. He was an editor at the Harvard Law Review. He clerked for Judge Kenneth W. Starr of the District of Columbia Circuit Court of Appeals and was a deputy assistant attorney general in the Office of Legal Counsel in the administrations of Presidents Reagan and Bush.

His academic articles, interestingly, cover issues such as "The World Trade Constitution"; "The Rehnquist Court and Jurisprudence of Social Discovery"; and "Our Supermajoritarian Constitution". He is a 1997 recipient of the Federalist Society's Paul M. Batter Award, given annually to outstanding legal scholars under the age of 40. He's the kid on the block here.

Finally, we have Mr. David Stoelting, an associate in the litigation practice group, resident in the New York office. He's Chair of the ABA's Committee on International Criminal Law and Vice-Chair of the ABA's Working Group on Rules and Procedure and Evidence for the International Criminal Court. And so, as co-sponsor of this program today from the ABA, we certainly welcome him.

After graduating from Georgia Southern College in 1982, Mr. Stoelting received a masters degree in international studies from the University of South Carolina in 1984; he was a Fulbright Scholar in West Africa in 1983; and he was a Peace Corps volunteer in Morocco from 1984 to 1986. He received his law degree from the University of Cincinnati, where he was managing editor of the *Human Rights Quarterly*. He also served as a judicial law clerk to Judge Nathaniel Jones of the U.S. Court of Appeals for the 6th Circuit and received an LL.M. in international legal studies from New York University School of Law, where he was a senior fellow at that school's center for international studies, and received their Ford Foundation Fellowship.

As you can see, all four of our speakers and panelists are highly distinguished, have extensive and considerable backgrounds in international law, and we believe are all especially well-equipped to address the difficult and contentious issues involved in the International Criminal Court.

We'll ask first for Mr. John Washburn to give us a little background, from his perspective, on the International Criminal Court. Mr. Washburn.

MR. WASHBURN: Thank you very much, Mr. Gede. I appreciate this chance to talk with all of you. Thanks also to Dean Reuter and the Federalist Society and the ABA for making this highly timely and appropriate occasion possible.

I obviously am a double-plus proponent of the Court, but I'm going to try at this time to throttle back my commitment in that direction, and to start us all off with a quick superficial but, at least, overall statement as to where the Court is now, a little bit more rounding out what Mr. Gede had to say about what the Court is like, and then a first look at the rules for procedure and evidence and the conduct of trials. My coverage on that will only be a start on what the rest of the group will do.

On the status and timing of the Court right now, you've just been told that the Court's jurisdiction comes into effect on July 1st, following the coming into the force of the Rome Statute. This means that crimes committed after July 1, which are otherwise within the jurisdiction of the Court, will be eligible to be tried by it. In September at the U.N., there will be a meeting of the governing body, the Assembly of States Parties, which will elect its officers and start the process for nominating judges and choosing the senior staff of the Court. At that moment, when the President and other officers of the Assembly

of States Parties are elected, the life of the Court will begin. It will at that point separate itself from the processes that have been going on at the U.N. and will begin its own activities as an independent international organization.

In January-February of next year, 2003, the Assembly of States Parties will meet again, will elect the judges, complete the hiring of the senior staff, and those persons will go to work in premises which will have already been previously prepared for them and set up. In March of '03, the Dutch government, no expense spared, will sponsor an enormous international celebration in the Hague presided over by the Queen of the Netherlands. This is going to be as elaborate an historic event as the Dutch and the European Union and other countries can make it. They will bring in heads of state from around the world, and this will be the formal inauguration of the work of the Court.

By June, we expect that the Court will be processing its first cases. This means that almost certainly some lawyer in this room, or a professional connection of some lawyer in this room, will be dealing with a case before the Court. The physical work of setting up the Court is already well underway. Buildings are being refurbished by the Dutch government. A prison has been assigned for the use of the Court, which will be run by the Court when it has its staff in hand. Advance and transitions teams are hard at work.

That's where we stand with the Court. I think that this is enough to show that the Court is about to be up and running soon, and we will need to deal with it as an existing and operational reality.

On the nature and description of the Court, very briefly — Mr. Gede has started us off — the Court was indeed created by the Rome Statute in 1998. It consists of that document plus the Elements of Crimes document and the Rules of Procedure and Evidence document, which were adopted on June 30, 2000 by the U.N. Preparatory Commission for the ICC, and will be forwarded to that first meeting of the Assembly of States Parties for its approval and final adoption.

These are extremely extensive documents, all three of them. They are precise and detailed on the crimes, jurisdiction, oversight, financing, jurisprudence and jurisdiction of the Court. The Rome Statute itself is an extraordinary document, basically setting up everything that a court needs to have to function, from the nature of its organs to highly detailed codification, customized from existing international law, of the crimes that it will try.

Just to give you a sense of this, the Rome Statute runs to 128 articles and 106 pages. The Elements of Crimes is another 48 pages. The Rules of Procedure and Evidence are about 100 pages, with 225 rules. They are a lot more detailed, for example, than the Federal Rules of Criminal Procedure. It's rather interesting to look at those two together. I'd be happy to give any of you who are interested cites to these texts, and also to show you some of the materials I have here, which include the legislative history of these documents.

The Court, as you've been told, will be permanent, independent, will have its own buildings, courtrooms, staff, guards and prison. And as I've mentioned, these are all being set up now.

The personnel of the Court consists of 18 judges divided into three panels of six — a pretrial chamber, a trial chamber and an appellate chamber. I think those labels are enough for an audience of lawyers to give you some sense of what they do. Judges serve for nine years — non-renewable. And there may be only one judge from a given country. Judges are to have either extensive domestic criminal law practice, with heavy emphasis on the practice. It is clear that what they want in the criminal law area is people who have been defense counsel, judges or prosecutors.

The other set of criteria, the "or", is the international humanitarian law expertise. This means that someone has to have a very distinguished background and record in international humanitarian law, again with a heavy bias in evidence in the legislative history for people with practitioner experience. Judges must also have the necessary qualifications to serve on their own highest courts. Judges may come from states parties only, which means that we will not have American judges until the U.S., whenever that should be, chooses to ratify.

The second set of personnel are a prosecutor and his or her assistants, and a registrar, which I think most you know is the name used in international courts to indicate the highest executive or administrative official. Judges provide overall supervision of the court through a group known as the Presidency. A judge is elected to be the President from among his brethren and sisters, and serves to run this executive committee of the judges.

Another and very critical body is the Assembly of States Parties. This is the intergovernmental body composed of those states that have ratified the court, or, rather ratified the Statute. It has the power to fire, hire, discipline, set a budget, put assessments on members to raise the money for the budget, and to exercise oversight and accountability. I would like to emphasize that a reading of the statute and the legislative history makes it very clear that the Assembly of States Parties is expected to maintain continuing oversight and accountability. And the structuring that has gone on in the preparatory process for the Assembly of States Parties makes it extremely evident that the ASP is going to make sure that the countries that give the Court money are getting value for the money, and that the prosecutor, judges and others in the structure of the Court are behaving as States Parties intend that they should.

There will also be within this structure a Victims and Witnesses Unit, which will provide support and care for victims and witnesses that are participating in the Court's processing.

There will be a Defense Counsel Unit. We have had fears that this was not going to happen, but it is now in the first-year budget of the court. This will be a body purely within the office of the Registrar, purely committed to the exclusive work of assisting defense counsel — in the United States, the National Association of Criminal Defense Lawyers and the ABA are

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very much involved in the shaping of this defense unit to make sure that it's effective. There will also be a defense bar, which will deal, working with the Office of the Registrar, on issues such as eligibility, discipline and qualifications.

Turning now to the issue of jurisdiction, you've been told that the Court will have jurisdiction over war crimes, crimes against humanity and genocide. This is a narrow band of jurisdiction within those general categories. Only the very worst criminals for the very worst crimes — the statute makes it clear that the crimes in question have to be especially atrocious, have to shock the conscience of humanity, have to be systematic and massive, and in most cases have to be pursuant to some kind of a plan or policy.

Aggression is notionally within the jurisdiction of the Court but suspended by the Statute until it has been defined in further negotiations, and then it must be inserted into the Statute by an amendment process. That will take seven years at a minimum. Judging by the way the negotiations to define aggression are going, I don't expect to see it, frankly, in my lifetime.

These thresholds, therefore, are very high. Although terrorism is not mentioned in the Statute as such, the crimes have been defined in such a way that almost all of the serious criminal acts that terrorists do would be within the Court's jurisdiction. For example, there is unanimity that the 9/11 events would have been within the Court's jurisdiction, had it been in existence at that time.

It's important to emphasize, as Mr. Gede said, that the Court tries only individuals, not governments or organizations. It has no jurisdiction over them whatsoever. Cases come either by reference through Chapter 7 powers or through a ratifying state where a crime has been committed on its territory, or by its national; in similar circumstances, of course, a non-ratifying state may consent to the Court's jurisdiction.

Let me now turn very quickly — I have three minutes left — to safeguards. The safeguards built in — and these are intended as safeguards, and so to call them that is not a matter of interpretation; these are clearly intended to function in this way. There are the thresholds that I mentioned — the very narrow definition of the worst crimes by the worst criminals. There is complementarity, in which a state, with a jurisdictional nexus to an individual, may go to the court and say we want to deal with this person ourselves. The judges must grant that request unless they deem that it's in bad faith or that the country concerned is incapable of carrying out an investigation or trial.

Countries may enter into or have bilateral treaty obligations to deliver persons to each other. In those circumstances, they may honor those obligations, rather than honoring an ICC order or arrest warrant. The United States has many of these agreements and is actively setting up to do more of them.

There is the safeguard by the Assembly of States Parties. There is the oversight provided by the ability of countries to say that information required by the Court is national security and they will not give it up. The Court must accept and defer to that. And there is the power of the Security Council to require the Court not to address an issue that requirement would be by resolution. The Security Council can renew the requirement annually, as long as it wishes.

On trial procedures and process — there's a great deal more to be said here than I can do. Fortunately, these will be covered by others here. I would like to make the observation that the issue that we're examining here, from my point of view — and here my status as a proponent may be coming out— the issue that we need to decide on is that this is a decision of the kind the United States government makes when it is considering an extradition treaty with another country. We do not require of another country that it has a court system that is precisely like ours, or indeed provides all of the rules and regulations that ours does.

We look at the court system of the country with which we are considering having an mutual extradition treaty, and we decide whether, overall, that country provides sufficiently fair trials for us to be willing to deliver an American to them in return for getting somebody back, whether we will have a reciprocal arrangement that does that. I would hope that this would be the perspective in which we would look at this court as a foreign court, which we will look at as we would at a court to which we may be planning to extradite.

The provisions — I'm going to take two more minutes — I'm sorry for this very rapid gallop, but I'm like somebody who has to describe the entire criminal process in the United States in 12 minutes. The trial processes and procedures of the court are hybrids between the civil and common law system. They were negotiated out particularly on that basis. This is a special court for special purposes, which is the result of an act of international legislation, multilateral legislation carried out through parliamentary diplomacy.

The trial processes and procedures contain all of our Bill of Rights due process protections, except for jury trial. These trials are by judges. This was not simply a cave-in to the civil law system. There was a spirited and extended discussion on this. There was a consensus in the end, in which the United States participated, that jury trials for someone like Hitler, Idi Amin or Milosovich were not practical, could result, actually, in discrediting jury trial systems in general, and that judges were better qualified to deal with trials of persons charged with these kinds of very special crimes, of this particular category.

The question of anonymous witnesses is not specifically ruled out in the language of the Statute, but the legislative history makes it quite clear that the cumulative effect of several of the Rome Statute's provisions taken together would result in anonymous witnesses being barred. Hearsay evidence is not *per se* inadmissible, but it is excludible by the judges for lack of probative value.

The defendant may use a lawyer of his or her own choice or be assigned one by the court if he or she wishes. Indigent defendants will have counsel paid for them through the resources of the Court. Most trials will take place in the Hague, but the judges are free to determine that a trial be held elsewhere. In all frankness, for economic and financial reasons it is unlikely, particularly in the first few years of the Court, that it will have trials anywhere else but in the Hague.

The complementarity demand — that is, a demand by a country that the Court defer to a domestic court — may be made at many different stages through the trial procedures. There are numerous preliminary interlocutory appeals available for both sides at all stages; many more than are available in our system. The prosecutor may appeal a conviction, but this is considered to be not a final but an interlocutory appeal because the trial does not close. You have a conviction; the trial is suspended but remains in existence at that point, while an appeal may be made by a prosecutor against a conviction.

The sentencing and convictions — the decisions of the Court are made by a majority of the judges. This is organized in such a way that each panel of judges will have three members, so that there will always be a two-to-one result. However, the statute calls on judges to make every effort to achieve consensus and makes voting a last resort.

Defense counsel will find, on the one hand — and this is an example of the hybrid situation — that judges will participate much more actively in questioning and in structuring the control and flow of the Court's work. But on the other hand, the rights and functions of defense counsel that we are familiar with, such as cross-examination, are fully provided for in the Court.

So, what we have here is a special court designed for a special purpose. You are open to examine, of course, the Rome Statute and the subsidiary documents to make your own determination about whether this is a court that will function. Obviously, as a proponent, I think that this is a carefully crafted court, the result of eight years of work by extremely distinguished international lawyers, not least the extremely expert people who served on our delegation. It's a fascinating subject for a lawyer to examine.

Whether or not you happen to like the Court, I hope that most of you will conclude that, in fact, this is a remarkable product that offers defense counsel and defendants a full and free and fully acceptable trial experience. Thank you very much.

MR. CASEY: With your permission, I will stand.

Somewhere in the novel *Dracula*, Professor Van Helsing warns his colleagues, "My friends, it is no ordinary enemy that we deal with." It seems to me that a similar warning is called for with respect to the International Criminal Court. Like Brams Stoker's fictitious count, the ICC is not what it may at first appear to be. It comes in the shape of justice, but it has the soul of an autocrat. Whether used for good or ill, the ICC's power will be checked only by its own conscience. The limitations some find in the Rome Statute are illusory. The Treaty's separation of powers — nothing but bureaucratic divisions of labor. The Court will be the sole judge of its own power, and complementarity will apply only as the ICC chooses to apply it.

I think it is safe to say that the design of this institution would, from the ribbons in their hair to the silver buckles on their shoes, have shocked the authors of *The Federalist*. As Madison wrote in Number 51, "You must first enable the government to control the governed, and in the next place oblige it to control itself." Like our own courts, the ICC will be an institution of government. It will have power over individuals; not merely states. But it will not required to control itself.

It is not, therefore, surprising that the Rome Statute fails to preserve the fundamental guarantees of the Bill of Rights in any form recognizable in the United States. Those rights — to a public trial by jury, to confront hostile witnesses, to protections against double jeopardy — do not merely ensure a fair trial. They are first and foremost limitations on the abuse of power. As Justice Story wrote regarding trial by jury, "It is the great bulwark of civil and political liberties, part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power."

By contrast, the civil law upon which the ICC is predominantly based, has never served as a check on governmental power. It may well deliver justice in individual cases, but its meteor is the vindication of the state, not its limitation. And if ever an institution needed limits, it is the ICC. War crimes prosecutions and prosecutions for crimes against humanity, particularly when they involve high-level officials, are inevitably political. You cannot avoid it. And the ICC was conceived and constructed quite openly as a political tool, as a tool of foreign policy.

Now, some argue that departures from American practice are permissible because, even today, Americans are not entitled to a trial under the Bill of Rights under all circumstances. They are regularly extradited to courts that offer protections no better than those of the ICC. But Americans are extradited for crimes they have committed abroad, and the ICC could reach people who have never left the United States. Moreover, there is a fundamental difference between washing our hands of a man and actually participating in his destruction.

By acceding to the Rome Statute, the United States would effectively vest the ICC with some of its sovereign power, making it a participant in the Court's prosecutions. The Constitution does not permit such a delegation.

Similarly, it is often claimed that the ICC would be no worse, and perhaps better, than the military commissions that the President has established in our war on terrorism, but those commissions apply only during wartime to individuals who are not and cannot be characterized as civilians. The ICC would operate at all times, in war and in peace, and it would wipe

Engage

away the ancient distinction between civilian and military justice — a distinction that has served us well, and that the Supreme Court has jealously maintained.

Now, there are many compelling reasons for not joining the ICC regime, but the Court's failure to preserve the safeguards correctly deemed necessary by the founders of our republic to ensure that the power of criminal prosecution is not abused would alone have fully justified U.S. rejection of this Treaty. Thank you.

MR. GEDE: Mr. Stoelting.

MR. STOELTING: [1] Thank you for the invitation to the Federalist Society and to the ABA for sponsoring this. It's great to be here.

My opening two words in response to comparisons of the ICC to Dracula, *et al.*, are "calm down." It's going to be okay. This is going to be a responsible institution, and one which could be used as tool of American foreign policy, not an opponent of American foreign policy. This is something that could be used to advance American interests.

Just think — in the last few years, how many times have we had instances when we have a war criminal or somebody accused of genocide or crimes against humanity, and there's no place to try the person. Cambodia, Kosovo, Sierra Leone, Congo — time and time again, there are instances when people get caught and there's no courts to try them. We can't keep creating these *ad hoc* tribunals on into the future for special circumstances. It's just not a workable long-term solution. There's no question that the law being applied by the ICC is law recognized by the U.S., indeed written and recognized by the United States military courts and the United States federal courts as law. We're just creating an institution to apply clearly established law. It's just a mechanism to apply law that we, as a country and as a government, recognize is law and is not being applied.

Moreover, the purposes and principles of the ICC are uniquely American. This is something that we should be embracing as Americans with a commitment to the rule of law, not shunning and running away from and declaring it to be an abomination. This is something that actually captures and enforces principles that the United States, among all other countries, has put forward and advanced over the last ten years — indeed, since Nuremberg.

We were the country that conceived and helped put together Nuremberg. We were the country that established the *ad hoc* tribunals for Yugoslavia and Rwanda. We are a country that is enabling the special court for Sierra Leone. Time and time again, you see the United States in the forefront, in the vanguard, of prosecuting war crimes and prosecuting crimes against humanity, except this one instance when there's a permanent court to be created to do what we know needs to be done, yet we're running away from it and declaring it to be an abomination because there's no exclusion for American citizens. And it really is as almost crass as that, to say that because there's no clause declaring that no American will ever be targeted by this court, we will do everything we can to undermine it.

The ICC is going to be a completely unique and new kind of international institution. Indeed, the Rome Statute is a new kind of document. This is not a standard setting body like the Kyoto Treaty or the Comprehensive Test Ban Treaty. It's not a treaty where a bunch of countries get together and say these are goals and aspirations, and everybody that signs on to the treaty is committed to these goals and aspirations.

This treaty creates a living, breathing institution that's going to have staff and powers. And the U.S. should be a part of it. If we were a part of it, we would be exerting our influence on it, we would have American judges on the Court, we would have American prosecutors in the Court. This is not going to be an uncontrolled debating society like the Durban Conference that it's often compared to. This is going to be a very tightly defined, narrowly targeted institution.

What we have now is just a blueprint toward how we'll go ahead. It is premature to be raising these kinds of apocalyptic visions of what the Court's going to do because it hasn't done anything yet. They haven't hired anyone. So it simply is premature to be targeting this court as an enemy of American interests, when all we have is a piece of paper. And when you look at the piece of paper, it should be clear that this is a conservative institution with narrowly defined jurisdiction, with innumerable safeguards.

You can say all you want about the safeguards being illusory. The fact is that the safeguards are there and they have teeth. And I think the greater risk is that the Court will never be able to do anything because it will be mired down in years of preliminary objections and states making objections.

If you look at two aspects of the Court - the triggering mechanism for its jurisdiction and the scope of its subject matter jurisdiction - this should be clear. It's true that there is no explicit carve-out for American servicemembers or peacekeepers. But, given the history of the United States, indeed our own Supreme Court has said that the Commander-in-Chief and President is not exempt from the reach of the law. I think it would be improper for us to demand that this court be created with a carve-out for one of its members or for one of the potential members.

To really understand how the triggering mechanism works, look at the example of Israel. Often, I hear people say, well, this court is going to target Israel and that Israel will be in the dock on day one. That's simply not true. In fact, the greater reality is that there practically is a *de facto* carve-out for Israel. And the reason is that Israel has not ratified the ICC Treaty and is unlikely to do so. The West Bank and Gaza are not states, so there cannot be a referral from one of those states.

So, as to any events that occur in Israel or in the West Bank or Gaza, you would have to have the consent either of Israel, if that was the nationality of the country of the accused, or you would have to have the consent of the country where the alleged crime occurred.

So, unless you had the consent of Israel, there absolutely can be no prosecution by the ICC, absent a Security Council referral. And I doubt very seriously there will be a Security Council referral. so, as long as Israel remains a non-ratifying country, and as long there is no Palestinian state on the West Bank and Gaza, it's inconceivable to me that even the minimum case for jurisdiction could be created, let alone an investigation or anything go forward that would result in an indictment.

As to the threat of the court reaching out and prosecuting Americans for crimes committed in America, that also is impossible under the court's exercise of jurisdiction. Without the consent of the United States, there can be no indictment against an American citizen for a crime committed in the United States, as long as the United States is a non-ratifying country. The reason is that without a Security Council referral, you've got to have the consent of the country of the nationality of the accused or the consent of the country where the alleged crime occurred. And when those two are the same, as it often is, and the country withholds its consent — it's not a ratifying country — the ICC will not have jurisdiction.

As to the scope of the crimes to be prosecuted, it really is here that we see the influence of American policymakers, and indeed, the American military. It is quite consistent with the scope of war crimes and crimes against humanity under American law. There are strong intent and knowledge requirements. The definitions do not pick up one-time events like the bombing of the Sudan chemical factory or the downing of the Iranian airliner a few years ago.

The definition of "genocide" is taken right out of the 1949 Genocide Convention, which the United States has ratified.

The definition of "crimes against humanity" is phrased as "acts committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack," and it requires multiple commission of acts "pursuant to, or in furtherance of, a state or organizational policy to commit such attack."

The definition of "war crimes" includes international armed conflict, which has been the case for a hundred years and is drawn out of the 1949 Geneva Conventions, which the U.S. and every other country in the world has ratified. It includes Common Article III and non-international armed conflicts, but it specifically carves out internal disturbances, riots, and it puts in a definition that says, "This is meant to apply only in protracted armed conflicts between government and armed troops."

So, as you can see, the exercise of jurisdiction is very circumscribed. This is not a court of universal jurisdiction. This is not a court that can reach out and indict anybody, anywhere, without the consent of the country where the crime occurred or the consent of the state of the nationality of the accused.

It's also a court that has a range of protections for defendants and accused persons that does, in fact, comport with our Bill of Rights — presumption of innocence, assistance of counsel, right to remain silent, privilege against self-incrimination, right to written statement of charges, right to examine adverse witnesses, right to have compulsory process to obtain witnesses, prohibitions against *ex post facto* crimes, prohibition against double jeopardy, freedom from warrantless arrest and search, right to be present at the trial, exclusion of illegally obtained evidence, prohibition against *in absentia* trials.

It's true there is no right to a jury trial. However, there are limits to that even in our constitution. There's no right to a jury trial when an American servicemember commits a crime abroad. The right to a jury trial only applies to crimes in the state or district where the offense is committed.

The parties to the court are closest friends and allies. This is a court of democracies. By condemning the court, we find common cause with Libya, Iraq — the tyrannies of the world. By becoming the champion of countries that don't ratify the treaty, by standing up and saying, look, you cannot touch any country that does not ratify the treaty, we champion the cause of countries that do not have American interests in hand. If we're not going to become a part of the Treaty, we should at least stop from becoming a place where war criminals can go and hide and say, well, the Americans will never extradite me to the ICC.

The 67 ratifying countries include Italy, Norway, France, Belgium, Canada, New Zealand, Spain, Germany, Austria, Finland, Portugal, Greece, Ireland, plus a range of countries from Africa, Asia and South America. Now, with the U.S. withdrawing its signature from the ICC, with the U.S. considering legislation that would prevent cooperation under any circumstances with the ICC, perhaps even close the door on Security Council referrals, and even authorize things like invasions of the Hague to free Americans held by the ICC, we risk becoming a haven for war criminals.

I think it's prudent for the U.S. to take a wait-and-see approach. If we believe our position in the world today as the remaining superpower gives us pause, and if we can't join right at this moment, I think we should step back and let the ICC go ahead and see what happens. And I believe that eventually, we will join this court.

Just to close, again, I think we should all just calm down, take a look at the statute, take a look at the reality, take a look at the purposes for which this institution was created, and see what happens. Thank you.

PROFESSOR McGINNIS: Thank you very much. I'm very grateful to be invited.

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I'm largely a constitutional lawyer, and I think in general, it's very useful to look at international law concepts through an American constitutional prism because we've developed concepts of accountability that make some of the international law concepts more understandable. What I intend to do today in my brief time is to try to show why I don't think we should join the ICC, by comparing it to an institution that Americans have come to know all too well: the IC, the independent counsel.

My claim is that the ICC suffers from all the structural defects of the IC, and then again some. I'll try to keep this clear; I know that the ICC and the IC are separated only by a letter, and my claim is that they are very, very similar in their defects. Indeed, all the criticism I think that can be levied against the IC — what were those criticisms? That the IC was liable, to politically driven misjudgments; and that ultimately, whatever the intention of its proponents, it undermined the rule of law. These are all fully applicable to the ICC. It seems to me bizarre, in fact, that we would consider plunging in as a member of the ICC of empowering a global independent prosecutor after we have understood the defects of an independent domestic prosecutor.

Well, let me begin with the criticism that the independent counsel was subject to politically driven misjudgments about prosecutors. The problem will be even worse with the ICC because the laws are less clear. In the case of the IC we had the crimes that were as clear as those that are made under U.S. law, that at least had a consensus that the U.S. had signed up to. Not so with the ICC. We have a variety of crimes here, and it's quite interesting that the ICC has not focused on the kinds of crimes which would be very clear, which would have a very clear consensus, for instance, like hijacking.

I'd be more sympathetic to an international criminal court if it just tried to focus on the international statute about hijacking. But no, the International Criminal Court has tried to include within its jurisdiction crimes that have not yet even been defined, like crimes of aggression. The U.N. has been trying for 50 years without much success to define what aggression is. And not surprisingly, that's very difficult because it is inevitably a contextual and political decision about what constitutes aggression, and people have very different concepts of what it is. It is very troubling to me that this kind of concept would be rolled into the ICC. It's a kind of concept that allows a great deal more discretion in enforcing than any kind of decision that we have left to our own independent counsel.

Some of the other kinds of crimes considered in the ICC also allow large elements of political discretion. For instance, I would refer to the ICC statute's definition of war crimes. It includes "intentionally directing attacks against civilian population or intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to the natural environment which would be excessive in relation to the military objective to be obtained."

This kind of provision requires the prosecutors and the judges of the ICC to compare the military objectives to how much incidental collateral damage is caused. That seems to me, again, a very open-ended kind of judgment that allows much more discretion than any kind of discretion that was allowed our own independent counsel. As John Bolton, the Under Secretary, has said, it's very unclear under that statute whether the United States could have been condemned for its bombing in Japan and Germany.

So, the open-ended nature of the crimes within the ICC are extremely troubling. I agree, some of the provisions like the Genocide Convention are a little clearer. But even those conventions leave out some of the U.S. reservations to those conventions that are clearly against our Constitution. So, there are a lot of unclear crimes, and some of the crimes that are clear, are clearly against our Constitution — for instance, parts of the Genocide Convention that allow conviction based merely on incitement.

Well, let's go from the first problem of politically driven misjudgments to the problem of a lack of accountability. The lack of accountability to the ICC comes from its lack — first of all, the separation of powers system. Unlike our own IC, which at least had independent and life-tenured judges appointing and monitoring the IC, the judges are elected by the same body that elects the prosecutor. There really is no separation of powers. And so, it violates a kind of first principle of U.S. constitutional structures that tries to confine the powers of an institution.

Moreover, while it said that the prosecutor is independent, independence, as we've learned from our own IC, is not a safeguard against all ills. Indeed, independent entities can easily be captured by one group or another. It's striking with our own IC that generally prosecutions against Democratic presidents were carried out by a Republican staff, and prosecutions against Republican Presidents and Democratic Staff.

Our experience of independent actors in the international realm suggests that this will be even a worse problem. International institutions are frequently driven by those with an agenda and rarely reflect neutral principles, of course, by the enemies of free speech — even the Secretary General, for instance, in his recent decision to have an exploration, an inquiry against the Jenin Massacres (Palestine), seems to only focus on the Jenin Massacres rather than the Palestine suicide bombings.

So, there is a real danger of a kind of high double-standards that one sees in the international law being brought into this context without the kinds of constraints that we would see against discretion, the kinds of constraints against accountability that we build into our normal prosecutorial system in the United States, and we learned to our great regret, were lost in the IC.

Indeed, in another sense, I think it's worse than the IC because, at least with the IC, or certainly with an ordinary prosecutor in the United States, we have civilians who are very much focused on that prosecutor. People are very much focused on that prosecutor because they fear that they may be prosecuted. They think that domestic prosecution will affect the crime rate in their jurisdiction. That's not going to happen with the IC. These are going to be large, symbolic prosecutions which aren't going to draw the attention of individual citizens, but of various interest groups who are going to be very interested in the symbolism of that prosecution. And that means you need more constraints in this context of the ICC, not fewer constraints with which the ICC is currently circumscribed, not the much fewer constraints that as compared to our normal kinds of prosecutions.

So, in summation, I would say that the ICC has the same risks as our own IC. While it may have been well-intentioned, it is the same kind of Utopian idea of taking politics out of politics and that in end only succeeds in discrediting the rule of law. I don't speak as someone who's necessarily unsympathetic to *ad hoc* tribunals, and I don't see why we can't have some of them when we have a consensus that aggressions or war crimes have been committed and when these crimes are carefully and clearly defined. Then we can have a tribunal to prosecute them. Nor would I object if we had an International Criminal Court that was limited to crimes of hijacking, which didn't have any elements of political discretion, so long as we had a better separation of powers system in the International Criminal Court.

Looking at our own experience with an unaccountable prosecutor with enormous discretion, we have a lot to fear. And I don't think anyone who is aware of our own experience can really be calm at looking at the ICC. Thank you very much.

MR. GEDE: Let me start off the questioning with some jurisdictional, constitutional questions, and then we'll get to some of the due process features.

Mr. CASEY, can you tell us what principles are involved that become the fundamental jurisprudence of the ICC, and describe for us the principle of territoriality versus universal principles of law that the court will have to start from? Where's the starting point here?

MR. CASEY: Well, the court will claim jurisdiction over the territory of all of the states' parties. It will also claim jurisdiction over the nationals of non-states parties, if the act involved took place in the territory of a state party.

That has been described as a form of universal jurisdiction. I mean, the idea is certainly an idea of universality. It's not technically universal jurisdiction, which is actually a very limited doctrine dealing with what you can criminalize on places like the high seas.

I think the most problematic part of the ICC Treaty is indeed the assertion that a treaty-based organization can exercise power over the nationals of countries that have not consented to the treaty. And I think that, frankly, is why it is not enough for the United States merely to repudiate President Clinton's signature on the treaty. Until the ICC says we will not attempt to go after people who have not consented to our jurisdiction, they're a threat and we're going to have to meet it.

MR. GEDE: Let me jump in on a due process question, right off the bat. Maybe Professor McGinnis or Mr. Casey can address it.

It was a fairly compelling point that Mr. Washburn made, that a jury trial of a notorious world criminal, such as Hitler or Milosevic or somebody of this sort, might be deleterious to the long-term health of jury trials. What's your response to that, Professor McGinnis?

PROFESSOR McGINNIS: As you see in my remarks, I'm not necessarily opposed to not having a jury trial, for instance, in the Nuremberg Trials or in an *ad hoc* tribunal. My complaint is not so much with the due process provisions of this Treaty. I think due process can and should sometimes be changed, and I actually don't think the U.S. system is the only system that is consonant with justice. My problem is entirely with the structure of the court and the discretion that is given. And so, perhaps Mr. Casey is in a better position to answer your question.

MR. CASEY: Well, I think the question, frankly, is not merely whether this court should have jury trials for everyone from all around the world. The question is, should Americans be entitled to jury trials. I don't think its necessarily unfair for someone like Slobodon Milosevic not to get a jury trial since he comes from a society that is a civil law country, and would not have been entitled to a jury anyway.

I think, however, that concepts of justice are very culturally based, and we have absolutely nothing to be ashamed of. I sometimes wonder what the State Department's problem is when it goes overseas to defend concepts like the jury trial. You know, call the Justice Department if you need help.

As Justice Story wrote, it's the foundation of the limits that our Founders considered necessary to avoid the abuse of power. So, I think if we are going to be a part of this institution, then we should demand that our traditions be respected.

MR. WASHBURN: If you've got an international court, this has to be a court in which countries come together to create it.

We cannot expect that a court so created is simply going to replicate our own national system. I have to say, with all due respect to Mr. Casey, that it's a rather arrogant assertion that a court, which in its nature has to be of this kind — that we can expect to make it a complete replication of our own system.

Furthermore, we have accepted courts and supported them. The Sierra Leone; the Cambodia effort, which crashed and burned; the East Timor effort; and indeed, the Rwanda and Yugoslavia Tribunals are all courts which did not simply copy U.S. courts.

Many countries took decisions to create a court like this. The court is not something of its own. It has been created by the countries that exercise their sovereign discretion to do it.

MR. GEDE: Can somebody point to precedent for the ICC? Do Nuremberg or Tokyo establish precedent, or was the jurisdiction that was being exercised there against the individuals involved an exercise of jurisdiction within that particular country?

MR. WASHBURN: Well, I think it's very clear. If you look at the way in which the Nuremberg court was created, it was created by an international agreement among the allied forces that set it up. Germany technically gave its consent to this because at the time that it was set up, the theory was that German sovereignty resided in the occupying forces. So, this is clearly established by a limited, be it admitted, but by an international agreement.

Obviously, the successor courts that followed in its train — the Rwanda and Yugoslav tribunals — by being established by the Security Council were established by a collective act of a considerable number of countries; a very large number of countries, if you consider that the Security Council, in theory, acts on behalf of all of the nations of the U.N.

MR. GEDE: Mr. Casey?

MR. CASEY: I think the point is well taken with respect to Nuremberg because — I mean, you call it an international court. In fact, it was a court that was set up by the United States, Britain, and Russia and France was permitted to join in later.

Using the sovereignty of Germany, it was not an international court: it was a German court. That's where the legal power came from— and the international community, let's be very clear, has no inchoate judicial power sort of floating out there in the ether, that it can call on. You need sovereigns to have judicial power. Even the Nuremberg court needed to look at the sovereignty of Germany. In the court's opinion, it makes very clear that that's what it's depending on, so I don't see Nuremberg as a precedent for creating an international court with sovereign power that hasn't been delegated from states.

MR. GEDE: Anybody else?

MR. STOELTING: I would just add that the question of whether a country can consent to have its citizens tried by an international criminal court should be a slam dunk. There simply is no question that a country can consent to have its citizens tried by its own courts or by an international court. And I would cite to the Gerard Wilson decision of the United States Supreme Court, saying that "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction." That's what countries do when they ratify the ICC Treaty.

It's speculated that one of the first cases might be Congo, which is a vast country with all kinds of armed bands, roving, perhaps committing crimes. The Congo may need help in prosecuting those people, and that's where the ICC may come in.

The question of non-state parties confuses the issue of a state party and an individual. Countries that don't ratify the ICC Treaty have absolutely no obligations under the Treaty. They don't have to do anything to support it. The only countries that have obligations under the Treaty are countries that ratify the Treaty, that want to be a part of it.

And as to citizens who commit crimes that may be within the jurisdiction of the Court, we've never taken the position that if you commit a crime abroad, you have a right to be tried by American courts. That's the opposite of what we do. It's always been, if you commit a crime abroad, you're at risk to be prosecuted by the court with jurisdiction over that territory.

MR. GEDE: Mr. McGinnis talked a little bit about military operations and the like. Where is a crime committed, especially in this high-tech world where a military commander can sit in Florida or at the central command and call the shots for military actions abroad, which actually occur abroad? If something is being alleged as a crime, where did it occur?

Mr. Stoelting, any thought on that?

MR. STOELTING: I mean, if you're asking about command responsibility, there are provisions for commanders having responsibility for war crimes and crimes against humanity that they know, or should have known, would occur under their

watch. That wouldn't exclude a commander who was not physically present when the crimes occurred. But the scope of the definition of the crimes — you have to keep in mind, it really picks up only plans or policies to encourage with knowledge and intent that war crimes and crimes against humanity will occur.

MR. GEDE: Professor McGinnis, I cut you off. I'm sorry.

PROFESSOR McGINNIS: Well, let me just go back to the Nuremberg point. I think the real distinction there, is that, there was a political decision taken as a consensus in the world that Germany was guilty of crimes of aggression. We set up a court to deal with the question of which individuals were responsible for that aggression. The Nuremberg tribunal did not make a decision about whether Germany was engaged in unjustified aggression.

My difficulty with the ICC is that it's going to allow a prosecutor and judges to make those better kinds of decisions, to balance, for instance in the context of a war crime, the damage to a civilian population and the military objectives.

I don't think we can give that kind of discretion to essentially non-accountable, non-sovereign actors with few constraints — and that's the reason I oppose it and do not think that these *ad hoc* tribunals represent substantial precedents.

MR. WASHBURN: Let me give you a straight answer to the question that you asked. Military lawyers, including one who participated in the U.S. delegation, to whom I had the opportunity to put precisely your question — he said that the rough and ready answer to it is that the crime occurs where the ordnance impacts. In the case of Osama bin Laden, in which we obviously had an act which must have been prepared and concerted in many different parts of the world, clearly the crime was committed when those planes rammed into the World Trade tower buildings.

MR. GEDE: Both proponents and opponents here have referred to the notion of the court having power over individuals and not states. You mentioned that at the beginning.

But Mr. Casey, you had a different perspective on that. You saw that as a negative and not as a positive. Could you describe what you mean.

MR. CASEY: Well, the ICC Treaty will have power over states to some extent. It will be able to ask them for assistance and even compel that assistance under its authority under the Treaty in some circumstances. But it will have jurisdiction only over individuals.

We talk about this as an international organization. International organizations don't have jurisdiction over individuals. States are international actors. It is an institution of government. It has the power over individuals that our own courts have. In other words, if the ICC wants to indict an American, it doesn't have to ask the State Department's permission. It acts directly on that individual. And if that individual, then, travels overseas, he may be arrested and sent to the ICC without reference to the United States. That's why it's so critical that this court has to meet the ordinary requirements that we consider necessary for an institution of government.

MR. GEDE: Mr. Washburn.

MR. WASHBURN: Well, it's a very existential question as to whether a court is an instrument of government in the sense I think Mr. Casey is trying to get across here.

The United States and most other advanced countries — despite Mr. Casey's adamant versions on the civil law system, courts are not intended to carry out the will of the state in the sense that a cabinet department or an armed force is supposed to carry out the will of the state. We expect courts to be independent and follow rules of law. We expect the judges will, in fact, not communicate with the Executive Branch over matters with which they are dealing.

There may be a larger sense in which you can call a court a part of an overall governance system. I leave that to you. But I do not think that this is an act of government. There is no executive branch. There's no state to which this court is attached. Were it to be attached to some larger structure, that would be world government, of which I assume no on in this room would approve.

The fact of the matter is that this is a court which has been created by individual states and governments in the fulfillment of their sovereignty. This is a court which is a consequence of eight years of very hard work by individual government delegations instructed by their governments through their sovereign processes to put an institution together. There was very vigorous representation of national interests, including by the United States, in the creation of this court. This court is derived from actions in pursuance of sovereignty by individual governments. It is not something that has somehow materialized out of an international ether, and we are suddenly surprised by finding its existence. It's a result of an extremely long process. I'm well aware of it because I participated in that process from the beginning.

You may have problems with the court, but you can't say that it is something that is somehow divorced from nation states and their sovereignty. We may feel that our sovereignty in some way or another is affronted by this court. I don't feel

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that way. I think this is an opportunity for leadership and action by the United States, and I think the United States made a dazzling display of its sovereign capabilities by the enormously expert and effective contributions it made to this court.

The court exists because other countries wanted it, fought for it, worked hard to get it, and they did so in the full exercise of their national sovereignties.

MR. GEDE: Professor McGinnis is poised to pounce here.

PROFESSOR McGINNIS: I certainly think this court is exercising governmental power in any core sense of governmental power. It's going to put people in jail without the consent of particular sovereigns. What could be more of an exercise of governmental powers than Utah.

It is true that sovereigns have brought this court into being. But that, of course, was true of the United States Constitution. A lot of states were sovereign and they breathed life into another juridical entity that went and had a life of its own. I think we have to understand that that is what is going on with respect to the court, and we have to hold it up to the same kinds of standards that we do to other kinds of constitutional mechanisms in trying to measure whether its structure is going to lead to accountability, and whether its structure is going to take away politically driven discretion. And it's on those kinds of features that I think the court falls short.

But I think it is a grave mistake to think that this is not governmental power. It is governmental power of the most fundamental kind to put people in jail, sometimes for the rest of their lives, and it is governmental power that is not, and quite understandably because of the theory behind the court, exercised by any sovereign, but is exercised even sometimes against the judgment at least of some sovereigns of the world.

So, it has to be measured and it has to be defined in a way that is going to at least meet the kind of standards for structural accountability that we see in other constitutive mechanisms that exercise governmental power in sovereign states whose political systems we respect, like the United States.

MR. GEDE: Let me ask the final moderator's question, then we'll open it up for questions from the audience. I'll make this between Mr. Washburn and Mr. Casey.

Mr. Washburn, could you describe or explain to us the principle of complementarity in the statute, including its exceptions — in other words, when it does not apply — Mr. Casey, your perspective on that.

MR. WASHBURN: Okay. I hope I can give a technical description of complementarity with which both Mr. Casey and I will be happy, so that we don't have to debate over that and can debate over other aspects of it.

As simply stated as I can make it, complementarity arises when a nation comes to the court and it has many different opportunities to do this— and this nation need not be a state party, incidentally.

Complementarity arises when a nation comes to the court and says you are addressing, investigating, prosecuting, trying, an individual with whom we have some kind of a jurisdictional nexus. And there are many different ways in which a nation could have that jurisdictional nexus. We intend to investigate, prosecute, try, or what have you, this individual ourselves. Therefore, we demand that you stand down, not pursue this further, and let us take over in this case with this individual.

The statute requires the court to do that, unless the judges determine — here are the exceptions you are asking for — that the state in question has no judicial system — if Somalia came in and asked for this, obviously the judges would not give it, or if Afghanistan came in and asked for this, you don't have a court system; you can't carry out what you are asking for — or the judicial system is not worthy of the name, it's a sham, it doesn't meet the international standards for an independent judicial system; or that the request is made in bad faith.

I was present when these exceptions were debated. The basis, obviously, for retaining this final judgment in the court in the case of the judges is that without these exceptions, any country could, under any circumstances, make this demand, if it had any reasonable jurisdictional nexus. The court would have to grant it. And the court would become an empty shell because no cases would come to the court except in those few cases where there was consent. But any country — most countries — if it didn't like the idea that the court was investigating somebody, could pull the case out and frustrate the court's purposes. This is very clearly stated by a wide range of nations.

A final thing to say about complementarity is that although the United States may not feel it is sufficiently complete, it fought very hard to get it and the phrasing of it in the statute was on the basis of the text provided by the United States. Thank you.

MR. CASEY: Well, complementarity is clearly the reason — I would bet a substantial sum that it's the reason — every one of the 67 parties that have joined the Treaty joined it. They all assume that it will protect them. I think they may ultimately be surprised because how complementarity is applied will depend entirely upon how the court chooses to apply it. There's no super-appellate court you can go to, to get its decision reversed.

But I think, from the perspective of the United States, complementarity is peculiarly problematic because under the Rome Statute, under Article 17, the court is freed of its obligations under complementarity, if it concludes that the proceedings in the targeted state were not conducted independently or impartially.

Well, we have a problem with that. Under our Constitution, the President of the United States is the commander and chief of the armed forces, and he is also the chief law enforcement officer. In any case that might come before the ICC, the President is a potential target. And in fact, if you look at the prosecution policies in the Hague, in the ICTY, he's the preferred target. They always want to get as high as possible. You don't make a career prosecuting privates.

The President has a conflict of interest. The men and women who will be investigating will work for him, and he is one of the people that needs to be investigated. I mean, it's one of the conundrums that was always used to justify the Independent Counsel, and I hope that we have learned our lesson, that it is better to depend upon the political structure of the Constitution, rather than to try to set up these extraconstitutional means.

But I think in any case, in our case the ICC has a ready-made excuse to ignore complementarity and to go after us whenever it chooses.

MR. GEDE: Thank you. Let's take 10 minutes for questions from the audience. There is a mic up here and I think it's working. So, unless you have a booming voice, please use the mic. But if you have a booming voice, please stand up and ask your question.

Yes, sir.

AUDIENCE PARTICIPANT: I'd like the panelists to comment on the accuracy of ICC's ability to compel production of witnesses and evidence for both prosecution and defense, particularly protection of the defendants if there is not sufficient cooperation from states in producing evidence for them.

MR. GEDE: Any member? Mr. Washburn.

MR. WASHBURN: All international organizations, unless they are to be part of a world government, have got an enforcement problem, and you're quite right to raise this, and I want to be equally candid in responding to it.

The effective functioning of this court will depend on the cooperation of states. In the case of states parties, those states are bound to provide that cooperation. In the case of a referral by the Security Council to the ICC under Chapter 7 of the U.N. Charter, states will be required by the mandatory powers of the Security Council under Chapter 7 to cooperate with the court. That would presumably include the United States, as well.

We can only look at the track record. The track record of the two *ad hoc* tribunals — and Mr. Casey's had more experience on this than I do, so he may correct me — is mixed. There's been good cooperation in some cases; not such good cooperation in others. You can have countries that play games with the court. You can have witnesses that can't be compelled because the court doesn't have physical enforcement powers. It has no constabulary, it has no police force. As a proponent of the court, I believe it would be undesirable for the court to have those powers because that would indeed turn it into an early element of world government.

The positive aspect of this is that we have found it possible to conduct fair trials in these two bodies, with witnesses present. Witnesses and victims do wish to come forward and to testify. There is a victims/witnesses unit, which is specifically designed to encourage that.

In the case of defense witnesses, this is the purpose of the defense counsel unit, which the registrar is now going to be bound to support and assist.

The registrar, under the Rome Statute, is required to assist defense counsel in bringing witnesses to the court and in making them available and supporting them to testify on behalf of the defense. I don't want to tell you that there are physical enforcement powers; there aren't. There will be problems in this area.

I believe that as the court takes hold and as countries are willing to cooperate with it and with the Chapter 7 powers that the Security Council can confer on the court, with skillful defense counsel and the court doing its best it can produce witnesses. If witnesses are not available, what will in most cases happen is that the prosecutor will not be able to make his case.

There will not be, using the standards of the court, the ability to convict someone simply because he or she has not been able to produce witnesses on their behalf.

AUDIENCE PARTICIPANT: Ken Jones from *The Congressional Quarterly*. Can the proponents address the question of whether there's something other than political judgment and distinguish between good bombing that we might do and bad bombing that Saddam Hussein may do? Good environmental damage that we might cause and bad environmental damage that others might?

MR. STOELTING: The questions before the court will not be, is this good bombing or is this bad bombing? The questions before the court are, were there crimes within the jurisdiction of this court that were committed? And those questions are questions that we have some history of dealing with. We have ten years of jurisprudence from the ICTY and the ICTR, a very extensive body of case law interpreting the very law that's to be applied by this institution. There's a very extensive body of commentary. There's legislative history of the court.

So, the question of how the law, which is clearly established law recognized by the United States and all governments of the world — the question of how the law will be applied to specific acts will be the same judgments that every judge and every prosecutor and defense lawyer deal with every day. What are the facts? What is the law? And, is there sufficient evidence of intent? Here, I think because the intent is at such a high level, that carves out an enormous body of acts.

There also is a provision in the Rome Statute that says that any ambiguities are to be construed in favor of the accused. And if there's any leeway in terms of interpreting the law, that leeway in interpretation is to go in favor of the accused.

MR. WASHBURN: I would simply somewhat generalize what David said. The kinds of issues to which you refer — the guidelines for the judges making them are spelled out in very great detail in both the Rome Statute, and furthermore the Elements of Crimes. The Elements of Crimes is a document that the United States negotiated, and on which it joined the consensus adopting it in the U.N. preparatory commission.

The Rome Statute and the Elements of Crimes are specifically created in extreme detail, in very great detail, to avoid excessive leeway in making those kinds of judgments. As David says, these kinds of judgments have to be made by judges all the time in applying the law to the facts. In the case of the Rome Statute and the Elements of Crimes, the countries creating these have done their very best to reduce the amount of interpretation or discretion on the part of judges on tough questions like this to the absolute minimum.

MR. GEDE: By body language, Professor McGinnis is ready to pounce again.

PROFESSOR McGINNIS: I just can't entirely agree with that. I mean, you can put in however much detail you want, but the facts are, to try to balance environmental damage and collateral damage to civilians against military objectives is an inherently open-ended inquiry that no matter how many words you put down in guidelines isn't going to erase the open-ended nature of that inquiry.

And of course, we haven't even discussed the crimes of aggression, which aren't even defined as we speak today, that are going to become part of this jurisdiction. And again, inevitably you have this political aspect of discretion. What troubles me, again — and I would make an analogy here — is that we have the ICC, prosecuting crimes that are so general and require so much political discretion that they actually resemble more a kind of common law of crimes.

Now, to be sure, there may be precedents the judges will use. But we, from very early on, rejected a kind of common law of crimes because we feared that that would give too much discretion to those who wanted to put people in jail. And I think it's even worse in the context of inevitably political judgments about aggression and balancing civilian and, indeed, environmental casualties with military objectives.

MR. GEDE: I've been given the high sign, and I'm afraid we're going to have to take our break. I apologize that there were two more hands for questions. Do we have five minutes, or — we need our five-minute break.

Before we take a five-minute break, these panel members will be here for a few minutes. Those who didn't get their questions answered, please grab them, but please thank them for their contribution. It was an excellent panel.

[1] Mr. Stoelting's comments are made in his personal capacity.

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FEDERALISM & SEPARATION OF POWERS

THE ROLE OF THE SENATE IN JUDICIAL CONFIRMATIONS*

Douglas Kmiec, *Dean, Columbus School of Law, Catholic University and Former U.S. Assistant Attorney General, Office of Legal Counsel*
Elliot Mincberg, *General Counsel, People for the American Way*
Doug Cox, *Gibson Dunn & Crutcher, moderator*

MR. COX: My name is Doug Cox and on behalf of the Federalist Society and its Federalism and Separation of Powers Practice Group, welcome to today's special event, a debate on the role of the Senate in judicial nominations.

Our formal topic is: Of Senate Default and Judicial Nominations. Does the Constitution Require the Full Senate to Act? We call it a debate, but we are going to be proceeding informally. We hope that once we've heard from our guests today, we are going to get some interesting questions from the audience, so we will be looking to you.

These days, the role of the Senate in judicial confirmations has become increasingly contentious. What little certainty we thought we had seems to be disappearing under the pressure of partisan politics. Take the role of the President. Most of us here today would agree that the Constitution grants the power to nominate judges, at least, to the President, and that the President alone has the power to nominate. He doesn't share that power with Congress or with the judiciary. After all, presidents and presidents alone have been nominating judges for 200 years.

But even today, that bedrock principle appears uncertain. Consider a recent insight offered by Senator Jeffords. Senator Jeffords is a lawyer and has spent the last 27 years in Congress. The functions and duties of his office are defined in the Constitution. As a member of Congress, he is constitutionally obligated to take an oath to support the Constitution. Thus, as a matter of professionalism, as well as patriotism, the Constitution must have been his daily study for 27 years. He has a very good basis to claim to be the real constitutional expert.

Senator Jeffords, with this background in mind, recently opined that he "slept better at night because he knew Senator Leahy was picking the judges." So, as he has observed from his expert perch, the functioning of the judicial nomination and confirmation process today, he perceives that the power of selecting judges belongs not to the President but to the Chairman of the Senate Judiciary Committee, an individual and office not mentioned in the Constitution.

A good case can be made that Senator Jeffords is not exaggerating, and that Senator Leahy is indeed picking the judges. To be sure, he is subject to political constraints and may suffer a political loss now and then, but the same is true of all Constitutional actors. His power to pick is also limited by the list of names that the President is good enough to submit to him.

It is not implausible today for a senator to conclude that by deciding for which judges to hold hearings, by making negative votes a matter of party discipline, and by a host of other maneuvers, Senator Leahy is *de facto* picking the nation's judges. Senator Jeffords' insight thus is not based on constitutional abstractions but on practical realities, and perhaps he is on to something.

In many disputes involving the separation of powers, the actual conduct of the executive and legislative branches function as a gloss on the meaning of the constitutional text. Certainly, all of the dueling statistics we've seen in recent weeks as to rates of confirmation under other presidents are designed to make prior practice a touchstone for the reasonable exercise of the Senate's constitutional advice and consent power. And perhaps the practice of permitting the Chairman of the Senate Judiciary Committee to exercise the *de facto* veto on judicial nominations is simply the most recent gloss on the presidential nomination power.

Well, no doubt our guests will be able to clear all this up. We are honored to have with us today — and we are very grateful to have with us today — two very distinguished gentlemen. Our first speaker will be Douglas Kmiec, Dean of the Catholic University Law School. Dean Kmiec is one of the nation's leading experts in constitutional law, just like Senator Jeffords. Prior to coming to Catholic, he taught constitutional law at Pepperdine and Notre Dame. He is the author or co-author of numerous books, and he headed the Justice Department Office of Legal Counsel under Presidents Reagan and Bush. He received his law degree from the University of Southern California.

Elliot Mincberg, our other guest, will respond to Dean KMIEC and offer some additional thoughts. He is Vice President, General Counsel and Legal Education Policy Director of the People for the American Way Foundation, an organization that promotes public education and constitutional and civil rights, and an organization that is no stranger to fights over judicial confirmation. In addition, he serves as Vice President for People for the America Way. He also is an expert in constitutional law, with an emphasis on First Amendment law, and he has served as counsel in a number of important First Amendment cases.

Prior to joining the foundation, he was a partner at Hogan and Hartson. He received his law degree from Harvard.

As I mentioned at the outset, our guests will share their thoughts with us, and then we will open things up for questions from the audience.

MR. KMIEC: Well, thank you, Doug. I am grateful to the Federalist Society and to all of you for allowing me to address this important topic and of course it is an honor to be put in the pantheon of constitutional scholars as Jim Jeffords.

This is a very important and vital topic, and while I am indeed honored to address it and to participate with Elliot to explore it with you, it will also not only prove I hope elucidating but it will eliminate any possible chance I may have had of judicial nomination.

But that is okay. That will merely put me in the ranks of a large number of other people who are great distinguished rank in the profession, in the academy and elsewhere, and who deserve to be on the bench but, in fact, are finding it far too difficult and far too problematic to secure that position of public service.

There is little question, I think in the reasonable mind, that President Bush's judicial nominees have been singled out for particular disfavor. One can play with a great many statistics, and I'll just give you the one which I think is the most relevant. If you compare the relevant period of time, namely, the early period of the presidential administration, the President has put forward 103 nominations — at least I think that was the number earlier this week. Of that number, 55 percent have been confirmed. In the same period of time for Mr. Clinton, it was 90 percent. In the same period of time for his father, it was 93 percent. In the same period of time for President Reagan, it was 98 percent. There is something amiss.

Now, when you explore the public reasons given for what is amiss, normally what you get is a version of tit for tat. There are several problems with that argument. The first is that the percentages indicate it is at best only partially true. The second is that the argument takes us nowhere. Having been married for some 29 years, I am familiar with a certain line of argumentation.

One can spend a great deal of time asking who is the last one to fail to take out the garbage, to fail to hang the key on the hook, or to turn off the lights in the basement. These conversations tend to be pointless, recriminating and lead to larger issues.

They also do absolutely nothing about the garbage, the light in the basement or the key that's missing from the hook. And the argument that is given by the Democrats as to why only 55 percent of these talented people, including people like Estrada, John Roberts, Jeff Sutton, Mike McConnell, have not been heard from is equally unavailing and pointless.

You get a second line of argument and that is "Well it's not just that you did it to us," which of course as I said at best only partially true, "but it's also that we just don't like you." And the syllogism runs something like this. President Reagan and President Bush were particularly good at nominating people who would follow their judicial philosophy; President Clinton apparently was busy doing other things and did not have time to appoint members to the bench who would follow his judicial philosophy and, therefore, by indirect implicit unremunerated pre-numeral delegation, the Senate Judiciary Committee and its Chairman have taken up this responsibility. There are several problems with this argument as well. They are all relatively patent.

The first is, it's hardly true. Yes, Mr. Clinton did appoint a large number of people to the bench and yes, they are discernibly different than Reagan and Bush nominees, but they are not different so much on ideology in a political sense, they are different on whether or not one observes the Constitution. If, in fact, one has a familiarity with federal state relations and their proper orientation, a familiarity with text and original understanding, and a desire to have principles of nondiscrimination based on race, then, yes, you can say there is a difference between Reagan and Bush nominees and at least some of those that now grace the bench because of the previous president.

And of course, the Senate Judiciary Committee has no presidential prerogative to step in for him. But worst of all about this ideological balancing argument is that, first of all, ideology is not defined and balancing is not defined and the authority to do it is nonexistence and perniciously it is a nontrivial attempt to destroy judicial independence. Insofar as it involves untenable questioning or promises in the context of the confirmation proceedings, it simply cannot be tolerated as a respectable academic view.

So, I think we have a problem. The problem can be stated in various ways. The Judicial Conference of the United States has a list that they keep of the number of judicial emergencies in the United States. It's a terminology that I don't think is quite saturated into the public mind yet. You know, we are going home on the Metro — oh my goodness, there's a judicial emergency.

I watched Dick Leon take his investiture yesterday with great grace and applause, deservedly so. But I also thought of the poor man getting the case docket he was about to get; and his district is better than some others.

So, here's the question. Is there a constitutional default? Yes. Is it an abuse of constitutional authority for what's taking place? The answer is yes. Now, the critical question — can this abuse be remedied? At its most general level, the answer is remedied how? That's another question and not an answer. But most likely, through the people and their choice of senatorial representatives, which is a long-term answer and a true one to our political process, but not necessarily an immediately hopeful one. This led me to focus, for purposes of our discussion here this afternoon, not just on the general default but on the specific means by which the Senate Judiciary Committee, under the leadership of Mr. Leahy, is proceeding.

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And that means is, of course, to defeat judicial nominees not only by stall and delay, but presumably in committee, as was done with Charles Pickering. Now the question is, is that constitutionally permissible and authorized? I will make the case here this afternoon that it is not.

Now, let's do some constitutional basics. There is no question but that the Senate has broad authority to set its own rules. I notice that Elliot has a Cato Constitution, which I think is generally the same Constitution as that adopted in 1787 — except that the Declaration of Independence is Article 1.

In Article 1, Section 5, it provides that each House may determine the rules of its own proceedings. This is, of course, quite a broad authority but it is not an unlimited authority. No one would ever contemplate that Senate committees could be organized around impermissible racial or gender lines, nor would one assume some facetious notion that the Senate Judiciary Committee can undertake to decide cases or controversies — a power obviously given, the last time I looked, in Article 3 to the courts. And I would submit that there is no reason to believe that the Senate Judiciary Committee has the authority to defeat a judicial nominee within its own ranks without sending that matter to the full Senate.

I believe the Senate believes this as well. If you look at Rule 31 of the Senate Rules, it provides that the final question of every nomination shall be, "will the Senate" — notice it's not ten Democratic members of the Senate Judiciary Committee — "will the Senate advise and consent to this nomination?"

Beyond the Senate rule, it is useful to look where it is always useful look if one wants to construe the Constitution: the text of the Constitution. The text of the Constitution provides in Article II, Section 2, that the President — as Doug has already affirmed, notwithstanding Mr. Jeffords' somewhat interesting opinion — the President shall nominate and by and with the advice of the Senate (again, not the Senate Judiciary Committee) appoint judges of the Supreme Court, etc. This is a proposition that was early confirmed by a Senate resolution found in the Executive Journal of 1789, which provides that all questions shall be put by the President of the Senate, and the Senators shall signify their assent or dissent, by answering — I love to say it this way — *vive voce*, aye or nay.

Now, that text is bolstered in a very important way, and in an unequivocal way, by the Federalist Papers. The Federalist Papers are not the Constitution, but they are helpful guides to the understanding of the Constitution.

Federalist 76 and 77 are replete with references from Alexander Hamilton in his defense of this particular organization of the appointment power, with the proposition that the Senate check will be one exercised "by the whole body, by an entire branch of the legislature." This is not just casual language. This is not just throw-away language that Alexander Hamilton was including for purposes of rhetorical flourish. This was reflecting the Constitutional Convention's specific rejection of having a nomination process checked by a smaller body because the example was before them of the appointments by the governor of New York, which were subject to confirmation by a small council of advisors. Hamilton said that was a sure prescription for disaster or, in his words, every mere council of appointment, however constituted, will be a conclave in which cabal and intrigue will have their full scope. Hamilton makes clear in Federalist 76 and 77 that small groups given the check on the appointment power are more subject to targeted improper influence and are far less accountable than the full body, the entire legislative branch, that is contemplated by the Appointments Clause in the Constitution. In his words, "If a small committee or council is given the confirmatory authority, all idea of responsibility is lost."

We are living that reality. All idea of constitutional responsibility has been lost. And worse than lost, it is now starting to invade, in ways that even Hamilton couldn't contemplate, the executive function. Hamilton asked the question rhetorically in the Federalist Papers, could it be that giving the full Senate a confirmation role would somehow put the Senate in the position of extorting powers from the Executive that rightfully belong in the Executive? And he answered his own question by saying, in relation to what objects, what could the full Senate possibly be asking of the Executive to take away the Executive's power?

We know that since Senator Leahy has determined that his committee should in fact be the cabal that Alexander Hamilton feared, we know what is happening. The committee is now asking for the deliberative internal documents of the Solicitor General of the United States, not for serious, necessary review of a nominee but for sheer political harassment. And the litigation policy and strategy of cert-worthy cases and strategy through the lower courts is something, quite frankly, that is not subject to be bargained for in a matter of confirmation. And to suggest it in the context of Mr. Estrada's nomination is, I think, one of the lowest moments in the history of that committee.

Beyond text, beyond context, we have historical practice. And here is the historical practice. Not a single Supreme Court nominee has ever been meaningfully defeated in the committee. Yes, it's true that Homer Thornbury didn't get to the full Senate floor. It's also true that Abe Fortas got defeated, and therefore there was no room for Homer on the bench. Aside from that one little historical fillip, every Supreme Court nominee has gone to the full Senate. And therefore, it's not surprising that Mr. Daschel* and others entered into an agreement at the start of this Congress that that's how Supreme Court nominees would be treated. There is no justifiable basis not to treat lower court nominees in the same fashion.

Now, what's the historical practice on non-Supreme Court nominees? Here, I rely upon the Congressional Research Service and its own report. It's own report is that, by any way you want to count it, at most, there have been four nominees in the entire recorded history of our nation that have been defeated in the committee. And if you look closely at those four nominations, what you discover is that three of those four are not really truly defeats in the committee but in fact very late

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nominations in a presidential administration that lapsed, or could not be taken after defeat or non-recommendation in the committee to the full Senate. Only one case in my judgment — that of Jeff Sessions in 1986 — is the historical anomaly.

Now, if text and context and historical practice is not enough to guide us, then maybe we should — and I say this with some trepidation — look at what the legal academy is thinking. Well, a member of the legal academy, not nearly in the same pantheon as Jeffords and KMIEC, but Larry Tribe has argued in his book that what matters most is that 100 Senators of diverse backgrounds and philosophies will vote on the confirmation of any judicial nominee.

When we look at the modern scholarship that emerged about the Senate Judiciary Committee, and it was enormous after the Bork experience, the typical recommendation made across the political spectrum was not to enhance or expand the role of the Senate Judiciary Committee but to lessen it. In fact, David O'Brien, in his report called "Judicial Roulette — the Report of the 20th Century Task Force" recommended that the Judiciary Committee be avoided altogether.

Other reports argued that the way in which to secure more "mainstream" candidates was to have a constitutional amendment that would require not majority within the Senate for approval but two-thirds approval. Notice that none of these scholarly inquiries assume that the question is disposed of with finality in the Senate Judicary Committee.

That's text; that's context; that's historical practice; that's modern commentary about the Committee and its role. Where does this leave us in terms of a constitutional violation? This is the separation of powers section of this wonderful society. We all know that a separation of powers violation occurs under our jurisprudence, either when one branch usurps the authority of another or when one branch undermines the independence of a coordinate, co-equal branch. I think we are there, ladies and gentlemen. Should there be a judicial remedy? It's hard for me to contemplate that.

Justice Kennedy wrote some time ago, "It remains one of the most vital functions of this Court to police with care the separation of the governing powers. When structure fails, liberty is always in peril." Is there a basis for judicial review and intervention to correct this mischief? One would hope it would not come to this. But are we far away from what the Court invalidated as a legislative veto, a committee attempting to affect others outside of its own branch, contrary to the single finely wrought procedure outlined in the Constitution itself and its own history? Are we very far away from executive impoundment? Presidents who have assumed the ability, contrary to specific and undeniable statutory mandates, not to follow those mandates?

Yes. I know what you're thinking; I hear it. *Nixon v. United States* — what's he going to do with *Nixon v. United States*? Not Richard; Walter. And, of course we know the issue there was the power of the Senate to arrange itself so that a committee basically conducted the trial and made a report — and here's the critical difference, of course — made a report to the full Senate for ultimate deliberation and disposition. In fact, Senate Rule 11, which was relevant in that case, explicitly guaranteed that the full Senate would determine the competency and the relevancy of the evidence itself, and if it so needed to send for witnesses to further augment the record before reaching its own conclusion.

Nixon's rationale is that judicial involvement in impeachments would undermine the intended Constitutional check or unhinge considerations of finality. And in context, it is a quite sensible ruling on that score. But in this instance, the opinion not only does not undermine the argument I'm suggesting, it actually supports it because a lawsuit challenging the absence of full Senate action on judicial nominees promotes a constitutional check and promotes finality, and does not in the least undermine the judicial or Senate function. It advocates it.

Well, Doug is being generous, but he's also pointing to the watch. And so, let me conclude. Judicial intervention would not be my preferred course. But separation of powers violations are not invisible to jurisprudence, nor can they be. At some point, a line is overstepped.

Let this discussion today be a public invitation to the senator from New England and his colleagues to exercise not abuse of authority but stewardship — stewardship of the responsible power that he's been given. And let him take steps to expand the agreement that already exists, that every Supreme Court nominee will go to the floor but also that every judicial nominee will go to the floor for ultimate disposition. If he is not prepared to do that, let at least the discussion begin that that should happen where there are undeniable judicial emergencies, as defined by the Judicial Conference, and where the nominees relate to those vacancies.

If that is not possible, then it seems to me that it is not only right but a duty to contemplate litigation and to contemplate other strategies in the advice of the President that may suggest, properly, under Senate Rules seeking to avoid the Committee altogether — a prospect that is possible under the Senate Rules but I admit to you is quite fanciful. It can get matters to the floor, but it can get matters to the floor for no particular purpose because one can imagine the body protecting its committee structure, as it should, when it is responsibly performing that structure.

It has been said by one senator that "every senator can vote against any nominee; every senator has that right. They can vote against them in the Judiciary Committee and on the floor. But it is the responsibility of the U.S. Senate to at least bring them to a vote." Those were the words of Patrick Leahy in 1997. But of course, that was then, and this is now.

The People for the American Way have properly pointed out in their materials that he was referencing not the failure to bring a nominee forward after a committee action, but the failure to call someone off the Executive Calendar. But I think the principle is the same, and the acknowledgement of the importance of full Senate deliberation is the same.

Madison, as you know, told us that the very definition of tyranny is the unification of the three powers into a single

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hand. Friends, ladies and gentlemen, the undoing of the effective exercise of the three powers is no less tyrannical.

Thank you very much.

MR. MINCBERG: It's always a pleasure to follow Doug to the platform at these events. And I want to thank the Federalist Society for inviting me to be here. As I've said sometimes on other occasions like this, I feel very much like Daniel being invited to the Lion's den. I hope you'll treat me as well as the lions treated Daniel.

I'm glad that Doug used one particular word in his remarks. He used the word "fanciful." I think, frankly, that is the best description I can think of concerning the view that it violates the Constitution for the full Senate not to vote on nominees. I think it is a fanciful point of view. I will support that for you through looking at the words of the Constitution — yes, the Cato Institute version. I wanted to be sure you guys would accept that I was looking at the right version. I'll also look to the historical precedents and what it would all mean, and then talk a little bit about the real way to solve the issues with respect to the judiciary and the appointment of the judiciary; something we at People For care very much about.

Now, it's absolutely correct that the words of the Constitution say that the President shall appoint judges with the advice and consent of the Senate. In other words, for a judge to be confirmed, they clearly must be voted on by the full Senate. A committee would not do. And that, I submit, is what Professor Tribe and Alexander Hamilton and all the other people that were talked about by Doug are really referring to: that notion of a confirmation having to come from the full Senate.

But nowhere in that article of the Constitution does it breathe a word to suggest that the Senate must actually vote in full on a nominee, particularly when, as we've seen for hundreds of years, much of the business of the Senate is done through its committees. The Constitution also says, for example, that the President is to recommend legislation to the Congress. Does that mean that the Congress has committed a constitutional violation every time the full Congress doesn't vote? Of course not. But don't listen to me; don't listen to people like Akil Amar, who have said the same thing. Listen instead to a founding member of the Federalist Society, Gary Lawson, who wrote the following several years ago.

"The Constitution," he says, "imposes no specific obligation on the Senate to act on the President's recommendations with respect to appointment or," he said, "even with respect to treaties. The Senate could simply refuse to consider or vote on all presidential appointments or treaties." Professor Lawson contrasts this, for example, with Article V of the Constitution, which is quite specific. Article V says that when the requisite number of states say so, Congress shall call a constitutional convention. So, as Professor Lawson points out, the Founders knew how to mandate action by the full Congress when they wanted to. They did not choose to do so with respect to Presidential appointments. And that, it seems to me, ends the argument from the perspective of the constitutional text.

But go further. Look further at some of what's been suggested. Look at the *U.S. v. Nixon* case, for example. Consider what the Constitution actually says there. The Constitution says, "The Senate shall have the sole power to try all impeachments." It doesn't say the Senate Judiciary Committee. If there was ever an argument, in terms of literal reading, to say that it ought to be that the full Senate should act, it would be that.

But in fact, as Doug has conceded, the Supreme Court ruled that the full Senate did not have to sit over every minute of the trial, although of course they must do the final vote. Why is that? Because, again, the Constitution says so, quite explicitly. Two-thirds of the members must vote with respect to an impeachment. So, based on pure text of the Constitution, I think it is frankly a no-brainer that the Constitution does not require the full Senate to take action once the Senate Judiciary Committee has decided not to confirm a particular judicial nominee.

But apply this — if you take Doug's theory seriously — to what it would mean. Look at, for example, the literally tens and hundreds of nominations that have never been voted on at all. Look at what happened under the Clinton Administration, where, between 1996 and 2000, just for the court of appeals alone, more than 40 percent of the people that the President nominated, never, ever got a vote. Was it a constitutional violation each time that didn't happen? Is the constitutional violation made worse because the committee acts and the full Senate doesn't act? Of course not. We argued strenuously, as did Senator Leahy, that the Senate should have acted on more of those nominees than they did. But the notion that it's a constitutional violation just doesn't cut it.

Look at some other examples. After all, the Constitution doesn't treat judges in one place alone. That advice and consent power applies to ambassadors and to all officers of the United States. So under Doug's theory, therefore, when the full Senate refused to vote on the nomination of William Weld as an ambassador, that was a violation of the Constitution. Somebody should have filed a lawsuit. James Hormel in fact was approved by the majority of the Committee that considered his nomination as an ambassador. There were only two votes against him in the Committee. Nonetheless, Senator Helms put a hold on his nomination and the full Senate didn't vote on it. Was that a constitutional violation? I would have loved to have seen Doug file that suit for Ambassador Hormel.

My favorite example is Bill Lann Lee. Bill Lann Lee was nominated to the position of the head of the Civil Rights Division under President Clinton. And he didn't have enough votes to get out of committee. Democrats on the committee, and, by the way, Senator Spector, argued that the full Senate ought to consider that nomination. It seems to me, from a political perspective, there's a stronger argument for that than with respect to judges because, after all, officers are there to

do the work of the President, and there's a pretty good argument that if the President doesn't have the people he wants to carry out his job, his job is being interfered with in a very direct way.

Here's what Senator Hatch, who now of course argues that the full Senate should vote on all of Bush's judicial nominees, said. He was asked, isn't this an issue of such importance that the full Senate should pass on it? Senator Hatch said, "No. That's what the Senate Judiciary Committees job is to do; to make these determinations." We're the confirming committee, and if the person doesn't have the votes to come out of the committee — and Bill Lann Lee did not — that should end it." To quote my friend Doug, I guess that was then and this is now.

Now, with respect to the analogy to the Supreme Court, it is certainly true that the Senate, by tradition, has agreed to consider all Supreme Court nominations. That's a tradition that the Senate has had and that, frankly, I think the Democrats deserve credit for continuing, rather than the approbation that they've gotten. But with respect to previous nominees, if you look at the period — and I look at the same Congressional Research-Service report that Doug does — if you look at the period since 1980, there in fact have been six nominees to various courts — Senator Sections was one of them; so was Kenneth Reiskamp and a number of others — who were not able to get enough votes to get out of committee. Of those six, only one got a vote on the full Senate floor. As to the timing issue, Reiskamp was defeated in April. Bernard Siegan was defeated in July. I see no reason why you can argue that the congressional calendar would have made it impossible to have voted on those folks. The fact is, there is no respectable constitutional argument for the position that the full Senate ought to be voting on each nomination that comes through. If it did, Senator Hatch, Senator Lott, and all the rest, committed more constitutional violations than I can count during the years 1996 to 2000.

That, I think, brings us pretty directly to the question that I think we all agree is an issue that ought to be looked at what do we do about the judicial confirmation issue? There is no question that what has happened since the mid-1990s has caused the situation to deteriorate quite significantly. To his credit — whether or not it was because he was distracted by other things, I certainly can't say — President Clinton did not, in his nomination process, make an attempt to push the judiciary as far to the left, one might say, as has been pushed by some of his predecessors to the right — something that a number of my progressive friends were quite critical of President Clinton for doing.

For example, look at his Supreme Court nominees of Ginsburg and Breyer. On both of those, he consulted with Senator Hatch, even when Senator Hatch was not chair of the Judiciary Committee, before he made those nominations. He continued that process of consultation with respect to lower court nominees. His reward was an unprecedented blockade that occurred, beginning in 1996. I gave some of the statistics for that before.

What's been the response of Senator Leahy? So far, since last July when Senator Leahy took over the Senate Judiciary Committee and when the full Senate became Democratic, 57 Bush nominees had been confirmed. That is three times the number that were confirmed in the first year of the first Bush Administration; more than twice the number than was confirmed in the Clinton Administration's first year. And if you compare it to years like 1996 when the Senate was under Republican control, it outclasses it incredibly. Do you know how many court of appeals nominees were confirmed in 1996 by the Republican controlled Senate? Zero. Not one. If there was anything that was a constitutional violation, I would like to see Doug take that case up to the Supreme Court or some place else.

In fact, we can quibble about whether it's appropriate to look at numbers and percentages all day long. But the fact is, in reality, it is certainly true that the second President Bush has done a very good job, and I give those of you who have populated his counsel's office credit for nominating judges more quickly than his predecessors did on either the Republican or the Democratic side. But there's only so much time one has to process nominations. Even if they submitted 300 nominees, there would only be so much time to process those that have been through.

But if you don't like my numbers and you prefer Doug's percentages, let's look at one other statistic. That is the number of vacancies on the courts. In 1995, just before the Senate was taken over by Senator Lott and other Republicans here were about 65 vacancies on the federal courts. As of last July, just before Senator Jeffords' historic switch, the number of vacancies that resulted from all the delays that we've talked about almost doubled to 111. The number today, for the first time in more than six years, has been reduced to 86.

So, I think that if you're looking at the actual performance of what has happened, the assertions that Doug has made with respect to Senator Leahy are some that he ought to take back. He won't, but he ought to, because Senator Leahy's done an excellent job at trying to deal with this issue.

What's the real solution? After all, it is certainly true that there are nominees that have been made by President Bush, that we have opposed, other groups have opposed, and I suspect members of the Senate Judiciary Committee will vote down. Some may even be voted down in the full Senate, depending on what happens in the future. But is there a way out of some of this? I think there actually is, if in fact your members in the White House, and the President, were truly as interested in solving judicial vacancies as in achieving other objectives.

The President announced when he campaigned that he was looking for judges and justices in the mold of Scalia and Thomas. Is it any wonder that Democrats and progressives are going to be skeptical, are going to be concerned, with respect to nominees in that mold? But, if in fact — and Senate members have pleaded with the Administration for this I don't know how many times — the Administration were more interested in putting people through, conservative nonetheless, but not

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quite in that Scalia and Thomas mold, and tried to do some genuine bipartisan consultation, as President Clinton did with respsect to a number of district court and court of appeals nominees, I think you could increase the number of people confirmed still further. But as long as members of this Society and members of the Administration are more interested in pushing the Supreme Court and the federal courts as far to the right as Scalia and Thomas are, as long as they're more interested in that than in actually filling judicial vacancies, I predict this problem will not go away because we and others who care about this issue are equally determined to say that the federal courts should truly be an independent check, and should not in fact be captured.

Yes, it is true. The President has every right to take judicial philosophy into account when making these nominations. But by that same token, so does the Senate have every right to take that into account in its processing. True peace will come if there is genuine bipartisan cooperation on this issue — something we and others have called forever a long time. That doesn't just involve the Democrats and the Republicans in the Senate. It involves the Republicans in the White House, as well.

Let me end with one final note, the attack on Senator Leahy with respect to records of the Justice Department relating to nominees. I have to remind Doug that in the days of the William Rehnquist nominations, which occurred during Republican control, with respect to the Bork nomination, with respect to several other nominations, as was recently mentioned in the *Legal Times*, memos from the Justice Department have, in fact, been looked at in reviewing the nominees' qualifications, and I don't think that comes as any surprise. The notion that Senator Leahy is attempting a partisan witch hunt with respect to any particular nominee frankly does not have support in fact.

I think it would make much more sense to spend less time debating the constitutional theory, which again, to borrow — and use a little out of context — Doug's word, is fanciful. It would make a lot more sense to spend less time debating that constitutional argument and instead talking about whether or not it is possible that maybe some genuine bipartisan cooperation could be found in a way that would, in fact, allow more of the vacancies to be filled without jeopardizing, in our view, the precious rights and liberties that the independent judiciary protects.

Thank you.

MR. COX: Well, we've heard strong opinions, strongly held, and our format doesn't permit rebuttal, so no one's going to be leaping for anyone else's throat up here. But I think both of our speakers have given you, the audience, a target-rich environment.

MR. MINCBERG: Do you have a bull's eye that I could stand behind?

MR. COX: Not just you by any means. I think that many people could have been surprised at the notion of where the Dean ended up with his litigation suggestion.

So, questions. Gene.

GENE MEYER: I'm interested in whether Doug has a response on the constitutional question. It was a very interesting argument, but I wasn't sure how he'd respond to it. And I wanted to ask Elliot, I don't know the numbers, but of the number with Clinton, how many of that 40 percent that were nominated in that last three months before the end of term.

MR. KMIEC: My response to the textual argument that Elliot made would be this. I don't think there's any either textual or contextual support for drawing a distinction between the power to confirm and the power to consider. I believe Alexander Hamilton makes it plan in the Federalist Paper, and I'll just quote him, that " the President is bound to submit the propriety of his choice", not just for purposes of confirmation, but in Hamilton's words, to the discussion and determination of a different and independent body, namely — again, quoting Hamilton in the specific — "the entire branch of the legislature."

So, it's very clear to me from the reading of the Federalist Papers and the arguments that Hamilton was seeking to reject — namely, the argument in favor of a smaller group and a committee or a council — that he was finding security in the size of the group and the nature of its deliberation, not just in terms of somebody that the smaller group likes as a result of cabal or intrigue, who managed to make it to the full Senate, and therefore you can now allow for the rubber stamp of the Senate floor action. That's not what was contemplated by our Founders, and I don't think that's what's envisioned by the text. So, that would be my answer to that, Gene.

I do think there is a difference, by the way, between *Nixon* and this case. The text of the *Nixon* case talks about the sole power to try impeachments. If ever there was language in the constitutional text that invites courts to stay out, sole powers language does that. And then you factor in the notion that the judiciary itself would have its function compromised by engaging in review — you have to remember that the judiciary not only has an impeachment function, but it has the function of trying the criminal cases that often parallel, as it did in Mr. Nixon's case. So, I think there are responses on both the textual as well as the precedential issue.

Elliot.

MR. MINCBERG: I'll answer Gene's question. With respect, Doug, I don't think your responses really cut it, particularly since it's clear that what Hamilton was talking about was a council that would have the power to approve nominees, which is a critical difference.

But with respect to Gene's question, I don't have the numbers in front of me, and we do have them on our report that we publish on our website. But I can recall a number of examples of people who literally waited years and years, sometimes without a hearing, sometimes without a vote. I think, for example, about the 5th Circuit. There were two nominees — Jorge Rangel and Enrique Moreno, who collectively, between them, waited, I think it was something like three and a half years, without as much as a hearing. Both were nominated to the 5th Circuit Court of Appeals, in plenty of advance time prior to a Presidential election. And I will say, at the time, beginning in very early 1996, and more recently in '99, even before 2000, some interest groups on the conservative side made quite clear their objectives. They wanted to stop any more nominees, as many as they could, because they wanted to preserve as many as possible for a potential future Republican president to fill. It didn't quite work out in '96. It did work out in 2000. And there's no question that stall had occurred for all that time, as I think Doug and I both agree, is part of what has hurt the atmosphere on that issue now.

MR. KMIEC: Although, let me suggest, we are now fully into the tit-for-tat marital dispute form of argumentation, which I think gets us nowhere.

MR. MINCBERG: No — I was only responding to Gene's question on that. That is certainly not my reasoning. I am more than willing to say, just based on the text of the Constitution, this argument doesn't cut it.

MR. KMIEC: But Elliot, it seems to me that you made essentially two arguments. You made an argument that they did it to us — argument number one — and the argument that the only way out of this impasse is if you give us people that we politically like. And the point, I think, of the President and the point of people advising the President is that this isn't a question of partisanship. This isn't a question of Republican or Democrat. This is a question of fidelity to the text and structure and history of the Constitution.

To the extent that there were delays on nominees in the Clinton Administration, most of those who were delayed were delayed because they had a record of judicial performance or a record that illustrated that they had a fascination with implied causes of action, for reading federal statutes in ways that could not possibly be governed by the text and that was largely governed by their own desire for a particular outcome.

It seems to me that those are two qualitatively different objections. One is an objection that says we want an outcome. We don't like the fact that states have certain immunity from certain federal causes of action; we don't like the outcome that the Commerce power may have a limit to it; we don't like the outcome that people with religious beliefs do not have to be discriminated against in the context of federal programs. Those are objections that are basically political objections that have great resonance in the political convention but should have no resonance before a Senate Judiciary Committee.

MR. MINCBERG: I find it fascinating that Doug decries the tit-for-tat and then proceeds to go right to it. The notion that the Clinton nominees were delayed because they were wacko judicial activists is frankly wacko. The two that I mentioned, Moreno and Rangel, no one raised an objection to that. Our current Attorney General, John Ashcroft, delayed a white-shoe litigator from Arnold & Porter, Margaret Morrow, for over three years without any evidence of judicial activism. But even if you believe those things to be true, if anything, that would reinforce the notion that Democrats now have, that we need to be awfully careful about who comes in.

It is certainly true that President Clinton, for better or for worse — and again, some of my liberal friends weren't too crazy about it — did, in fact, take seriously the advice part of advice and consent, did take advice in advance of nomination. It is certainly not unconstitutional for President Bush to do the same. That kind of work, I think, would in fact bring us out of this problem.

AUDIENCE PARTICIPANT: Will the full Senate vote on nominees that have gotten out of committee?

MR. MINCBERG: I don't know. You'd have to talk to Senator Daschle about that. But again, I would be very surprised if the people who have been approved by the Committee are not voted on by the full Senate, at least by the time that they adjourn. Whether it's going to happen between now and July, I don't know. The President just yesterday asked the full Senate and House to, before they recess, agree on a major restructuring of the government and presumably to confirm whoever he nominates to that particular position. They might be busy, but I would be very surprised if the people approved by the Judiciary Committee don't get full votes before Congress adjourns — again, a marked departure from what happened prior to that when the Republicans were in control.

AUDIENCE PARTICIPANT: Would you agree that the legal issue of confirmation is the same for judicial nominations as Executive Branch nominees?

MR. KMIEC: I think textually, it is the same. I can't draw any distinctions based on just the plain reading of the text and, therefore, I would concede that point to Elliot. But I do think, to the extent that we are informed in our understanding of the text by Federalist Paper argument or by tradition that has followed from the beginning, that judicial nominees have been set out in a particular way both by the Founders and by the practice that perhaps does not extend to executive nominees.

It does seem to me, as Elliot's argument makes plain, that a good number of executive nominees have been treated differently; certainly far differently than Supreme Court nominees, both by agreement and long-standing practice. Even though we may disagree as to the specific numbers, it's a very, very small number of lower court nominees who have been disposed of with finality by the Committee, in the sense of the Committee acting and then not reporting out to the full Senate.

There's a different number about the Committee not acting, and one can have a different debate about whether it's a more grievous constitutional violation to do nothing, or a more grievous violation to reach a conclusion in a deliberation and then not allow it to go forward.

MR. COX: Roger.

AUDIENCE PARTICIPANT: Concerning the argument from Hamilton, and the cabal in New York — is it not the case that that was raised in reference to the fear that the small group would act to confirm people, and therefore deprive the full Senate of its vote, and it cuts the other way when you're talking about denying? I see nothing in the Hamilton text that suggests that he was referring to a small acting committee denying; it's quite the other way around.

MR. KMIEC: Well, it's an interesting read, Roger, but I think you're reading something into Hamilton that's not there. Hamilton is talking about deliberation and determination and discernment. It seems to me that all those things, in discussion, can go in either direction. You can have a committee, as you have had, report a nomination favorably and the vast number of judicial nominees do get reported favorably over time in terms of historical practice. But you can also have nominees reported without recommendation and with negative recommendation. And there's nothing that I see in 76 or 77 of Hamilton that says he was talking about one case rather than another.

MR. COX: Yes, in the back.

AUDIENCE PARTICIPANT: I'd like to direct a question to Dean Kmiec. What about the political questions doctrine? Bruce Ackerman and some Senators said that because of *Bush v. Gore*, President Bush shouldn't get involved in nominating Supreme Court justices. Even if you're correct that the Constitution is violated, is our recourse truly to be found in the courts? What about standing?

MR. KMIEC: You know, everything you have just said was encapsulated in the great hesitation that I kept articulating about turning to the courts. I think there is a violation. I think there is a good chance that if one filed the complaint, it would be treated as non-frivolous and not subject to sanction.

MR. MINCBERG: Does anyone want to take a bet on that one?

MR. KMIEC: On the other hand, I think the arguments you raise for nonjusticiability are powerful arguments that would have to be contended with. I don't think they are as powerful as they were in *Nixon*, as I have tried to distinguish *Nixon*, because of the different nature of the judicial role here, which is affirming a constitutional check and affirming the separation of powers without undermining other constitutional functions. In *Nixon*, you very much had, if you invited the judiciary in, to undermine its own function in terms of criminal cases, and also undermine its functions in terms of the check on the judiciary itself.

As the Chief Justice articulated in *Nixon*, if you involved the judiciary in the review of Senate convictions under the impeachment power, you're inviting their review not just of judicial officers but of all officers. And certainly, if you invite them of judicial officers, the single check on the judiciary has disappeared, so that's a different case.

Your question about standing is undeniable and would be one that would keep the lamp on the Dean's desk burning long and hard.

But that does not deny the constitutional violation, even though it may be non-justiciable.

MR. MINCBERG: I just want to mention one specific thing about Doug's interpretation of the *Nixon* case, which again I

think is just plain wrong. What the Court was called upon there to do was not to get involved substantively in whether Judge Nixon should be impeached, but just to enforce the Constitution's requirement, which according to Judge Nixon, required that the full Senate act at every stage on his impeachment. And again, the text seems to be more with Judge Nixon on that issue than with Dean Kmiec on that issue. The Court nonetheless rejected it.

AUDIENCE PARTICIPANT: Consultations, conciliation and even compromise may be a better way to resolve some of these disputes.

MR. KMIEC: Well, as a constitutional matter, I think it is well settled, as Doug said in his opening remarks. But it is the President's prerogative to nominate. So, he does not have an obligation, as a constitutional matter, to consult.

MR. MINCBERG: Agreed.

MR. KMIEC: As a practical political matter, I think one would readily urge consultation in many cases. If that consultation is to be more fulsome — to pick the word that Chuck Cooper used to use in the Office of Legal Counsel — if it is to be more fulsome, I would think there ought to be some consideration given in response. Namely, we will consult in advance but the guarantee will be that every one of these people we consult about will go to the floor for the full, constitutionally-intended deliberation.

MR. COX: We can't have reasonableness breaking out too much here. I mean, I thought the real response was the recess-appointment talk.

AUDIENCE PARTICIPANT: You made mention that procedurally, you should treat judges like ambassadors, that there is a textual basis for that. What are your views on blue slips?

MR. KMIEC: Well, my response to blue slips is I don't like them. I have as much dislike for the blue slip process as I do for committee final determination. I do think there was a helpful agreement reached to make at least the blue slips public. But that really tells you that you're about to suffer an injury and you are suffering an injury and it's not done anonymously; so, it's the difference between being mugged by someone you know and being mugged in the dark.

The fact of the matter is that I think they're both aconstitutional and not consistent with the argument that I've set forth.

MR. MINCBERG: Which again, if it true, would have meant that there were multiple constitutional violations by now Attorney General Ashcroft, Mr. Sessions and many others during the Clinton Administration.

But what I was trying to talk about was the constitutional matter. Ambassadors, executive officers and judges are all in the same part of the Constitution. I don't think that translates necessarily into the Senate deciding to give the same deference to executive as to judicial nominees, or vice versa. As I pointed out, I think there's a stronger political argument that a president ought to get more deference with respect to people who are in his own administration. After all, they're only there as long as the president is. They're there specifically to fulfill his policy functions, as opposed to the judiciary, which is lifetime, an independent branch. And I think that is the tradition that has arisen in the Senate, and I think, frankly, that's a very good tradition, although I agree with you that the Constitution doesn't differentiate.

MR. COX: Yes, sir.

AUDIENCE PARTICIPANT: On the issue of whether there is a constitutional requirement for the full Senate to act on judicial nominations, I heard no distinction until a moment ago between the Supreme Court and the other judges. The Constitution clearly allows, permits the Senate or the Congress to, by law, avoid the confirmation by the Senate, then Section 2 of Article II, except for ambassadors, other public officials, judges of the Supreme Court and other offices of the United States not herein provided, which shall be established by law, which includes all judges except those of the Supreme Court, as they think proper, and the President alone and the courts alone are in the heads of departments.

So, in other words, the Senate does not have to do it. They have an out, by law, if the Congress wishes to, to avoid having to confirm these people at all. There is clearly a distinction, though, here, and a question, too, between the justices of the Supreme Court and the judges of inferior courts.

MR. KMIEC: There is the distinction. Obviously, one Court is constitutionally created and others are created pursuant to legislation. I don't believe the Constitution's ever been interpreted as — I assume you're not arguing that Congress has the power to limit the terms of the federal judges that they appoint to Article III benches around the country.

MR. MINCBERG: No. I think the argument is that Congress could, by statute, say that for lower court judges, they shall be appointed consistently with the Appointments Clause, but in other vehicles than advice and consent.

MR. KMIEC: Well, I think it's a good argument and it's one that would need to be contended with. I don't think it defeats the argument insofar as one understands — we still have an argument about what it means, in terms, to give advice and consent, and what the obligation of that is under the constitutional text.

AUDIENCE PARTICIPANT: The Constitution clearly provides an out. They can even let the President do it and other courts do it.

MR. COX: Yes, sir.

AUDIENCE PARTICIPANT: Elliot speaks of the importance of cooperation and consultation, but I wonder how serious the Democratic leadership would be. Didn't Senator Leahy say something, congratulating the President, that his first eleven nominees is a group we can work with?

MR. MINCBERG: The fact is, a number of those have in fact gone through, including, I should point out, some that Senator Leahy clearly would not have chosen. Edith Brown Clement, a member of this Society, conservative by any way, shape and form, was confirmed to the 5th Circuit Court of Appeals. But a number of them have not, and that's because a number of that first group are frankly among the most controversial nominees. Several of them will get hearings; there's no question about that, this year. The Senator has promised hearings, and I believe he'll deliver, at least with respect to Priscilla Owen, Miguel Estrada, and I think Mike McConnell, I think were the three specifically mentioned.

But, as Senator Mike DeWine once pointed out, the Senate can't operate first-come, first-served, because it would slow the process down even more. When subsequent to that first group, the President nominated some folks — actually a few of them, actally there was a little bit of bipartisan consultation. There were a number of people nominated after that first group who had consent or at least advice by individual Democratic senators.

Those people got through more quickly because, in fact, they were less controversial, it was easier to get them through, and given what Doug has talked about, about the needs of the courts, it made sense to prioritize that way. But that is unfortunately not the case with respect to a number of those first 11. A number of them are very controversial, very troubling, and I think the Senate is doing the right thing in processing them carefully. You'll find more about that on our website. I'm sure you'll disagree with it, but you'll find some of the reasons why a number of them, we think, are quite controversial.

AUDIENCE PARTICIPANT: I was just wondering if the distinguished speaker from People for the American Way believes that every single American citizen should be represented by a reasonable Senator who will move forward?

MR. MINCBERG: I think the American people certainly have the right, if they really care about this issue — as someone has suggested — to vote in a Senate that would do what you assert you want them to do. But in fact, President Reagan actually tried to do that — some of you probably don't remember this — in the '80s, tried to argue that because the Senate wasn't approving some of his judges fast enough, this is why the Democrats ought to be turned out, and it didn't work. There's no question, it's going to be tried again this year and we'll see what happens with that.

But I think that is no more true than it would be true to say that people have a right to demand, as a constitutional matter, to vote on James Hormel or Bill Lann Lee or many others. The notion that the full Senate must act on everything that the President sends up would paralyze the legislative process.

MR. COX: We're going to take one more question and then we're going to end because we like to finish very promptly at this Society.

AUDIENCE PARTICIPANT: I just have a quick question for Mr. KMIEC. Do you argue that there's an affirmative constitutional obligation for the Senate to consider all nominees? And Mr. Mincberg, would you place any limits on the Senate's ability to delegate the stop power?

MR. KMIEC: I think the first question is very difficult. There's a non-judicially enforceable constitutional duty for the Senate to take up nominees, but by virtue of the fact that it's not judicially enforceable, you're dependent upon the body of people that you've elected to perform the function.

MR. MINCBERG: I think it would be almost impossible to conceive the Senate giving away any of its power — to an outside agency. So, I don't think we have to worry too much about that. There are some other aspects of the Constitution that we haven't delved into that might argue with respect to that, about giving the power to a body that wasn't elected by anybody. Certainly, the 19 senators on the Senate Judiciary Committee were elected by the people of their respective states.

MR. COX: I want to thank both our speakers. Maybe we can arrange a rematch after the fall elections. I want to thank all of you for coming.

* This panel was part of a conference sponsored by the Federalist Society's Federalism & Separation of Powers Practice Group. It was held on June 7, 2002 at the National Press Club.

FEDERALISM & SEPARATION OF POWERS

THE JUDICIAL CONFIRMATION PROCESS: PERSPECTIVES FROM THE THREE BRANCHES*

Honorable Laurence H. Silberman, *U.S. Court of Appeals for the D.C. Circuit and former U.S. Deputy Attorney General*

HON. SILBERMAN: Now remember, I'm speaking as a federal judge. I have, therefore, no view as to what it is legitimate for Senators to ask and no view as to the fight as between the two parties concerning suitable nominees. I do observe, however, in a neutral fashion, it seems to me, that under the existing regime, as I understand it, in the Senate Judiciary Committee in my time, it has always been true that nominees who were perceived on the extreme wing, either conservative activists on the conservative side or on the liberal side, were always in some trouble.

As I see it now, using the standard that the Senate Judiciary Committee and its supporters would use means that no nominee presently on our circuit court could get through—perhaps, maybe one or two—no nominee on either the Democratic or Republican side. As I understand the standard, no one with a strong judicial self-restraint philosophy nominated by a Republican who is well educated, smart and intelligent and a good lawyer can get through, and the same thing is true for his or her counterpart on the Democratic side. So, I think this present regimen means absolute stalemate if the Republicans were to apply the same standard. But you note, it's focused on intelligence and deep thinking. The ones who seem to get through are those who don't manifest any intellectual ability…or not a very strong intellectual ability. Now, this is really an extraordinary change. But, you know, I have no view as to what is appropriate for Senators to look for.

I do have a strong view, however, of what is appropriate for judicial nominees to do or say. And I think the model in that respect was Antonin Scalia. I confess that I acted as his counselor. He said nothing when he was nominated and went through the confirmation process rejecting any probing into his judicial philosophy that could be even thought to bear upon cases that came before the Court. And he recognized that there was no stopping point.

I will never forget when he was asked the question whether he would still stand by *Marbury v. Madison*, and there was a recess. He called me on the phone because a very skilled lobbyist from the White House, or being designated by the White House, Tom Korologos, was telling him that he had to answer that question, and that the senators were really terribly upset about his stonewalling.

He called me on the phone and I said, you know, as a matter of principle, if you answer *Marbury v. Madison*, there's no stopping point between there and *Roe v. Wade* or anywhere else, so that's a matter of principle. Secondly, pragmatically, the only way you could ever be defeated is if you start answering these questions. So, he did not answer the questions. That was frankly the right position.

We have gone downhill since that time, when my colleague and friend Bob Bork went up. He thought he could turn that nomination process into a Yale Law School classroom, which was a profound mistake, since they only recorded Senator Kennedy's questions and not any follow-up. So that didn't work and it became a disaster, and it has become increasingly a problem for Supreme Court nominees.

What is new now is the suggestion that this is going to be practiced with respect to Circuit Court nominees. That's sort of astonishing. I think it was Senator Biden, that major legal thinker, who took the floor of the Senate to say that if a nominee did not answer his questions, which would go into how the nominee might rule on cases that came before him—certainly at a philosophical level, if not on a case-specific level—he would filibuster. That's going to put a lot of pressure on nominees.

But, the answer, it seems to me, for any nominee who goes up before the Senate is that it is unethical and it is dishonorable to answer any questions that bear on how you would approach a case coming before you. That includes questions that are cast in philosophic terms because they can easily project onto cases that come before you. And if you have committed yourself in public, that can't help but have an impact on your decisionmaking process as a judge. Either you're going to be a liar, as I think certain nominees have been, or you're going to be committed unethically as to how to rule when a case comes before you.

Now having said all that, I will go on to say, with respect to the confirmation process, that in my view a nominee to the federal bench, who is not independently wealthy and therefore, indifferent to the judicial salary the first prize is not to get a hearing. It's only a third prize to get confirmed because it is now apparent that, in light of what the Justice Department did under Attorney General Ashcroft and the position they took in the Supreme Court, and the Supreme Court's refusal to decide the case, with three Justices dissenting, on the constitutionality of keeping judges from getting the cost-of-living increases that they were guaranteed in legislation.

For most federal judges who are not independently wealthy, you face an inevitable decline in your real income, for reasons which I can go into in question-and-answer. It is unwise, in my judgment, for any man or woman who relies upon the federal salary to take a federal judicial appointment. It's just a mistake.

* Judge Silberman's remarks were part of a panel sponsored by the Federalist Society's Federalism and Separation of Powers Practice Group's Project for Judicial Independence. It was held on April 15, 2002 at the Capitol Hill Club.

E n g a g e

INTERNATIONAL & NATIONAL SECURITY LAW

THE U.S. RESPONSE TO THE INTERNATIONAL CRIMINAL COURT: WHAT NEXT? CAN THE ICC BE EFFECTIVE ON THE WORLD STAGE?*

Tom Malinowski, *Washington Advocacy Director, Human Rights Watch*
Elisa Massimino, *Director, Washington, DC Office, Lawyers Committee for Human Rights*
Prof. Jeremy Rabkin, *Cornell University*
Prof. Ron Rychlak, *University of Mississippi School of Law and Vatican Delegate to the Rome Convention*
Honorable Edwin D. Williamson, *Sullivan & Cromwell and former Legal Advisor, U.S. Department of State*
Stewart Baker, *Steptoe & Johnson and former General Counsel, National Security Agency, moderator*

MR. BAKER: We're going to do this almost entirely out of questions, as opposed to set-piece presentations. So, let me introduce the panel, which is a really excellent panel. I will start with Tom Malinowski. Tom is head of the Washington office of Human Rights Watch. He previously was chief speech writer for the National Security Council under President Clinton. And, he's worked for the Ford Foundation and for Senator Moynihan.

Next to him is Jeremy Rabkin, who teaches international law and American constitutional history at the Department of Government at Cornell University.

Then, Ron Rychlak is a professor of law at the University of Mississippi, and who has previously practiced law at Jenner & Block, and participated, I believe in the ICC negotiations on behalf of the Vatican.

Then, Elisa Massimino is the Director of the Washington office of the Lawyer's Committee for Human Rights. She has taught at the University of Virginia Law School and George Washington, and previously practiced law at Hogan & Hartson.

Finally, we have Ed Williamson. As many of you know, he was for two and a half years in the first Bush Administration. They actually called it the first Bush Administration, but they had something else in mind. He was the legal advisor to the State Department, and apart from that dalliance with government service, he has spent his career at Sullivan & Cromwell.

What I'd like to do is get to some of the questions about what we can do in the world we're in now, where we've already un-signed the treaty. First, I think it would be useful to explore what the impact of the Treaty and why originally the U.S. was so enthusiastic about it.

I'll ask Elisa to lay out the reasons the U.S. wanted this treaty in the first place.

MS. MASSIMINO: I'm anxious to get into this discussion, too. The short answer is that the best arguments for the ICC and the reason why the U.S. was for so long so enthusiastic is the same argument that we hear all the time, and that we all make about domestic crime. It's the practical and moral value of justice and accountability, it's the deterrence factor, and it's the question of victims' rights.

On those issues, the court is an important step forward, but obviously it's not a panacea. It's not going to deter psychopaths. You know, people ask, will it be a deterrent to Saddam Hussein. It's not going to deter people who cannot be deterred anymore than domestic criminal law does. But, the idea is essentially the same as domestic criminal law; once it's shown that it works, the deterrent factor will be strengthened. Right now, the ICC is not much of a deterrent; it's not operating. But, to the extent that the court works responsibly and well in holding people accountable, eventually that will kick in.

MR. BAKER: So, Ed or Ron, what happened? Why did the U.S. turn around so dramatically on this issue.

PROFESSOR RYCHLAK: Well, I don't know the inside workings of the government. But certainly, I think that if we're going to talk about deterrents, as I look closer, I do not see a deterrent value from this court, primarily because we are talking about people who will be protected by an army. You have to get them out of power before you can prosecute these people.

I spoke to lobbyists at the U.N. about this. I said, "Do you really think there's a deterrent value in this kind of situation?" They said, "Well, we have to do something." Well, take pictures of Mussolini hanging upside-down in Milan and blow them up into posters, if you want to convince people that we will take care of tyrants. I am not sure that a court with no death penalty, with a form of due process, with lawyers for the defense, will deter people. I think that's one of my big concerns.

PROFESSOR RABKIN: I want to challenge the premise of the question, that this was something that America was enthusiastic about. This is something that President Clinton was having fun with. That's different from America being

enthusiastic about it.

And if you ask, why was President Clinton drawn to this, the answer is that there were all kinds of atrocities taking place in Yugoslavia. A lot of people were worried about it, and Clinton, after he had that experience in Somalia, said we're not getting involved in that. No troops. Therefore, let's send in lawyers. That's always a good gesture. Then, there were a million people slaughtered in Rwanda, and Clinton said from the very beginning, "We can't get involved in that; we can't get involved in that." What do we do? Let's send in lawyers. That was Madeleine Albright's forceful foreign policy. As she said, "We are the indispensable power because we have more lawyers than any other country in the world."

You should not start from the premise that there's a serious policy objective here; you should start from the premise that this was Clintonism, which is different from serious policy.

MR. BAKER: Sending in the lawyers when everybody's getting killed is kind of a two-fer, isn't it?

PROFESSOR RABKIN: Unfortunately, we send in the lawyers afterwards.

MR. WILLIAMSON: Stewart, I would enter my position that an international criminal tribunal is possibly a useful tool to have in the toolbox. It depends very much on how it's done and so forth. I mean, for example, I think that had we had Saddam Hussein in captivity, we definitely would have preferred that he be tried by an international criminal tribunal. I think what we did with the Lockerbie defendants, while not perfect, was certainly the best solution under the circumstances.

The problem with this particular ICC really goes to the question that was discussed at the last panel. It is the concept of complementarity. Incidentally, I'd like to take a couple of minutes to raise a couple of issues that were raised in the previous panel, and perhaps those panelists can come in during the question period about it.

First, I would just make the observation. Of the 67 countries that have ratified, seven of them each have populations of less than 100,000, and include such mighty powers and contributors to maintaining international peace and security as Nauru and the Marshall Islands. But having said that, I do not deny that there will eventually be substantially more than 60 ratifiers, and that we would be able to find 60 countries with whom we do not basically disagree as to matters of criminal justice.

There was a statement made by David Stoelting, and this is kind of key to my understanding of the ICC. That had to do with the question of the West Bank and the Gaza Strip. My understanding is that after July 1, it is quite possible that, say, on July the 15th, the Israelis take out a school by mistake or something like that. It could be 2010, it could be 2030, it could be 2003. Whereas, a Palestinian state established that covers the territory where those civilian casualties occurred, and that that Palestinian state can certainly consent under Article 12 of the Rome Statute to the court having jurisdiction under those circumstances.

PANELIST: It's much more immediate than that.

MR. WILLIAMSON: Well, let me just correct a couple of concepts here.

Second is on the role of judges — John Washburn, I would be interested in your precedents for this sort of independent set of judges. The closest precedent that I know of is the International Court of Justice. I do not believe that anyone takes the position that those judges are not there acting in the interest of the governments. In fact, any defendant, any party to the ICJ, is entitled to have a judge of its own nationality sitting in that particular case. And I'm unaware, except in a couple of cases — it was usually involving the U.S. — where a judge voted against his own government.

And, on the issue of complementarity, I think it's a little easier for me to focus on this using a slightly different example than what John Washburn used. Let's take the case where it's not a question of whether or not the U.S. will try to do something about the marine general who's the commander of Guantanamo Bay, for example. But suppose we've decided that he was acting in accordance with the Geneva Conventions, or that the Geneva Conventions were not implicated when he did not give the hearing as to the status of the detainees at Guantanamo Bay. Then, later, somebody brings a complaint to the ICC, and the U.S. comes forward and says, we've already done this. I think it's quite easy to reach the conclusion that the U.S. is unwilling to prosecute this person for this war crime. So, I think you immediately walk right into the exception for complementarity, and it's that second-guessing that I disagree with.

MR. BAKER: Why don't we explore that one. Does "unwilling" mean that the prosecutors can say, "Well, you obviously haven't done a very good job of prosecuting this, or you haven't prosecuted it for reasons that seem sufficient to you, but they don't seem sufficient to us?" Tom, Elisa, do you think that is a plausible interpretation of "unwilling"?

MS. MASSIMINO: No. I don't think it is. What the Statute says and what the parties intend, and those who were at Rome can attest to this, is that "unwillingness" is not an unwillingness to prosecute. It is an unwillingness to investigate allegations of violations of the laws of war. In fact, what I've seen in having discussions with the Bush Administration about

this very issue is that there has been a lot of thinking and research and reaching of the conclusion — I don't necessarily agree with every element of that conclusion — about the applicability of the Geneva Conventions to Guantanamo. I think that would probably constitute an investigation; certainly, a willingness to investigate allegations of violations of the laws of war.

So, it's really important that it's not unwillingness to prosecute. You don't have to prosecute in order to satisfy complementarity. That would kind of defeat the whole purpose.

MR. WILLIAMSON: I'm sorry, but Article 17 — and it's sort of awkward to look at the wording — but it does say, unless a decision resulted from the unwillingness of the state genuinely to prosecute.

MR. BAKER: Is there anybody here who knows anything about Ixid arbitration? Probably not. Right? Okay, I get to say whatever I want.

The Ixid arbitration was for arbitration of investment disputes between investors and nations. And it provided an appellate process that was supposed to be very rare. It said, the only time the appellate panel can overrule the original arbitration panel is if there are no reasons given for the lower judgment. The third appeal — that panel said, well, yes, you've got 150 pages of reasons here, but they're not good reasons and that's as bad as no reasons, so we are going to reverse. There really was not much you could to at that point because everybody had signed up to the Treaty, and they used the words of the Treaty.

What is the protection against that kind of interpretation of the words "genuinely prosecute"?

PROFESSOR RABKIN: Again, I think the premise of the question is mistaken because you're looking at this as if it's a legal forum. It's not a legal forum. It is utterly, totally, completely political.

To the extent that criminal justice has some kind of integrity in the United States, it's because we have a long tradition of operating a criminal justice system, and we know what it is.

Suppose we said, let's improve our system by getting together with China, and then China and America will together synthesize the best features of their two systems, and it will be sort of broadly accountable to China and America. Everybody would throw up their hands and say that is insane.

Now, if you look at this list of who we're doing this with, it happens not to be China, so don't worry about that. But it is quite a lot of other very nasty countries which have no experience running anything except hate sessions at the U.N. Basically, this list is the European caucus, everyone that they whipped in line in Europe, and then their African colonies, with just a handful of others. It's basically Europe and Europe's clients. And you have to ask with a straight face, France — do we trust them to be impartial and serious and take a legal view of this? To ask the question is to answer. It is ludicrous.

Let me just add one more thing. One more thing. We were told in the earlier panel by Mr. Stoelting, this is not going to be like the Durbin Conference; everyone's so upset about the Durbin Conference. Well, yes, everyone was rather upset about the Durbin Conference. And who hosted it? It was basically done by Europeans, all of whom stayed.

They said, "Well, it's a little embarrassing, all this Nazi literature and all this Nazi rhetoric; we're a little bit embarrassed, but not embarrassed enough to walk out." Okay, those are the people who are setting up this system. It is utterly clear, this system is designed for propagandist show trials, and that's what you're going to get.

MR. MALINOWSKI: Look, this whole thing is based on a fear of foreigners. That's sort of the root of all of this. I mean, the critics of this, they see the rules and the rules are airtight, and so they say the rules don't matter; you can't trust the foreigners who are going to be implementing the rules.

Now, even if you accept that, the United States — this Administration — has just made a colossal strategic, tactical blunder in refusing to exert U.S. influence on who gets to implement these rules. EU begged the State Department to play a role in selecting the judges and selecting the prosecutor. This Administration said, no, we're not going to do that. We're not going to exert American power and influence over this. We're just going to let these rogue states, as you called them, run the show.

In fact, it's not going to be rogue states. It's not the EU plus the countries who hijacked Durbin, who hijacked the G8. Freedom House, which is a pretty respected conservative organization, did an analysis of the countries that ratified the treaty on the basis of their characterization of countries as free, partly free and not free. And of the ratifying countries, only one was not free. That's Tajikistan, which is right now a client state of the United States in Central Asia.

I mean, this is just preposterous. You have to imagine a massive conspiracy of America's closest NATO allies to put Donald Rumsfeld on the dock in order to buy into this paranoid theory. Even if the prosecutor is a rogue prosecutor, even if at every single stage they ignore the rules, the notion that America could not get the Security Council to shut down the prosecution is just absolutely preposterous.

Our closest allies on the Security Council in that case would be China and Russia, who would see such a prosecution for exactly what it was — a precedent for putting Putin and Chiang on the dock over Chechnya and Tibet. They wouldn't stand for it, and the French and the British wouldn't stand for it either. It's delusional.

MR. BAKER: And can they stop it?

MR. MALINOWSKI: Yes. The Security Council can stop any case before the court.

MR. BAKER: Subject to veto?

MR. MALINOWSKI: Subject to veto. To veto it, you have to imagine that either France or Britain would exercise a veto to put an American in the dock in a politically motivated case, which would basically be to imagine the end of NATO. Or, you would have to imagine that the Chinese or the Russians would be smoking something and allowing this international body to start interfering in the internal affairs of countries where massive human rights violations take place. That would be suicidal from their point of view, politically. So again, I think you would have to be delusional to imagine that.

MR. BAKER: Ed.

MR. WILLIAMSON: I would definitely recommend to Tom, as soon this panel is over, to give Mr. Kissinger a call and tell him that he really has nothing to worry about as he gets ready to go to Europe, where I guess Baltasar Garzon is lying in wait for him.

MR. MALINOWSKI: I wouldn't say Mr. Kissinger has nothing to worry about. But he has nothing to worry about from the ICC. He's got everything to worry about from other courts that you guys ought to be more worried about than the ICC.

MR. BAKER: On this question of whether American forces can be prosecuted, I thought it would be at least useful to pick out an example from recent history and ask whether there's a plausible war crimes case to be made. I thought I'd just read a passage from *Blackhawk Down*. This is where the American forces have lost their helicopter support, they're trying to rescue some of the pilots and they're in trouble themselves. Just one paragraph.

"Somalies continued to mass to the north. In the distance, it looked like thousands. One group moved down to just a block and a half a way; maybe 15 people. Nelson tried to direct his machine gun only at those with weapons, but there were so many people and those with guns kept stepping from the crowd to take shots. So, we knew we either had to let the gunmen shoot or lay into the crowd. After a few moments of debate, he chose the latter. That group dispersed, leaving bodies on the street, and another, larger one appeared. They seemed to be coming now in swarms from the north, as though chased from somewhere else. They were closing in — just 40 or 50 feet up the road, some of them shooting. This time, Nelson didn't have time to weigh alternatives. He cut loose, and his rounds tore through the crowd like a scythe. A little bird swooped and then threw a flaming wall of lead at it. Those who didn't fall, fled. One minute, there was a crowd; the next minute, there was just a bleeding heap of dead and injured."

That's the testimony in the investigation. I will, for contrast, read a human rights report on Jenin, which says, it's a war crime to engage in military action that results in disproportionate civilian deaths.

"Human Rights Watch concludes that the Israeli military actions in the Jenin refugee camp included both indiscriminate and disproportionate attacks. Some attacks were indiscriminate because Israeli forces, particularly the IDF helicopters, did not focus their fire power only toward legitimate military targets, but rather fired into the camp at random. This indiscriminate use of fire power added significantly to the civilian casualty toll of the fighting and the destruction of civilian homes in the camp."

That, I take it, is a slightly veiled accusation of potential war crimes by the Israeli IDF, which killed 50 people in Jenin. We probably killed between 500 and 1,000 in Somalia. Is there a plausible war crimes case made out by that passage from *Blackhawk Down*?

MR. MALINOWSKI: Let me address both aspects of that on Jenin. What we found after our investigation in Jenin was, first of all, that no massacre took place, contrary to the Palestinian leadership. But there were approximately 22 civilian deaths, of which some appeared to be cases where civilians were unlawfully killed. And we did suggest, in fact, that a war crimes case could potentially be brought in those cases.

But let's assume that we're living in a parallel universe, in which Israel does fall under the jurisdiction of the ICC; for reasons that have been explained, it doesn't and it wouldn't. Events today in Israel would not suddenly fall into the jurisdiction ten years from now, if a Palestinian state is declared. But let's assume that it did fall under the jurisdiction.

Simply stating that a war crime occurred doesn't necessarily suggest that a war crime that meets the higher standard of the ICC occurred. You'd have to show a pattern, a plan, an intent. And, we wouldn't argue based on our findings that even if these things did occur and they were proven, they would constitute war crimes under the ICC statute. In fact, the Israeli government has taken steps in the last couple of weeks to address some of the concerns that we express, particularly with

respect to the use of civilian shields.

Now, let me get to your central question about Somalia. Again, I'm just responding to the passage, as you've read it. I would say no, that you couldn't bring a case in that case. This gets back to the proportionality test that we were debating in the previous panel. I think some of the critics of the court suggested that this weighing test is designed to give prosecutor discretion to go after soldiers in that situation. In fact, it's designed to give the military discretion.

You could easily have a simple rule that says, if the military kills 500 civilians, that's a war crime because civilians are innocent people who shouldn't be killed in war. In fact, the laws of war say something very different. They say that civilians can legitimately be killed in wartime. And in fact, they give the armed forces of any country a great deal of discretion, so long as they meet this test of proportionality.

Again, based on the description that you read — that very chilling description of a soldier who's trapped in this situation, clearly making a decision that there's a military necessity and presumably that civilian shielding was involved, to make a decision that resulted in that kind of tragedy — I don't think anyone could credibly allege that a war crime occurred. Certainly not a war crime on the level of the ICC definitions.

MR. BAKER: Of course, the Israelis probably lost more people in Jenin than we lost in Somalia that day. They obviously thought that they were under attack that required that kind of fire power. But Human Rights Watch thought that there was a plausible case for disproportionate use of force there.

MR. MALINOWSKI: Well, I mean, in fact the Israelis — they certainly don't agree with all of our findings, but they have actually acknowledged that some of our findings were true on this issue of the use of civilian shields, where they used Palestinian civilians basically as props for their guns in some cases. The IDF has issued an order to all of its troops ceasing, so I don't think there's quite as much of a controversy as you might suggest.

Our report fell, really, right in the middle. The Palestinians hated it. The Israelis didn't like every aspect of it. I think it's generally considered quite credible.

MS. MASSIMINO: You know, I think, getting back to the political aspect of this — in one sense I agree with Jeremy, and I think Jeremy and Tom really agreed on this one point. That is that the questions and fears about this court really get down to questions of politics. You know, a lot of what we're talking about this morning are arguments between people who think the court will be used irresponsibly against the United States and people who have faith that it's not going to be, or believe that it won't, or believe that the statute is structured in such a way that it constrains that use of political power.

On these questions of Israel and Palestine and all of the hard cases, the question really is, will the court be a responsible institution that does what we supporters of the court intended for it to do? That is to go after the world's worst human rights criminals — people who commit genocide, massive war crimes and crimes against humanity. And, how does the U.S. best make sure that happens? That's the question now.

I mean, the court is coming into existence. It's an academic exercise to talk about whether it should be stopped. We've moved on from that. We're past that. The court is coming into existence, and the question is, what's in the United States' best interest now? Almost all of the political arguments raised against the court — and while I disagree with most of them — they certainly deserve debate, unlike, I think, many of the legal questions, which do not deserve as much debate as they get. The political questions do deserve debate.

But it seems to me that almost all of the political concerns raised about the ICC would be best addressed from the viewpoint of U.S. national interest by engagement by the U.S. with the court in an ongoing way. The question about who the prosecutor is going to be: the question about whether aggression will become one of the crimes that ICC has jurisdiction over. These are all questions that the United States and American people have a great interest in the outcome. How do we best exert influence in the outcome? And how do we best exert influence over that? I would say it's by engagement. So, that's where we are now. What does the U.S. do now that the court is coming into existence?

MR. BAKER: Jeremy.

PROFESSOR RABKIN: You cannot participate in a thing like this, and then case by case, say no, we repudiate that political prosecution; no, we repudiate that politicized venture.

You've got to make an assessment at the beginning, whether you think, on balance, enough of these things will be responsible and the politicized wounds will be minor enough that you can live with it. And that's not plausible, given our experience with international institutions, with the U.N., with the U.N. Human Rights Commission. Our experience is that they can't be trusted. And so, it makes sense for us to say from the beginning, "Anything they do, we presumptively question." We may be able to live with some individual prosecutions, but the thing is not set up to do what you are describing.

You're saying that we all agree that we really want to go after genocide. Except, the countries that are likely to do this aren't parties to it. So, what it's really set up to do, I think, is to embarrass other countries, to provide a propaganda forum

against those other countries, that Europeans happen to have a grudge against. And who are those countries, mostly? Israel, Israel, Israel and then the United States. So, I don't want to give that court to the Europeans.

MS. MASSIMINO: You know, it's interesting to me that four years ago when we were having this conversation, and the critics of the court were raising the specter that it was going to be controlled by Cuba, Libya, Iraq and Sudan — well, you know, nothing could be further from the truth because countries that ratify the treaty and become part of this court have to subject themselves to the jurisdiction. Countries like that are completely unwilling.

And now, those same critics are raising the specter that the court's going to be controlled by such arch enemies of the United States as Senegal and Mexico. It's absurd — and our NATO allies. I think it's interesting to see the arc of this same argument and see where we're likely to end up.

The point that you make about how we ought to say right now on principle that we're not going to be involved in any prosecution going forward, I think that's very unwise. I think it's quite likely that there will be a prosecution in the next five years, at most, that the U.S. very much wants to see go forward, of a terrorist or a drug kingpin. And, what is the United States going to do? Suppose it has the documentation, the best evidence, to further such a prosecution.

MR. BAKER: I think that's important, but I want to stick to this question. Can we really be a little pregnant here? If we go in, can we later say, no, it's not working out and we're leaving? I don't think so.

MS. MASSIMINO: I think in a way we can be a little pregnant here because what we arguably should have done is to not squander what influence we had with the court by remaining a signatory.

MR. BAKER: Okay, but that's done. So, what can we do now?

MS. MASSIMINO: Well, I think the Europeans are still asking the Bush Administration to engage on the issue of who ought to be the prosecutors. There certainly are avenues for the United States, clearly, to exert influence over those important questions that remain unanswered. And it would be foolish, I think, and irresponsible of the United States to back away from those invitations of interest on the part of our allies who want to help make the court more responsible.

Some of my colleagues don't share this view, but I think U.S. participation in this court will help make it stronger.

MR. BAKER: Ed.

MR. WILLIAMSON: Well, Elisa, I would certainly agree with you that the U.S. ought to be involved and engaged. And the thing that baffles me about this process is that there is already a forum, a platform, for that engagement. It's called the United Nations Security Council. And we have engaged, and we could have done a better job. But we did get engaged, and we established two *ad hoc* tribunals. And so, I have absolutely no problem with going through the exercise and establishing a set of rules and procedures and so forth for *ad hoc* tribunals that would be triggered for the Security Council.

One of the things I really want to focus on here is this question of the quality of the judges and the prosecutor. I still do not see any precedents out there that give me any comfort. Again, I keep going back to the ICJ. Now, the U.S., as a member of the Security Council, has the ability to veto any judge elected by the General Assembly to the ICJ. We have never even dreamed of doing that, even in the midst of the Cold War period, and so forth. In fact, we had a sort of a gentlemen's agreement among the Permanent 5 to support each other's nominees.

I'll take a couple of minutes. The ICJ and the LeGrande case, which was the German citizens who were on death row, in our zone had the opportunity to interpret the provision of the ICJ statute that permits the ICJ to issue provisional measures. Now, people ask me, what's a provisional measure and I say, it's kind of a morally binding preliminary injunction. The statute says that the court shall have the power to indicate if it considers the circumstances so require any provisional measures which ought to be taken to preserve the respective rights of either party. And then, pending the final decision, notice of the measures suggested shall be forthwith given to the parties.

Now, the ICJ, with the U.S. judge voting and a 13 to 2 majority, reached the conclusion that that provisional measures were legally binding; sort of the same as the injunction. None of this "morally binding" stuff.

I quite frankly do not have much confidence in these U.N.-generated bodies. I just don't think the quality's very good. One of the very prominent ICJ judges recently resigned — and I'm not talking about our own, Steve Schwegel, here — and the rumor is because he took a bribe on one of the cases before the court. That just goes back to John McGinnis' point. It's the unaccountability of this court and that it can be hijacked. And if such noted human rights respecters as Cuba and Syria and Iran can be on the U.N. Human Rights Commission, I certainly think some of the judges could find their way onto the ICC when they become partners.

MR. MALINOWSKI: Well, once again, those countries are not members of the ICC for a very, very good reason — because

they know that if they —

MR. WILLIAMSON: Well, just use the Central African Republic as an example, rather than Syria.

MR. MALINOWSKI: Okay. I'm not that scared of the Central African Republic.

I don't know about the ICJ, but there are other international courts out there. There's the ICTY, for example, which the United States has long supported, including this Administration, to its great credit.

MR. WILLIAMSON: Well, that was my example.

MR. MALINOWSKI: And it's one of these U.N. created courts and I don't think we've ever had any problem with the quality of the judges. And the accountability there is exactly the same.

MR. WILLIAMSON: And even in those circumstances, we have had some trouble with both the prosecutor and the judges.

MS. MASSIMINO: Well, as we do in the U.S. system. I mean, I don't think you can condemn the system because individual judges are —

MR. WILLIAMSON: Exactly. But, at least in the ICTY case and in the U.S. system, there is a process, an ability, to bring errant judges and rogue prosecutors to account.

MR. MALINOWSKI: As there is here.

MR. WILLIAMSON: There is not, in the ICC.

MR. MALINOWSKI: Sure, they can be removed by a simple majority vote. And any case can be stopped by the Security Council, just as it can be with the case of the ICTY. Same system.

MR. BAKER: Jeremy.

PROFESSOR RABKIN: I think there have been a lot of abuses and a lot of disturbing trends with those special tribunals for Rwanda and Yugoslavia. We shouldn't be looking at them and saying they work great.

Without getting into details, I'd just appeal to people to step back for a minute. We are talking about this as if it's a perfectly normal, ordinary, routine thing to impose a court on a country, which operates at some higher level above that country. And this has never happened for hundreds of years. Why did it never happen for hundreds of years? Why did no one even propose it for hundreds of years? Because it's weird. I mean, it's bizarre. We're talking about accountability at such a high level of abstraction that we forget that it has no meaning. What does it mean to have accountability to 67 different countries? It doesn't mean anything. "Accountability" means, in some sense — and I'm not really emphasizing democracy — that there's a fairly stable community with a fair degree of mutual trust, so we say that the court system has to operate in a way that that community can accept. That has some meaning when you're talking about a real community.

It's just preposterous to talk about a community of 67 countries, half of whom are African tyrannies and the other half of whom are European countries who – well, I'm sorry to keep saying distrust foreigners. But these foreigners aren't very well disposed toward us. These foreigners are protectors of Iraq. These foreigners are protectors of people who burn synagogues — hundreds of them in France. I mean, these foreigners are not particularly our best buddies, and it doesn't matter if they're in NATO, which the French aren't really anyway.

MR. MALINOWSKI: I think we've just heard a very principled and consistent argument against any sort of international court at all, and I respect that. That is an argument that is far more radical than any argument that the Bush Administration would make. So, let's state that for the record. And again, it's a respectable argument, but it does leave open the question of what you do with tyrants who commit genocide, who are not going to be brought to heel in their own countries.

MR. BAKER: Ron.

PROFESSOR RYCHLAK: Rather than talking about fear of foreigners, can we maybe talk about fear of courts? I think part of it is this idea of, we're putting together a standing court to prosecute crimes. There have only been four times in history that we've had these kinds of trials take place. We're now going to have 18 judges with staff, with a standing court. I think they're going to start looking around for something to do. David, this morning, said it's a living, breathing institution. That's

what scares me the most — that it will evolve. We've seen it in our own courts in the United States. I mean, the Federalist Society, one of the sponsors of this event today — I think it's very important — it's one of their issues. It is taking things up to a higher level. And that, I think, is ultimately the scariest part of this.

MR. BAKER: Okay. So, there we are. We could become a little bit pregnant and see if we could stay there. The alternative, though, is what? I mean, this is going to happen, so what should the U.S. do about it, if it's going to happen anyway?

PROFESSOR RYCHLAK: There is one comment there — we have unsigned, which I think is a wise thing because the fact that we participated in Rome is now used as an argument to say you really shouldn't have un-signed. If you do a little bit, people say you have to keep continuing that. I think it showed respect for international law in un-signing, rather than to try to subvert the court without un-signing.

The United States can be an observer, both at the last remaining prep comm. taking place in July, and then for the Assemblies of States' Parties, first in September, then early next year, which allows you to sit and participate. We won't have a judge and we won't have a vote, but the United States still carries a lot of weight. The United States has not participated in the last two prep comms — not sent their staff. They were at the first seven or eight, but the last two, they have not participated in. They can be there. That gives them a voice. I think that answers at least part of your question.

MR. BAKER: And if they accept 75 percent of our recommendations, which would be a good record, do we have some obligation, moral or otherwise, to come back into the fold?

PROFESSOR RYCHLAK: I don't think so.

MS. MASSIMINO: I want to make clear, too, that there are some questions that are of great interest to the United States that have yet to be resolved. But if the concern of the United States is that it wants an exemption from the ICC to become a party, that concern is not going to be addressed. And if that's the thing that's going to continue to hold the U.S. back, then the U.S. will be held back. But I don't think it's so black and white like that.

I think that the United States ought to be an observer and engage and put forward recommendations. This doesn't have to a big public display. They ought to do that. What we've been hearing from the Administration now, in the context of the un-signing announcement, is that it intends not to do that. That, I think, is unwise. I think it puts the U.S. in a more difficult situation. I don't think that the U.S. will become pregnant, because it engages with its allies on these very important questions. I think it has a duty to do that, and a responsibility.

MR. BAKER: Jeremy.

PROFESSOR RABKIN: We need to make clear — forget about the court. We should have nothing to do with the court. We need to make clear to countries that are cooperating with the court that if they arrest an American, we will regard that as a hostile act by that country. And we don't care that they signed the treaty; we don't care that they're participating in this court. They have arrested an American; they have affronted us.

And we should make that absolutely clear to the government of the Netherlands, which we heard was going to spare no expense to celebrate this court. That's totally great. Have a good party. But if an American is being held in one of those expensive prison cells, that is something that we are going to hold the government of the Netherlands responsible for.

We cannot allow the principle that if you sign a treaty, you have contracted out of your obligations to the country that you have injured. If they're holding an American, the Dutch have perpetrated an injury against us, and we should make it absolutely clear that we hold them responsible and we are not going to allow them to hide behind the ICC and say, "Oh, it's really the ICC." That is the principle that we are advancing now in our war on terror. If you harbor terrorists, you are responsible, and you cannot say, "Well, they're just terrorists, they're not us." No. You're harboring them; you're responsible.

If this court gets out of control — maybe it won't; maybe you're right — but if it does, we should be prepared in advance, so we have to prepare ourselves. We have to steel ourselves now. Bush should lay down a marker saying, "You go against an American, you're in big trouble." Yes, up to and including military retaliation. And if they've spent a lot of money building buildings for that ICC, fine. They can be vulnerable to American firepower and Human Rights Watch can write a report afterward saying it was disproportionate. I think we ought to warn the people in those buildings to get out because we're about to demolish them. But we should be prepared to take military action because this is about protecting Americans, and that is our government's job — protecting Americans, not punishing tyrants. That's a nice thing to do, but that's not the primary obligation of the American government. The primary obligation of the American government is to protect American citizens.

MS. MASSIMINO: You know, there are easier ways to do it than bombing the Hague, though.

In fact, the statute recognizes that countries can negotiate bilateral agreements that would, in fact, prohibit the transfer of an U.S. citizen. And the U.S., I think, is seeking to negotiate those agreements now. That's not something that's in contravention of the treaty. A lot of people who support the court think that's not a good idea. But it's right there in the statute. And, you know, more power to the U.S. It should negotiate those bilateral agreements with every single country, if it wants to. And then we have even stronger protection that would enable us to become a party to the treaty.

MR. BAKER: Ed, is that practical?

MR. WILLIAMSON: I don't think so. I mean, if you were talking about — if we're really going to have 120 states' parties, the idea of going around and doing this to each one. I think the place to go is the Security Council. I think the question was sort of, what is it that the Security Council says?

Basically, the problem with the Rome Statute is that there's no way to distinguish between the good guys and the bad guys. Victor's justice may not be perfect justice, but at least you know who the good guys are and the bad guys are, and the good guys are in control.

My preferred Security Council resolution would be the Security Council saying that the ICC shall have no jurisdiction over the member of an armed force, including the civilian chain of command, which was exercised in its right of self-defense under Article 51.

Then, the debate as to the jurisdiction of the court would focus on whether or not there was a legitimate exercise of the right of self-defense, rather than immediately getting into the question of whether war crimes have been committed. The problem with that scenario is that you will always just have a terrible set of facts on your hands. Now, I don't think this is really practical. I think it's a little too broad.

I do not believe that the French or the Brits would exercise their veto under the circumstances. I certainly think the Russians and the Chinese would support us, and that only leaves another six of the remaining 13 — excluding the Brits and the French; I assume that they would abstain. So, that's much easier from a diplomatic standpoint.

Stepping back from that, maybe not quite so broad is that the U.S. did propose to provide immunity to the East Timorese peacekeepers. And according to the *Washington Post* report, the French objected and claimed that it would be a violation of their obligation to the ICC, which is, in my view, not correct.

Just a quick little footnote. The reason the Security Council could do this, and it's the right place to do it, is that Article 25 of the U.N. Charter requires members to follow the directions of the Security Council. It can issue these directions and orders under Chapter 7. And then, Article 103 of the U.N. Charter provides that obligations under the Charter are superior to any obligations under any international agreements. In other words, the Charter trumps the Rome Statute.

MR. BAKER: Let's explore that. We've got peacekeeping troops in a variety of places under U.N. mandate. And we asked once for an exemption from ICC jurisdiction and got blown off. But, are we going to ask for Kosovo, for Bosnia? And what happens if we get blown off there?

MR. WILLIAMSON: Well, I think — I asked someone in the U.S. U.N. how bad was it. And the response was that this is just really an opening salvo on our part, that there had not been adequate time between the delivery of the de-signing letter and this vote and so forth, to do the necessary diplomatic heavy lifting. And it will be heavy lifting.

The thing that sort of annoys me about it is that we're going to have to use up some diplomatic capital to get us back into the position we should be in. And we could be better using that diplomatic capital for other things. Like, what to do about Saddam Hussein.

MR. BAKER: Let me ask Tom and Elisa. Do you think that that's a reasonable thing for us to ask, that our troops in Kosovo, say, shouldn't be subject to prosecution?

MR. MALINOWSKI: First of all, they already have essentially immunity from prosecution. There is a standard U.N. Status of Forces Agreement, which gives the country contributing troops to a peacekeeping mission exclusive jurisdiction over its troops. And it may be possible for the United States to work out some sort of blanket Security Council resolution that builds on that, codifies that, and hopefully that will be satisfying. I don't think the United States is going to get much more than that.

MR. BAKER: That's a Status of Forces Agreement between the U.N. and the troop-contributing country, and also the U.N. and the host country. In this case, it would be Bosnia, for example, or East Timor.

MR. BAKER: I thought it was Serbia that was the host country in Kosovo —

MR. MALINOWSKI: Well, that's more complicated.

But to get more than that — I mean, we're in a little bit of denial in this country about the extent of support, particularly within NATO and the EU, for this court. The Administration has handled its relations with those countries and the ICC in the worst possible way. Basically, for every action, there's an equal and opposite reaction from those countries. And you will see consistent exercise of a veto by France and Britain for any resolution that seeks to give blanket for-all-time immunity to U.S. peacekeepers.

MR. WILLIAMSON: Tom, when was the last time either of those countries exercised their veto rights?

MR. MALINOWSKI: What's that?

MR. WILLIAMSON: When was the last time either of those countries exercised their veto rights?

MR. MALINOWSKI: Well, in the East Timor resolution, they made clear that they would —

MR. WILLIAMSON: They would oppose it.

MR. MALINOWSKI: — that's right. And the Administration debated —

MR. WILLIAMSON: I do not believe they have used their veto right in recent history.

MR. MALINOWSKI: No. Generally, what happens in the Security Council is we don't press the matter if we think Britain's going to veto it.

There was a debate within the Administration on the East Timor resolution as to whether the United States should vote against, essentially declare a policy of shutting down peacekeeping missions, if this concern isn't addressed. And the good guys won and decided, at least for now, that they're not going to do that. So, there really isn't much weight behind the U.S. posture in the Security Council. And I'm not sure where it's going to go unless they can work out some sort of face-saving solution that builds on the existing system.

At the same time, I think you will see Mr. Helms and others in the Congress perhaps deciding that if the Administration isn't willing to shut down peacekeeping missions, they will. And we're going to have this ugly fight again and again and again. And we need to ask ourselves, is that really where we need to go in order to carry out this long twilight struggle against Queen Beatrice.

MR. BAKER: Jeremy.

PROFESSOR RABKIN: If the Security Council would pass a resolution saying you can never prosecute an American, ever, I might be willing to say, okay, that's good enough.

But clearly, they will not do that. They will not do that. That cannot possibly happen. The most that you could get — and I don't even think you can get that — but the most that you could get is, we won't prosecute you in relation to anything that happens in East Timor, or this little place, or that little place — which means that we have bought into the principle that we need to be given an exemption. We need to be given an indemnity that implies that when we don't get it, we are otherwise vulnerable to this court, and that's something we should never allow.

Yeah, you can make fun of the, ha ha, Queen Beatrice. The question is, why are these other countries so keen on this? I think the reason they're keen on it is that they are very, very uncomfortable with the idea that America has the military, and America decides on its own when and how to use it. And I'm sorry that they are uncomfortable. But we paid for it; it's ours.

That's just the fact. And we should use it responsibly, and we should be open to their criticism and we should take it seriously. But we cannot accept their jurisdiction, and that is really a pretty fundamental principle. We shouldn't compromise that fundamental principle by saying, okay, let's try to get a partial approval from them on this particular and that.

MR. BAKER: Well, let me ask you — and if you've got questions, just raise your hands. We'll call on you. But let me ask about whether, in fact, we can sustain a position like that.

Suppose Saddam Hussein is apprehended someplace that recognizes the jurisdiction of the ICC. Are we really not going to participate in his prosecution?

PROFESSOR RABKIN: I've never understood the force of that question. What does it matter whether we participate. First of all, who's going to capture him, if not us? And if we catch him, we just try him ourselves. But let's take, hypothetically, that

the French or the Dutch capture him. Those valiant Dutch peacekeeping troops this time strike home and they grab him. Okay, great. We salute you, Queen Beatrice.

Good work. Why do they need us? If they think they can have a trial, let them have a trial. They thought they could have a Pinochet trial. What do they need us for? They were ready to go ahead without some of the evidence we had. We weren't offering Pinochet evidence; we don't need to offer Saddam Hussein evidence. If you could imagine a case in which they have the military means to capture Saddam Hussein, you ought to be willing to imagine a case in which they have the legal talent to prove, gassing 10,000 Kurds was really bad.

MR. BAKER: Well, we're much more likely to have intercepts than the French.

PROFESSOR RABKIN: The truth is, I think it is much less important whether he is convicted than it is that we say, you can't come after us because we have for 200 years conducted a policy which is, when we are attacked, we have the military means to defend ourselves. This notion that it is absolutely vital, suddenly, now — now — to have a world criminal authority hovering over the world to keep the peace — how did that suddenly become so vital? It is not so vital.

And the last thing is, if you want to be trusting of the Europeans — I absolutely trust them on this. If you could imagine them mounting a trial of Saddam Hussein, which I can't because they'd be afraid of terrorism — but if you could imagine it hypothetically, you could imagine them, if necessary, deviating a little bit from the highest standards of criminal justice to make sure the guy is convicted. They do know how to do that in Europe — to reach the result which they are determined to reach.

I trust the French on that.

MR. BAKER: Tom.

MR. MALINOWSKI: I think you just asked the first truly relevant, pragmatic question that we've heard this whole morning. There've been a lot of very interesting, wonderful, fun questions to debate, but in terms of what we're actually facing as a country with this court, that's it.

This has been a theoretical debate about a theoretical institution for very long in this country. And the supporters of this court have projected their hopes onto the ICC, and the opponents have projected their fears onto the ICC. Everything that we've said thus far is going to be completely irrelevant about two or three years from now, once this court has a track record, for better or for worse, of prosecuting or not prosecuting the world's worst war criminals.

Now, if I'm right, what are the kinds of cases we're going to be faced with? Colombia's about to ratify the ICC Treaty. Why is it ratifying? Because it wants to use it against the FARC, the left-wing rebels the United States is helping Colombia to defeat. If and when that happens, the United States will be presented with a request for evidence, intelligence, or anything that could help prosecute the leader of the FARC.

I could easily imagine a case against Charles Taylor in Liberia, one of the world's ugliest thugs, where again the United States would be put in that position. I could see a country deciding to put the United States on the spot in the Security Council by referring a case against the leadership of Sudan. Now, all this debate is fine and good, but the United States will not veto that resolution. It will not.

MR. BAKER: Ron, Ed, what do you think?

PROFESSOR RYCHLAK: Well, number one, it seems to me that if the issue is handing over evidence to a proceeding in some other jurisdiction, that does not necessarily make you part of the court. I mean, we could do that with another nation, right? So, I don't see how this impacts whether we should be part of the court. Tom said, two or three years from now we'll have a track record. It'll be very interesting to me whether we will have any trials.

I think it's going to be a very long time before we have any kind of track record. So, I guess my concern, my things I'm looking for, is all I have.

By the way, we had mentioned Pinochet. I'm not sure he would have left power had the ICC been in place. He was granted immunity. National immunity will mean nothing to the ICC because it will not recognize national immunity. You may still face prosecution, so you stay in power. You can't have a Truth and Reconciliation Commission where people come forward and confess their sins and are forgiven.

Even if you say, well, the judges won't really prosecute someone who's been granted immunity in that circumstance. I'm not going to give up power. I'm not going to face that risk in exchange for a grant of immunity, which I would but for the ICC.

MR. BAKER: Back there.

AUDIENCE PARTICIPANT: What judicial philosophy will the court have? How ill they interpret the Statute?

MS. MASSIMINO: I think that's a really good question. But I think that it's very hard to predict that because we don't know the make-up of the panel of judges. Again, if we seek to influence what philosophy the judges of the ICC take vis a vis the statute, then we have to be engaged in that process of choosing the judges, being in there and promoting the philosophy we want. I think, you know, that the statute itself was very carefully drafted; obviously, it's much more specific in a lot of ways than our Constitution. But it is a much more limited document. We're talking about a criminal statute with very specific definitions of crimes. And if you put the Elements of Crimes document with the Statute of the ICC, I think that the range of differences in outcome based on individual judicial philosophy that might sit on the court is much narrower than you might expect to see on our own Supreme Court. But again, there are numerous questions like that, and our best answer to that is to seek to be engaged in that process. We have a perspective, as other countries do, about how the ICC bench ought to be interpreting the Statute in places where interpretation is a question and we have to be in there talking about that. And disengagement and divorce from this process doesn't give us the opportunity.

MR. WILLIAMSON: Why can't you do that through an op-ed column in the *Washington Post*?

Seriously, we're not solid. We're not commenting. And then again, I look at the ICJ. We were engaged in the ICJ. We just had the presidency of the ICJ. But the ICJ still does things like the Nicaragua case, where they accept fraudulent evidence, where they're not rigorous enough to examine the quality of the evidence.

Another thing is — Ron saw it coming and there's no question about it — I think one of the proponents of the ICC, Mike Sharth, has written a little article on amnesty. And he basically says that this probably is going to limit the ability to negotiate disputes through the granting of amnesty, but that's the price you pay for this — my wife came to my mind.

But I think that we've had the concept around for these super-national courts and so forth, and it does sort of remind me a little bit of what Mark Twain said about second marriages, that they were a triumph of hope over experience.

AUDIENCE PARTICIPANT: President Clinton authorized the U.S. to sign the treaty. He did so with qualification because of significant flaws with the Rome Statute. Can any of the panelists tell the audience whether or not those flaws were corrected. And he also recommended that his successor not sign the treaty unless they were connected.

The second important point one of its provisions does exactly what Jeremy suggested — authorized the U.S. to go in and remove, capture an American from the Hague. It passed overwhelmingly in the House and the Senate. And another version is presently being considered in the House. Could any of the panelists comment on that?

MS. MASSIMINO: Tom, do you want to talk about that?

MR. MALINOWSKI: Sure, the Hague Invasion. Yes, it passed. I love that provision, frankly, because it helps most people ridicule the bill. I hope it stays in because it's a joke. The United States is not going to invade the Hague.

Technically, you're incorrect about one aspect of it. It's not just a provision that permits the United States to go in and rescue Americans. It permits the United States to go in and invade a country to rescue any political, covered allied personnel, which would apply to a Turkish colonel, an Egyptian intelligence officer or an Argentine postal clerk, anybody who's employed by the government of a NATO ally or major non-NATO ally. I mean, it's something — if you put that before the American people, you would either get a big laugh or you would find some people like Senator Byrd, for example, who actually cares about war powers, saying this is an embarrassment and we shouldn't do it, which is why, despite the fact that it's passed in various versions in both houses, it's never been enacted into law.

MR. BAKER: Jeremy.

PROFESSOR RABKIN: You make it sound as if this was something done by Senator Helms on his own, who just barely scraped together a majority of yahoos. As a matter of fact, I think it got 92 votes in the Senate. One thing I know for sure is that my two senators, Charles Schumer and — what's her name? — Hillary Clinton, both voted for this thing. And the reason they voted for this thing is not that they're worried about Argentine postal clerks. And the reason they were able to vote for this thing is that everybody in New York says, "Yes, if they interfere with an American, we should be ready to hit back." It doesn't require that we invade the Hague. It leaves all the discretion to the President. But it is putting countries on notice that we are serious about this.

And what it is most clearly saying is that there is not going to be somebody getting an award in the State Department because he did a year of night-duty monitoring what happened to that American over months and months of pointless negotiation. That is past. There is not going to be a Carter Administration saying, "Well, you have an American; let's not be too hostile about this." I mean, we want to put people on notice, and that's a serious thing to do and worth doing. Most Americans support it. Good luck to you.

E n g a g e

I mean, I've seen you on TV; you're pretty good. But I think you will have a hard time ridiculing this effectively. I think that most of the American people think, "Well, yes, this is one of the reasons why we have the military, to protect Americans."

MR. MALINOWSKI: One reason this bill passes, in addition to the wonderful name, American Service Members Protection Act, which no one can vote again, is that here's what it does. It tells the President, you've got to invade the Hague, unless you don't want to. You've got to impose sanctions on all these countries, unless you don't want to. And so on and so on. It's one of these things that's easy to vote for; it has no impact. It's frankly kind of pathetic.

PROFESSOR RABKIN: It has an impact because it makes it easier for the President, if you have a president who feels that he should be protecting Americans instead of cooperating in the global governments of the world. If you have, let's say, a Republican president, he now can say I've got authorization already, and that makes it a little easier for him to act. And I think this President will act.

MR. BAKER: So Elisa, if it doesn't, in fact, require that the government, the administration, do any of these things but simply authorizes it, what's wrong with having that arrow in our quiver?

MS. MASSIMINO: I think it's a kind of pointless piece of legislation. No administration, this one, and no future administration is going to bomb the Hague to get somebody from the Rwandan motor pool out of custody.

MR. WILLIAMSON: But, Elisa, let me just —

MS. MASSIMINO: That's not going to happen. And it is a feel-good kind of vote, and it has not been enacted. I don't think it will be enacted. But if it is, I don't think that any administration is going to — what it will do, though, is further alienate the United States from its allies who consider this a slap in the face. They know they're not going to have to gear up their militaries when the U.S. invades the Hague; no one takes it that seriously.

But for the Administration to allow that to happen, if a bill like that gets enacted — in fact, the Administration opposed the original version of that bill quite strongly and said, we're not doing it unless you make it meaningless and give us all the waivers that we want. So, it's quite clear what the Administration's view is toward that, despite some particular Administration officials' statements on that.

MR. BAKER: Let me ask about the alienation. Obviously, at the end we made proposals at the end of the negotiation that out allies in NATO and basically the EU bloc and the folks that depend on them, and Africa, just blew off.

MS. MASSIMINO: And it was, essentially, a U.S. exemption. Let's just be clear about what the U.S. got and didn't get. What it didn't get is a blanket exemption for all U.S. nationals to the court.

MR. BAKER: Right, which we thought was necessary because we are more likely than anybody else to be involved in a lot of international military actions. But it's perfectly understandable why they would see it as bullying and arrogant, and it's perfectly understandable why we would see it as necessary. But if, in fact, there are not consequences to blowing us off in these international negotiations, aren't we going to see that again and again? And if we simply say, well, we don't want to piss anybody off, then people will say, well, then it was fine, what we did in Rome.

MS. MASSIMINO: Well, I wouldn't generalize that broadly. In fact, organizations like mine are frequently pushing the United States to do something that's going to piss a lot of people off. You know, we need the United States sometimes to act unilaterally. You know, I'm not a person who thinks that unilateralism is always a bad thing, if it's done for the right ends.

So, I wouldn't over-generalize and say that the principle on which I'm suggesting the U.S. act here is one that means that we don't ever want the United States to stand firm and stand on principle, et cetera. We often do, and we're often the ones pushing the U.S. to do that.

I also would not characterize the negotiations as the U.S. being blown off. Really, I think that's completely not reflective of reality. That's based on conversations with U.S. negotiators who were in Rome, and beyond, and in the prep comms. I mean, there is a key philosophical difference here. And it was not because of feelings that the U.S. was arrogant in wanting this exemption; I'm sure all the other countries would want such an exemption.

Our allies, similarly, would have wanted such an exemption, if such an exemption would not have gutted the capacity of the court to go after countries like Iraq and Libya. But it would have, and that's why they made the judgment that it's better, on balance, to craft the Statute in such a way that it constrains the possibility so much so that it is a virtual impossibility for their nationals to be brought before this court. The U.S. has made a different judgment on that balance. I mean, that's what

this all comes down to.

Despite the fact that some countries who are parties to the Treaty think the United States is unduly unilateralist, think the United States is arrogant, they can think all that they want. That's not the purpose of this court. That's not what's driving the establishment of this court. What's driving the establishment of this court is the repeated failure of the United States and other governments to hold the world's worst criminals accountable, and a desire to have that not be the case again; a desire to stand on the side of the victims of those violations.

MR. WILLIAMSON: I'm sorry Elisa — really. Again, I admit that I was not that close to what went on in Rome. But, my impression is that what happened was that the U.S. position that the court should be Security Council-triggered was met with overwhelming opposition by people who were hostile to the role of the permanent members in the Security Counsel. Then the U.S. took a very stupid position and somehow wanted to carve out from the Statute countries that were not parties to it. That is totally inconsistent with the approach that we take on multi-lateral agreements, whether it's torture or what have you. I mean, that was just so counterproductive to getting that up, I really think it was a colossal error on the part of the Clinton Administration to go off in that direction.

MR. BAKER: Jeremy.

PROFESSOR RABKIN: I just can't accept this claim that it wasn't hostile to America: "That wasn't it," they say. "It was that they were so concerned about atrocities not being punished." This is just absurd. Hitler, Stalin, Pol Pot, the genocide regime in Rwanda — what do they all have in common? They were all partners with France.

There has hardly ever been a genocidal regime in this century which the French have not embraced, funded, cooperated with. It's preposterous — utterly preposterous — to say that Europeans are just so concerned about this that they have to snub the United States because they really have a moral concern. This is really insane if you view the world this way, if you make it, to your mind, credible. Human Rights Watch and all these other groups, which I think are sincere, have exactly the same agenda as the Europeans, and "therefore the whole worlds agrees," they say. I think these advocacy groups are being used by governments, and the governments have very different agendas, and the governments' agendas are not very nice.

MR. BAKER: One question — last question.

AUDIENCE PARTICIPANT: I see some problems with the ICC. If you assume that a defendant is here, let's say, in New York and he's indicted by the court, what do you do? Who decides in the instance when there's a conflict between the United States Constitution and the ICC Statute?

MS. MASSIMINO: Well, I think that's a great question to end on because it is very forward-looking. I think one of the benefits that I expect to see coming out of the ICC's existence is that countries, including the United States, will be amending their national criminal laws and jurisdiction so that such a person could be prosecuted inside the United States.

You know, that is true right now in the United States with regard to torture. A non-U.S. national who commits the crime of torture outside the United States can be brought under very pedestrian jurisdiction into federal court and be put to death if found guilty for the crime of torture. That's never been done. Ambassador Crosford* really kind of laid out the agenda for this in his comments around un-signing in his press conference. That is of the things that I expect we will see, and that we ought to see. Even opponents of the ICC and proponents ought to join together to make sure this happens, because we need to fill the gaps in current U.S. law so that we can properly exercise complementarity.

It was a very interesting phenomenon when Pol Pot was discovered in the jungle and the Clinton Administration asked itself, "Well, what can we do with this guy? Where should we try him? Let's try him here." And it was quickly discovered that we don't have the criminal law jurisdiction to try such a person here. That would be the first thing that my organization will be looking for in a case like that — not to immediately send such a person to the ICC.

The ICC is supposed to operate when national jurisdictions can't. The least that the United States ought to be doing right now is getting its own house in order so that it can exercise jurisdiction over people who it wants to see in the dock. This is not a requirement; there's prosecutorial discretion; some cases won't be brought. But if there's a case where the United States thinks the person has committed crimes against humanity, war crimes, genocide, it ought to be able to have the jurisdiction to prosecute that person in a regular, run-of-the-mill proceedings in federal court.

MR. BAKER: Tom.

MR. MALINOWSKI: I don't have much to add to that. I totally agree. I think that's an issue where we probably can move forward with the Administration in a pragmatic way.

Engage

I want to make maybe a more general comment to respond to my distinguished colleague. The United States is the most powerful country in the history of this planet. We have overwhelming military-economic might; military spending that vastly exceeds everybody else combined. We've got planes at an Air Force base in Missouri that can take off and fly to any point on this planet and destroy any target in any weather and fly home without ever having to land. It's awesome. And one of our major problems is managing the resentment that that sometimes causes around the world.

Here we are expressing not confidence but fear that a bunch of middle-aged jurists sitting in a building in the Netherlands, from Denmark and New Zealand and Canada, are going to come after us. And they're going to limit our ability to exercise this awesome, unprecedented power and might, which would be comical, if it wasn't for the fact that it leads people to start talking about shutting down peacekeeping missions and withdrawing U.S. troops from different places around the world. That would really hurt U.S. national interests, and certainly damage American prestige.

American conservatives, I think, do this country a great service, and they do the world a great service, by reminding us to be skeptical of international agreements and international treaties that promise to fix everything. But there's a real big difference, I think, between skepticism, which is healthy and makes this country stronger, and fear, which makes us weak and petty and insignificant. I think we need at least to have some faith in American power and our own capacity to defend our interests as we move forward with this debate.

Again, three years from now, this is either going to be a successful court or it's going to be a failure. Either we're going to be proved mostly or partially right or you're going to proved mostly or partially right. And if you're right, you're going to have a very easy time. You know, the United States is going to have a very easy time dealing with this court, if indeed the prosecutor is a rogue prosecutor and he's going around trying to chase Don Rumsfeld around the globe. But if you're wrong and I'm right, then the current posture is going to be completely untenable. Politically, it's going to be untenable in this country, if this court does, in fact, do its job and it goes after the right people. And at that point, I think the whole debate will be transformed one way or another.

MR. BAKER: The doubters have their moment to sum up.

PROFESSOR RABKIN: Could I just say, I think this is not framed fairly to say, on the one hand hope, and on the other hand, the voice of fear. I don't think I'm expressing fear. I'm expressing contempt, loathing — I mean, I could go down a list. But I view this not —

MR. MALINOWSKI: That's what leads to the Dark Side.

PROFESSOR RABKIN: If you want to put it in emotional terms, the main feeling driving my criticism here is self-respect. I think we owe it to ourselves to say, "Wait a minute, we won't allow this to be done to us," and not because there are going to be Dutch troops occupying New York. Of course there won't be. Of course. But you have to be able to say, we are not going to be morally intimidated. We are not going to allow ourselves to be used for the gratification of people who want to have an international spectacle at our expense. That is a matter of self-respect.

To be a little more down to earth, we did actually put up with too much of this at the U.N. in earlier times. And one reason why we did it was because no one's paying attention to the U.N. so it doesn't really matter. So, we just sat there and let them beat us up. It was all just talk. You could say, well, in the end, really, it's just talk, if they indict someone, because the ICC can't really follow through. Well, right. They can't "really" follow through.

But, as a matter of self-respect, we want to make it clear that we don't even accept that they can start, that we are our own country and Europe doesn't have any right to govern us. None. Zero. And you can say we are now the world's greatest superpower. But before we were the world's greatest superpower, before we were any kind of superpower, before we were even a power, we founded this country in a revolution against Europeans, and said that by "the Law of Nature and of Nature's God, we're entitled to a separate and equal station among the powers of the earth." And what that meant was: "Back off! We're our own country!" And we're still entitled to say that.

I don't believe in three years everybody will be saying, "Gosh, this court is so great." I think in three years there will be a lot of uncertainty about what it is. And I'm perfectly happy to stay on this side of the Atlantic while Queen Beatrice works out what kind of court this is going to be. If it turns out to be safe and nice and good, fine. But why do we have to be part of it while it's having its experiment? It's the Europeans who like to have experiments: Fascism, Communism — they have all kinds of experiments. Let them experiment. We will stay here with our Constitution. That's a fair deal.

MR. BAKER: Ron, two tough acts to follow.

PROFESSOR RYCHLAK: You know, I can't say what Jeremy said as well as he said it. But last night in the hotel, I read 200 or 300 columns and letters to the editor — there's a listserve that compiles these things, and I printed them out. Over and over and over again, our European allies — I can't believe we're breaking them. I represent the Holy See when I go to the United

Nations. Mother Theresa said a thousand people may say you're wrong; it doesn't mean you're wrong. You have to evaluate and look at things closely.

It's not fair. I don't think our service men or our leaders are in jeopardy. If Bill Clinton and Kissinger can't travel to certain nations, that's a small cost, if the court were going to be worthwhile. I don't think there is a real up-side to this court. I ultimately do not believe that deterrents will work here. And when you weigh the minimal risk — and I think they're minimal right now, although I do think because it's a living, breathing institution, that might change. When you weigh that against a very limited up-side, then I say it's not worth it.

I don't think three years from now we are going to have any kind of track record that anyone will accept. People will say, "We haven't had time yet; we've just begun the investigation; we've done this." And what it will be for the United States will be another one of those things that Europeans say this, and they're investigating this President, and they're investigating that. It will be another consideration in a *Blackhawk Down* situation should that be a consideration, when the guy's Blackhawk is down and he's got the machinegun, he's looking at the crowd coming at him? Should he think "I'm going to protect my men, get the people, what's going to happen with the ICC?" Do we want to give them another consideration at that point? I just don't see the up-side that justifies that.

MR. BAKER: Elisa, you've had one chance at this, but —

MS. MASSIMINO: Real short. I think that the question is, do we have any shared goals here? I want to believe that we do. Maybe I'm naïve, but I want to believe that our shared goals are that we do not want to see the world's worst criminals get off. I think we want to see them held accountable. And the question is, how do we best do that?

It used to be, a lot of people argued that the road to stability was accommodation to violation and state-sponsored killing. But that's been proven to be wrong. It's a question of short-term stability versus long-term stability. Justice mechanisms, whether it's the ICC in the outside cases or national jurisdictions or *ad hoc* tribunals, are part of the solution to that.

If the ICC fails, then I think it undermines the goals that we all share. I agree that it's not going to be overwhelmed, despite the fact that the world is not lacking in potential defendants. The ICC is not going to be overwhelmed with defendants in the dock. And that's exactly how it should be. I think if the ICC helps to motivate nations to hold their own accountable, that is the ideal result. That's what we all want.

MR. WILLIAMSON: Elisa, I think where I'd say we disagree — there's no question that every member of this panel is in favor of using whatever tools are available to bring bad guys to justice. What I find amusing is that at the Rome meeting, the U.S. delegation showed up without an agreed-upon position within the delegation — I understand the French had the same problem. But out of this meeting comes this thing which is just not a very good idea in the way it got implemented. But all of a sudden, it becomes the only vehicle. And those who are against it, are, as David said, are holding themselves out to provide a haven for war criminals. That's just nonsense. We're all against war criminals. We're all for bringing them to justice.

I think the thing that bothers me about it is that we are probably the best practitioners of respect for the rule of law. Some may be equal to us, but I don't think anybody is superior to us. We have rigorous rules that our service people in the military abide by. We have courts. We have a system. And we are the ones who respond to the alarm. We do not need to put our servicemen in a position where the responsible powers in the U.S. can be second-guessed by people who, at the end of the day, are not accountable to anyone else. And that's the problem with the ICC, the Rome Statute.

MR. BAKER: So, unless there's somebody here from the French Embassy, I'd ask all of you to join me in thanking this panel.

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Engage

LABOR & EMPLOYMENT LAW

A BRIEFING*

Hon. Cari M. Dominguez, *Chair, Equal Employment Opportunity Commission*
Hon. Arthur Rosenfeld, *General Counsel, National Labor Relations Board*
Hon. Eugene Scalia, *Solicitor, United States Department of Labor*
David Fortney, *Fortney & Scott, moderator*

MR. FORTNEY: My name is David Fortney. I am the Chair of the Federalist Society's Labor and Employment Section. The Federalist Society is pleased to present this program.

The program today is a good example of the types of ideas that we really want to promote. So we're glad to have you here, and I'd like to tell you a little bit about how we would like the program to run today. We advertised that we will end at noon, and we will end at noon.

With that said, the format will be that we will simply start alphabetically, so there's no priority here by surname with our speakers, nor any priority in agencies or anything. I've asked them to prepare a 10- to 15-minute overview on some of the policy issues that each of their respective agencies are working on at this point. Then from there, we will have some question-and-answer exchange. At that point, we would be delighted to have questions from the audience also. We're a small enough group so that we can easily do that, so don't be shy.

Before I start with the introductions, I would also like to acknowledge and thank John Scalia from the Federalist Society, because this is a great program. It was John's idea to put this program together. This is the first time that we have had these three agencies, the Labor Department, the National Labor Relations Board and the EEOC, all sitting down in this type of presentation. I think it's just super. So, it's a privilege to have that.

Let me briefly introduce the speakers we're going to hear from today. You have detailed bios in your materials, and all of our speakers have bios that are multiple pages, so I won't go through that with you.

The first will be Cari Dominguez. Cari, as I'm sure you know, is Chair of the Equal Employment Opportunity Commission. Cari was confirmed in August of 2001. She's serving a five-year term, and her term will expire in July of 2006. On a personal note, in addition to having her as a good friend, I enjoyed the privilege of having Cari as a client at one time in a former life. She was at the OFCCP and I was at the Labor Department. So, Cari, we're glad to have you.

Our next speaker will be Arthur Rosenfeld. Arthur is the general counsel of the National Labor Relations Board. Arthur is also a former Labor Department junkie, and he and I worked together in the Solicitor's Office there. Prior to his confirmation, Arthur was the senior labor counsel for the Senate HELP Committee; that's Health, Education, Labor and Pensions Committee, and he was senior labor advisor to Senator Jim Jeffords. Arthur was confirmed by the Senate for his current position in May of 2001.

And last, but certainly not least, is Eugene Scalia. Gene, as you know, is the Solicitor of Labor. He was appointed by the President in January 2002, and he has been active on a number of fronts both at the Labor Department, and with respect to the Federalist Society. Gene has co-chaired a chapter in Los Angeles in one of his prior lives and has been very active with us throughout. He is widely published; some of his articles are listed in the biographical materials you have and otherwise.

So, with that, Cari, can I turn to you and ask you to start for us?

CHAIR DOMINGUEZ: Thank you, David, and thank you very much for your warm welcome and introduction. It's a great personal treat to be introduced by someone whom I professionally admire greatly, and had the pleasure of working with. I have to say, it's a great treat that my married name allowed me to move up to the top of the alphabet.

I used to be an S; now I'm a D. This is good.

It's a great pleasure for me to be here, and I feel particularly privileged to be a part of this distinguished panel. Gene's agency, the Department of Labor, and the Commission have been working closely together on a number of issues. We've enjoyed a very close working relationship. Of course, the Commission was modeled after the National Labor Relations Board, and they're sort of our big brother, if you will. So, it's good to have Art Rosenfeld here — his world is very much our own. All of us will be talking about the *Hoffman Plastic* decision, which is a perfect example of how a decision that affects one agency certainly has repercussions throughout all of the employment and labor agencies and the arena.

Let me also just take a moment to say a few words about the Federalist Society. You know, we at the Commission spend a lot of time talking about diversity. And I believe that the Federalist Society provides a forum that allows us to practice the purest form of diversity, and that is the form from which all the other forms of diversity emanate. That is, a

diversity of views and perspectives and opinions that are forged by our own uniquenesses and individual experiences. So, I just want to commend the Society for creating this forum that encourages diverse points of view to be engaged towards the advancement of sound public policy and legal discourse.

Just as it is with the Federalist Society, it is with this Administration that one finds the word "freedom" at the core of its efforts. The Commission has three main initiatives that promote this very cherished national value. In management, we have the President's Freedom to Manage Initiative. This promotes independence, flexibility, and accountability in how we manage and use the resources that have been entrusted to us by the people of this country as we deliver services and products that are citizen-friendly, citizen-centric, and are responsive to the needs of our citizens and our working men and women.

At the programmatic level, we have two initiatives. We have the President's New Freedom Initiative, which is designed to increase access and employment opportunities for the 54 million Americans with disabilities. This is a government-wide initiative. We all share in that initiative. And in fact, tomorrow we'll be celebrating the 12th anniversary of the enactment of the Americans with Disabilities Act. We're going to be looking at the accomplishments and ways to continue to improve access to this very valuable yet untapped resource in our nation's economy.

And finally, we have a commission-specific initiative, one that I launched shortly after my arrival, which we have called the Freedom to Compete Initiatives. When we peel all of these laws that we're all responsible for administering and enforcing, what is it that this is all about? This really speaks to the value of fairness in the workplace — the freedom to compete in the workplace on a level playing field, without regard to factors as irrelevant or immaterial as race, gender, religious background, national origin, disability status or many of the others you're so intimately familiar with.

So, we are very hard at work at the Commission in promoting these principles in a user-friendly manner through extensive outreach efforts and through consultations. We have our traditional partners, we have our attorneys and the human resources compliance professionals who follow the activities of the Commission. We want to broaden that scope. We want to get to the line executives. We want to get to the managers, the people that are influencing organizational change, and invite them to engage with us in a collaborative spirit.

Just a quick overview for those of you who may not be as intimately familiar with the Commission as some others of you may be. By way of background, the Commission is a five-member commission that was enacted as part of the Civil Rights Act. We became operational in 1965. No more than three members can come from the same party, so at the moment, we have two Republicans, two Democrats, and we have one vacancy. The President has nominated the third Republican Commissioner, who has not yet been confirmed. We also have a Presidentially-appointed, Senate-confirmed general counsel position that has been vacant the whole term that we've been there, and in fact it was vacant during the previous administration, so we're following some positions that aren't necessarily all that helpful to me.

We have 51 district offices throughout the nation. The budget has remained constant over the last several years, about $300 million, with about 2,800 employees. Even with all of these years of experience, we continue to receive a sizeable number of charges. Consistently, we've gotten about 82,000 — a little over 80,000 charges each year.

About 35 percent of those charges are race-related; about 30 percent are gender related. The two fastest growing segments of our activity are age and disability, and I should tell you that we are getting a lot of men filing age discrimination charges. As the economy has taken a downturn, we've seen a higher incidence, particularly related to age. About 10 percent of our activity is national origin. And one to two percent is religious discrimination. That piece of it has taken a huge spike since September 11.

We have had a tremendous increase in charges filed directly related to the September 11 incident. In fact, we've had 577 formal charges of workplace discrimination, and in religious discrimination, we've gone up to 610 charges. That's almost triple the number of charges we historically get, most of which has to do with Arab-American background, being of Muslim or Sheikh faith. So, the Commission has embarked on a very aggressive campaign to make sure that employers prevent misdirected anger to be directed toward innocent working men and women who come from these backgrounds.

When I became Chair — as David mentioned, August 6 will mark my first anniversary — I had a very simple mission but a very difficult mission to implement. That was, take a fresh look at the Commission; see what's working; see what needs to be improved, particular in light of the 21st Century workplace, when you have globalization, shifting demographics, and see how the Commission is positioned to address the issues of the 21st Century.

We quickly launched a strategic review of all of our functional areas, leaving no stone unturned, looking at what can we do better and what can we do to be more responsive to what's happening in the workplace today. From that, we developed what we call a five-point plan, which really sets the strategic framework. There's almost that General Electric model we've all heard about, the work-it-out concept; if it doesn't fit one of our core business objectives, then we have to ask ourselves why are we doing it. We did the same thing at the Commission. We said, "Let's take a look at what's really at the core of our enforcement and outreach responsibilities. And if we're doing things that don't really relate to that, should we continue to do them in light of our limited resources and the current workplace?"

The first point that was very well received and continues to be, is what we call proactive prevention. It is the President's primary mission. In our efforts, we ask: how do we make sure that we prevent charges from being filed in the first

instance? How can we be far more aggressive in information sharing, in developing a clearinghouse of best practices and other kinds of information, sharing best ideas? We've been toying with the idea of some sort of seal of approval, something that allows employers to understand what are the core components of being EEO-fit and having good programs in place.

Proactive prevention also requires extensive coordination, an example of which is the work we've been doing across agencies on cash-balance pension plans. These are the plans that became famous and popular in the late '90s. And as employers converted from the defined benefit pensions to a cash balance approach, we received close to a thousand charges that raised the issue of age discrimination.

And I'm pleased to have in the audience a couple of experts from our shop, David Frank, who's my legal counsel, and Lynn Clements. If you really want to know all the nitty-gritty, feel free to talk to them because that's been their life's work since they've joined the Commission.

But it's an example of how we need to process these charges, looking and developing a framework that allows us to determine whether in fact there is age discrimination; it's a very difficult issue to address. Are these conversions in fact age-driven? Are they driven by other factors? We can't get into the details of the investigation, but I can ensure that Labor and Treasury and IRS and Pension Benefits Guaranty and many other groups have been quite involved in coordinating our efforts on this.

Quickly, the second point of our plan is called proficient resolution. If we can't prevent a charge from being filed, what can we do to address those charges, those issues, faster, better, cheaper? I cannot take credit for this because it was prior to my arrival, but we launched the priority charge handling process some years back in the Commission, which allows us to look at charges based on the merit-worthiness of the charge, and not necessarily on the timelessness. So, we're looking at that; we're looking at technology and other ways to improve.

Thanks to those efforts, we've gone from 110,000 charges in inventory — which is a fancy word for backlog — down to an all-time low of 32,000 charges. So, we have made tremendous headway and Congress is getting a little happier with us, which is always good.

The third and fourth points are very related, and they really are at the core of our work. That has to do with strategic enforcement and litigation, and with mediation and alternative dispute resolution. At the core of our work, we have continued to have tremendous success at mediation. In fact, about 66 percent of all of the disputes that go to mediation are successfully resolved with over 90 percent satisfaction rate by both sides, the charging parties and the respondents, on mediation. That tells me that they respect the process. They may not necessarily agree with the outcome in the process because usually, when you're in an adjudicatory role, there's always someone who that doesn't feel satisfied. There's a bit of a compromise. But nevertheless, there's a tremendous respect for the process and allowing the members to participate together.

On strategic enforcement, the Commission files anywhere from 300 to 400 lawsuits a year. In the scheme of 80-some thousand charges, it is not a whole lot, so we have to be extremely strategic and selective in how we go about choosing. Are these cases that are novel? Are these cases that are going to advance case law?

Preliminarily, we have just completed a study. It's not yet ready for publication but shows that we have been quite good at selecting the cases. In over 60 percent of the cases that go to trial, the Commission prevails. So, this is a pretty good indicator that we're using those resources fairly cautiously.

On the other hand, I think we need to do a better job of looking at the data, looking at the trends. We sit on a goldmine of information. How do we make sure that that information is in fact being transformed into a more strategic enforcement?

In connection with that, we just launched the national mediation agreements concept. We were dealing with charges and retailers one establishment at a time on the same issue. We said, why don't we go to a centralized model that allows us to connect and have a focal point within the employer organization as well as within the agency and deal with these issues in a more systemic, consistent and uniform manner? That's beginning to take hold. We've had three agreements signed, so that has been a very helpful tool for us.

The final point in the five-point plan is what I call practicing what we preach. I believe that we cannot have credibility with our customers if we ourselves don't apply the same standards. So, we have asked internally to launch the best mediation program we can develop, the best outreach efforts, and apply those standards to ourselves so that we have some credibility when we go out to the employer community.

Very, very quickly, let me just mention three significant Supreme Court decisions that have affected the work of EEOC, and that I know my colleagues are going to talk about very extensively. In *EEOC v. Waffle House,* a six-three decision, the Supreme Court held that an agreement to arbitrate between an employee and an employer does not bar the EECO from pursuing victim-specific relief on behalf of an employee who files a timely charge of discrimination. We believe that this decision acknowledges the role that EEOC plays in the work place, that we have the authority to recover full relief for individual victims of discrimination when it serves the public's interest. We believe there is a role for arbitration, and the courts have reaffirmed that and will continue to endorse that. But at the same time, there may be instances when it is important for the Commission to become involved.

Engage

Hoffman — I'm just going to briefly touch on it because I know that my colleague is going to get very much into that decision. But it is one that we have to look at. Although it's enforced by the National Labor Relations Board, it does have an impact on the Commission's ability to recover certain damages for undocumented workers. I'm pleased to say that we believe that, while back pay awards are not allowed, there are lots of other forms of remedies that are permissible under the decision, and we have been very consistent with the statements made by the Department and the NLRB as it relates to this topic.

And finally, *Chevron USA v. Echazabal*, where the Supreme Court, in a unanimous decision, supported our interpretive regulations on that decision, giving a strong endorsement to our agency's direct threat regulations and rejecting claims that we actually acted in a capricious or arbitrary fashion when issuing these provisions. So, we're pleased with some of the rulings, but we'll take what we get.

Anyway, let me stop here and defer to the "R" in the group. Thank you.

MR. FORTNEY: Arthur.

MR. ROSENFELD: So, the Supreme Court decided *Hoffman*?

CHAIR DOMINGUEZ: Slightly.

MR. ROSENFELD: Good morning. I may have the easiest job of the three of us up here because I came into an agency that's been mission-driven since 1935, with great professionals and career folks. And so, every day I come in and talk to these people, and they tell me the pros and cons of where they think I should be going, and I often follow their advice. But I do what I think is right. What I'll talk about in a few moments is the prosecutorial discretion of the general counsel. But I make a decision. In many cases, the decision would be to not issue a complaint, and for all intents and purposes, that particular labor case is over and the parties can get back to work and if necessary resolve that dispute in some other manner.

But in any case, I have a great job and great folks. I'm sure you all do also. I'm not trying to steal thunder. I'm looking over here — by the way, I know a lot of you here, and it's nice seeing you all again. But the other reason my job is so easy, of course, is that every morning I sit in my office and the phone rings, and I pick up the phone and it's Peter Hurtgen. And he says, "This is the Chairman." He has been nominated to head the federal mediation service and I will miss him.

Let me talk briefly about the status of what's going on in terms of Board seats. Currently, we have four seated members on the five-member Board, three of whom are on recess appointment. The confirmed individual, Wilma Liebman, has a term which expires in December of this year. There have been nominations made to the Board of four people — I'm going to have to stop and think about this — Alex Acosta, Peter Schaumber*, Bob Battista* and Dennis Walsh. We have four nominations pending, and Wilma is in the process.

There will be consideration, I think, of this five-member package sometime this term -- hopefully sometime this term. When your term expires at the Board, unlike, for example, the NMB, you're out, which the White House discovered about a year ago with Peter. There was about a three-day hiatus in Peter's service because the White House was unaware of the fact that when his term expired, so did he.

White House Personnel are on the case, and I have the utmost confidence in White House personnel to get this resolved by the end of the year — I love that.

I was going to read you some stuff on prosecutorial discretion. I'll be very, very brief. Suffice it to say that the statute, in 1947, was amended. Prior to that time, the general counsel was basically the Board's legal officer. In 1947 the statute was amended. Section 3(d) states, "There shall be a general counsel to the board who shall be appointed by the President by and with the advice and consent of the Senate for a term of four years. The general counsel of the Board shall exercise general supervision over all attorneys employed by the Board, other than administrative law judges and legal assistants to Board members, and over the officers and employees in the regional offices." This is the important part, "He shall have final authority on behalf of the Board in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the board, and shall have other duties."

And I have other duties. As general counsel, you wind up being the administrative officer because it's difficult for a five-member agency to make decisions about administrative matters. They'd have to sit down and vote: I mean, they're having sufficient problems getting decisions out. In any case, this provision, this formal authority, was one of the reasons that President Truman vetoed Taft-Hartley. It was overridden by the Congress.

I'm now going to give you an example of what I do. I'm not going to give you numbers. I want to get to the question-and-answer period as quickly as possible because I think that'll be more fun.

I had a case brought to me by my Office of Appeals. We cannot operate unless a party files a charge that the law has been violated. If the charging party files a charge and the regional director refuses to issue a complaint — doesn't find merit to the charge or refuses to issue the complaint for other reasons; —for example, we will not issue complaints, even where there is merit, if it wouldn't effectuate the policies and purposes of the Act. Where the regional director makes that decision

to dismiss, the charging party has the right to appeal that to the Office of Appeals.

In part, this procedure was devised by the General Counsel as a protection for the individuals who filed the charge and their rights. And of course in part, it's a mechanism for the quality control of our regional offices to make sure the decisions are proper. In any case, we had a case where the regional office decided not to issue a complaint, and it came to Appeals, and it came to an agenda where I sit down with the Office of Appeals and they argue the Region was wrong and that a complaint should issue. In most cases, that's what they do.

Here are the facts. An employer and a union are about to start collective bargaining. The employer wants to bring in a laptop to take notes instead of using a pencil and pad. The union refuses to negotiate if there's a laptop in the room. The employer refuses to negotiate if he can't bring in his laptop. The employer filed the charge, an 8(b)(3) charge saying the union is refusing to bargain. There is Board precedent that you cannot bring in verbatim recording devices, and that's understandable because it would chill the free exchange of information.

Matters in negotiations, like the size of the table, the size of the room, the no. 2 pencils, are preliminary matters, and thus are not mandatory subjects of bargaining. I know I'm losing some of you here; I'm losing me. But it's important to know that items like these are permissive subjects of bargaining. And, you can't insist on a permissive subject of bargaining to impasse. You can ask and even insist, but not to the point of impasse. So, the employer is saying that the union is insisting to impasse on this permissive subject of bargaining — bringing in the laptop.

I get this case. I look at it. Again, we can't operate without charges being filed, and we do not solicit charges.

I'm thinking, the employer is saying the union refuses to bargain on this permissive subject -- the laptop. Couldn't the union say that the employer is insisting on bringing in a laptop, which is a permissive subject of bargaining? We don't solicit charges. I suggested to the region that they talk to the union. What I wanted to do is get a charge from the employer, get a charge from the union — the same facts — and issue both complaints. And I think that would have driven the Board crazy. But importantly it would have presented the issue to the Board in a way that the could consider whether to treat a laptop like a recording device.

Unfortunately, from my perspective, I couldn't get the union to go along because the parties by that time had started negotiations. But Peter, one of these days, we're going to get this issue to you.

PANELIST: With or without the laptop.

MR. ROSENFELD: Oh, you would not believe — I can sometimes go through nine cases in an hour. I have an hour limit. That day, with in the appeals agenda, when this came up we had three cases, one of which we deferred, one of which lasted ten minutes; this laptop case took about two and a half hours of discussion, and it seemed like that's all we talked about for the next three weeks because it was such an interesting topic.

But the impact of this is, I hesitate to use the word, "negligible". It was going back and forth and the arguments were based on, if we issue a complaint on the employer's charge, we're really seeking a change in the status quo and that would mean parties would be in doubt about the state of the law while they waited for a decision from the Board. If the union would have filed the charges, we'd be defending status quo and that would not have presented the same problem. Well, the case has gone away. But, that's what I do for a living, and that's the best part of the job, frankly, these agendas, both appeals and advice.

The statute is an interesting statute. The scheme of the statute is such that we have to determine what phrases such as "good faith bargaining" , and "no interference, restraint or coercion," mean. The NLRA was designed by Congress so that the Board would flesh these concepts out. So, the statute is sort of a living thing, and as the workplace changes — and it has changed — hopefully, the statute will be up to the task. But the agendas are fun because we're always dealing with — laptops aside, because we do have a few luddites in the agency – new issues, things like email and whether a computer is employer property, or is it a work site and on and on and on.

Hoffman Plastic — we just issued a memorandum to the regions on *Hoffman Plastic* last week, I believe. It's on our website. The gist of this memorandum, to my regional directors, is that number one, undocumented workers are still employees as defined in the Act and held in a number of Supreme Court cases. Number two, we're going to seek special remedies for cases where there would otherwise be no remedy. We talked about pushing for formal settlements, which gives us a leg up in terms of contempt — notice reading, for example. We're not sure of what the full extent of these remedies might be, but our regional directors, all 31 or 32 of them, are very creative. We've asked that these creative individuals, when they come across a fact situation wherein they think a creative remedy is warranted, to send it to Washington so we can have a single overall litigation strategy in this important area.

But the third, and I think most important, piece of this memo is that I'm telling the regional directors that we are not the INS. We're not going to willy-nilly investigate these matters when an employer or, in some cases, a union raises allegations as
to the undocumented status of an employee — I emphasize an employee. The memo, again, is on the website, and you might want to take a look at it.

Engage

I think I will now pass the torch to Gene Scalia.

MR. FORTNEY: The EEOC and NLRB are independent agencies, where of course the Labor Department is part of the Executive Branch. So, Gene, are you working on anything beyond laptops over there? What are you doing at Labor?

MR. SCALIA: Thanks, David.

I want to second what's been said earlier about what a good idea this forum is, and I think it exemplifies the value of the Federalist Society, which does a better job than any other organization I know in bringing people together for discussion of legal issues. I'm proud to be included in this panel, and think the Federalist Society's putting it together is a real service.

I'll talk about three subjects today: first some enforcement issues at the Department; second, our approach toward rulemaking; and third, I want to touch on some thematic points suggested by a few Supreme Court decisions this Term.

Let me start by acknowledging, as I'm sure many have pointed out, that there's a similarity between federal law enforcement and the annual Harley-Davidson convention in Sturgis, South Dakota.

I was driving across the West a few years ago when this convention was going on, and I caught a newspaper article about the event. The title was "Dakota Town Shaken by 250,000-Biker Rally." The article reported, "The town now belongs to 250,000 motorcyclists, a virtual occupying army in black leather boots and tattoos here for an annual conclave that has become perhaps the world's largest biker rally...."

The article goes on to say that since the gathering "got underway last weekend, seven bikers have been killed in accidents and more than 150 people have been arrested for drunk driving. Scores more have been jailed for drug possession." The heading to the next part of the article is, "Armed Man Shot to Death." I'll stop with that description of goings-on in Sturgis. But the article hastens to add that there were a variety of people there. The Hell's Angels were there. So was a group called the Banditos, not a very auspicious name. But there were also biker clubs sponsored by Christian groups and the Alcoholics Anonymous. Malcolm Forbes was there. And it's been rumored that the Death Valley chapter of the Federalist Society was there -– with Leonard Leo riding at the front on his Harley.

There's a quote in the article that caught my attention at the time, and it's what I want to focus on. The reporter interviewed somebody who lived in this town, who explained, "It's only a small percentage of bikers that make trouble. But the problem is, a small percentage of 250,000 people is still a lot of troublemakers."

I start with this story for two reasons. Let me be clear. I don't regard it as a complete analogy. There are some resemblances, but I'm sure there are some in business — and probably also some in biking -– who would take offense at the suggestion that bikers and business people are identical.

But I begin with this, first, to make the point that we're approaching our jobs in the Labor Department with the view that most of the people that we regulate — most employers and, for that matter, most unions (we regulate unions to a degree) — do want to comply with the law. That's something I know from having been in private practice representing primarily business for about ten years. Most of my clients were trying to comply with the law. Most employers want to do that, and I think that's an important thing for us to keep in mind as we go about doing our job.

I should add that respect for the law, a desire to comply with the law, is a spirit and an attitude that can be cultivated and instilled. Our Assistant Secretary for OSHA, John Henshaw, speaks eloquently and effectively about the employers out there who really come to take pride in having exemplary safety and health records. I think our going about, John going about, others going about and working to instill that value in companies can do a great deal to promote the safety and health of workers. That's something that John and Secretary Chao have done very effectively.

It's important to do this, in part, because it's just not possible for us to inspect anything approaching a large percentage of those whom we regulate. OSHA, for example, would take 167 years to inspect every worksite that it regulates. That can't be done. It's important, therefore, that those we regulate be given incentives to comply with the law beyond the mere threat of inspection or enforcement.

For these reasons, compliance assistance is something that Secretary Chao has made a great priority during her time as Labor Secretary. She and the agency heads within the Department have been endeavoring to do a better job making information available on our laws' requirements, and on how they can be met.

Secretary Chao has also made efforts to establish career positions within the Department that will remain after this Administration leaves — career positions for compliance assistant officers who are not there to prosecute, to investigate, or inspect, but instead are there to help people do a better job complying with the law.

Of course, the second point I have to make from the quote about the biker convention is that, even though most of those we regulate try to comply with the law, there still is a percentage that is not concerned with complying. That percentage may not be large, but, to paraphrase the Sturgis resident, "a small percentage of the American economy is still a lot of troublemakers." As a result, enforcement remains very important within the Department of Labor, and particularly within my office, the Office of the Solicitor.

For those of you who don't know, the Solicitor's Office is about a 500-lawyer office, about half of us in Washington, DC and the other half in regional offices. Out in the regions, we almost exclusively conduct litigation. We also do some

litigation in the national office. In the national office, we're also greatly involved in assisting with rulemaking and providing advice and counsel.

I've said that enforcement remains very important to us at the Department. And I've said that knowing that this group would want to hear it, for at least two reasons. First, the Federalist Society is a group that places great emphasis on the rule of law. Part of the rule of law, of course, is enforcement of the law when the law is not respected. Second, law enforcement is something that is important to the Federalist Society. Some of you, maybe even many of you, are Republicans, and certainly law enforcement is something Republicans are often closely associated with.

One of the most effective enforcement mechanisms that OSHA has is something that we call our "egregious policy." I always take pains to emphasize that the policy is not egregious. The policy itself is commendable. The policy is issuing multiple citations — what we call instance-by-instance citations — for each violation of a regulation, rather than issuing a single citation for multiple violations. It's a policy we use when dealing with employers that have shown themselves to be particularly disrespectful of the law. That policy was introduced, I'm told, by George Salem, a Solicitor in a prior Republican administration. It's a policy that's important to me and that we continue to pursue.

The third reason that at least some of you may be interested to hear about our continuing interest in strong law enforcement, is that some of you are in private practice. You're lawyers representing businesses and you are mindful of the maxim of a distinguished former White House counsel who remains involved in the Federalist Society — "God bless the man that regulates my client."

So, as I say, law enforcement does remain important with us. I'm certainly mindful that it's a special responsibility and mission of the Office of the Solicitor. When I consider where the Labor Department has gone wrong in the past, I think that one of the principal sources of its going astray is losing sight of its core mission and forgetting that its core mission is enforcement of workplace standards: ensuring a safe, healthful workplace, and assuring that workers are compensated in accordance with federal law.

The best example of this sort of mission creep, of course, is the threatened home office inspections during the last Administration. That's a policy we've decided not to pursue. We don't currently have a plan to inspect laptops at home.

Another example would be volunteerism. We've been interested in looking for ways the Department is discouraging volunteerism more than is appropriate, and is confusing what is genuine volunteerism with work. We recently issued an opinion letter having to do with volunteer firefighters, many of whom, even in their free time, genuinely do want to help stop fires, and would like the freedom to volunteer to do that. We issued an opinion letter making clear that in appropriate circumstances they do have that freedom to volunteer.

So focusing on work issues is one core part of our mission. Another core part is focusing on low-wage workers. At other times when the Department has gone astray in the past, it may have been because we became too preoccupied with legal issues having to do with higher wage earners, and lost sight of the fact that low-wage earners often are least able to determine when their rights are being violated, and are least able to hire others to help them. Low-wage earners are particularly deserving of our attention and efforts.

We recently brought two cases against poultry processing companies, and we've gotten some criticism from people who in other areas are supportive of what we are doing at the Department. The cases had to do with "donning" and "doffing" practices, putting-on and taking-off sanitary clothing in the workplace. We thought the cases were important to bring for three reasons.

First, because of the rule of law: It seemed clear to us after a close evaluation that the time these workers were spending putting on protective clothes — and the circumstances in which they were doing it in the couple of companies we looked at — was time that needed to be compensated under the law. That seemed fairly clear under the statute, under a Supreme Court decision, and under our own regulations. And so, in the interest of the rule of law, we went forward with the cases.

Second, we thought it was important for the Labor Department to get involved because these were low-wage workers who were somewhat less likely to receive adequate compensation without our assistance.

And third, it is important for us to clarify the law, and this was an area where the law had become unclear and we were seeking to clarify it. In our first day in court, we filed a settlement agreement and consent judgment with one of the two companies providing for back wages that we estimate at $10 million. That is one of the largest recoveries in the history of the Wage and Hour Division.

A third priority in our enforcement efforts is willful and repeat violators of the law. We received a decision two days ago from the D.C. Circuit in a case involving an employer that had knowingly exposed its employees over a period of time to fire hazards due to what's called combustible dust resulting from certain operations the company conducted. There was a federal study indicating the company's practices were hazardous. There was an internal study indicating they were hazardous. The hazards were not adequately addressed; we found 89 violations in our inspections. The employer denied none of the violations, but said they were not willful. We disagreed and just recently prevailed in the D.C. Circuit, obtaining a $600,000 recovery, which is a sizable recovery for OSHA. I'm proud of that. It's important that we vigorously prosecute employers who show what amounts to contempt for the law.

To round out my discussion of enforcement priorities: I've mentioned low-wage workers, and I want to emphasize that that this is not to suggest that ERISA is not a priority for us as well. It is. I see Bob Davis is here. He's a former Solicitor, and Bob is well aware that ERISA ends up being an area the Solicitor spends a good deal of time on. I have probably spent more of my own time on ERISA matters than in any other single area. We are certainly mindful of the importance of protecting peoples' retirement savings and health plans.

Let me turn to regulatory policy. First, we have reinstituted at the Department what we're calling the Policy Planning Board. It used to be called the Policy Review Board, but was disbanded in the last Administration. As a consequence, until recently, regulations were being issued by individual agencies within the Department with relatively little knowledge and oversight by the Deputy Secretary's Office, for example, or by the Assistant Secretary for Policy.

Secretary Chao has reconstituted what we are calling the Policy Planning Board, which is chaired by the Deputy Secretary and Assistant Secretary for Policy and includes the heads of all the agencies within the Department. Many career and political appointees attend each meeting of the Board. The meetings are an opportunity to review proposed regulations, to discuss them and vet them, before they are sent over to the *Federal Register*. There's an awful lot of experience and knowledge within the building, not necessarily limited to a particular program area. By putting this Board together, we're drawing on that knowledge and experience, but we're also ensuring a degree of central oversight of the Department's rulemaking efforts that is important for a cabinet-level department, and is an appropriate exercise of the Secretary's responsibility for what goes on at OSHA, the Wage-Hour Division, PWBA, and other components of the Department.

In our rulemakings themselves, there are a couple of things we're emphasizing. One is clarity. Another is identifying where we need to change the regulations on the books to make them better comport with the contemporary workplace. The best example of that is the so-called white-collar exemptions to the overtime requirements for executive, professional, and administrative employees. These exemptions have been on the books more or less unchanged for more than 40 years.

To read the job descriptions in these regulations is in some respects to read an encyclopedia of jobs that used to exist. So many of the titles are archaic. To give you a few examples, these regulations are very good at telling you whether or not a "jobber" is exempt or non-exempt. You can look at the regulations and find out whether a "linotype operator" is exempt or non-exempt. You can find out the exempt status of a "straw boss." And my favorite, which may be more a matter for the Justice Department than the Labor Department, you can find out the proper way of compensating a "gang leader."

These regulations don't do as good a job as they need to do in explaining how to compensate some of the jobs that we have in the contemporary workforce. And for that reason, we're taking a look at revising them.

Let me make a few points about this Term's Supreme Court decisions. You heard from Arthur on the *Hoffman Plastic* case. We have taken a view very similar to the NLRB's. I want to concentrate on a theme that I saw in several of the Court's cases this Term, and that is how federal regulation ought to interact with what I'll call private work rules.

As a first example, let me talk about the *Barnett* and *Chevron* decisions. They were both ADA decisions. They were interesting to me because both involved rules put in place by employers that were, at least in part and arguably primarily, rules for employees' benefit. *Chevron*, as Cari has said, involved a rule that prohibited a worker who had a kidney condition from holding a job that would have exacerbated the condition and, doctors said, perhaps threatened the worker's life. The company excluded the worker from the job under its safety policy. That decision was challenged by the worker, but it was upheld by the Supreme Court, unanimously. As I say, this is a workplace rule put in place by the employer primarily for the employee's benefit. Obviously, there were incidental benefits for the employer, and I don't know fully the employer's motive, but the rule was at least in part for the employee's benefit.

The *Barnett* case was an ADA case involving the interaction of the ADA and seniority systems. The question was whether, when you have a seniority system in a workplace, a reasonable accommodation under the ADA can require making an exception to the seniority system and giving a worker a job to which, under the seniority system, the worker would not be entitled. The Supreme Court indicated that in the ordinary course, the seniority system would prevail. It did allow for exceptions under a possible variety of circumstances. But again, the decision was interesting to me because it was the second time this Term that an employer went to the Supreme Court to defend a rule that was in place partly to help employees — again, I'm not saying entirely to help employees; I don't know the employer's motive. Note that this was not a union-negotiated seniority system; it was a company-implemented, company-imposed seniority system.

There was an aspect of the *Barnett* case that was of further interest to me that I'll touch on briefly. That had to do with whether the rule would have been any different if the seniority system had been negotiated with a union. As I said, the seniority system in that case was put in place by the company. The AFL-CIO filed a brief in the Supreme Court saying, whatever you do with this particular seniority system, there are additional reasons why, when a seniority system is negotiated with a union, more deference is due that system under the Americans with Disabilities Act. It's an interesting question, how you take account of the fact that private workplace rules are union-negotiated, if indeed you take account of it at all.

Let me offer the following as food for thought for this group, because I think this is a group that likes to think seriously and creatively about labor and employment policy. What I have to say now really does not have anything to do with our current enforcement of regulatory policies or programs; I offer it for purposes of thought and discussion.

It seems that right now the law takes three different approaches toward union-negotiated workplace rules. In the

Engage

Barnett case, it took what I will call the neutral approach. It didn't seem to matter to the Supreme Court whether or not it was a union-negotiated seniority system. The AFL-CIO said it should matter. I think Justice O'Connor, in her concurring opinion, suggested it might matter. But the Court did not indicate it was important on the whole. That's what I will call the neutral approach to union-negotiated rules, and I think that is the predominant approach.

A second approach that you will find on occasion is what I'll call the deferential approach to union-negotiated workplace rules. One example of that is Section 3(o) of the Fair Labor Standards Act, which has to do with changing clothes in preparation for work. As I've indicated in discussing the poultry cases, in a lot of circumstances, that kind of clothes-changing time is compensable. It does have to be paid. But Section 3(o) of the Fair Labor Standards Act enables a company and union to agree not to pay the time. So, this is a case where the law is deferential and says, "Well, when there's a union negotiating, maybe we'll view the employment terms a little less skeptically."

The third approach one sometimes sees is what I'll call the skeptical approach. The best example of that is the Supreme Court's decision in *Alexander v. Gardner Denver*. The general rule now on agreements to arbitrate statutory claims is that when an employee enters an agreement to arbitrate discrimination claims, for example, that may be a valid agreement and the employee can be held to that agreement and not permitted to go to court. The employee has all the same rights, the Supreme Court has said, but those rights can be subject to mandatory binding arbitration; the rights are resolved in a different forum.

That's the general rule, but the rule for unions is different. The Supreme Court said in *Alexander v. Gardner-Denver* in 1974, that when it's a union-negotiated agreement to arbitrate claims, then there is the opportunity to go to court, as well as the opportunity for arbitration. So, that's a case where the law is a little skeptical toward union-negotiated agreements. The individual employee can enter a binding agreement for the mandatory arbitration of statutory claims, but the union cannot.

I've offered the foregoing as an observation, by way of food for thought. Again, it's not something that has to do with our programs particularly or any items on our agenda at the Labor Department, but I think it is an interesting aspect to labor and employment law currently. You can certainly make arguments for each of the three approaches.

Cari talked about the *Waffle House* case, and I wanted to conclude by referring to that. *Waffle House* was a welcome decision for the Labor Department. It affirmed the government's ability to bring a claim on behalf of an individual employee, notwithstanding the fact that the employee and employer had agreed to arbitrate the claim. The employee would be compelled by that arbitration agreement in most circumstances to arbitrate and would be barred from court. But the Supreme Court said that does not preclude the government from going to court. As a government litigator, I welcome the authority and discretion to be able to proceed to court on a claim, even when the employee has agreed to arbitrate.

That said, for the Supreme Court to say that the federal agencies need not defer to arbitration agreements is not the same as the Supreme Court saying that we may never defer to arbitration. The National Labor Relations Board has a long-standing practice of deferring to arbitration agreements and permitting factual issues, at least, to be resolved in arbitration. If the process was fair and reasonable, the Board often will defer to the outcome.

Likewise, the Labor Department has regulations indicating that, for example, when a worker complains to OSHA that he was terminated for raising a safety concern and that allegation is being arbitrated, the Labor Department may wait, take a look at the outcome, and if the outcome seems reasonable, not proceed. So, I think it's important to be clear that, while *Waffle House* has affirmed our ability to litigate despite an arbitration agreement, there still are policies that are not invalidated by the Supreme Court decision, under which deference to what I'm calling private workplace rules may remain appropriate.

Thank you.

MR. FORTNEY: Thank you, Gene. Let me open it up. We have about 20 minutes. Is there anyone in the audience who has a question that they would like to raise with this panel? Mr. Davis.

AUDIENCE PARTICIPANT: I think this is a question primarily for Cari and Gene. I think one of the very welcome visible parts of this Administration's programs in your agencies is, Cari, as you put it, prevention — you and the Secretary have quoted as compliance.

Let me ask the follow-up. Let's say that our clients take a good, healthy, frank, candid look at what they're doing and whether it is legal. And let's say that we as lawyers get a little nervous about whether that's protected by privilege or work product. What are the chances that our clients are going to have to end up sharing that deliberation with the enforcement people?

MR. FORTNEY: Did everyone hear that question? No? All right. Let me see if I can briefly summarize it. We have a mic, and I will require questioners to use the mic.

In a nutshell, and not as eloquently as Bob Davis stated it, the question deals with the emphasis on compliance, assuming that those of us that represent employers, that our clients take a good, hard look at compliance and do a candid assessment of their strengths and weaknesses, which is part of any assessment. What is the likelihood that those assess-

ments that are viewed as sort of the crown jewels are ultimately going to be disclosed to the enforcement components of these agencies?

The tension is obvious, and I know there's been a bit of a track record particularly with OSHA, on this issue — the self-assessments. That's one reason why lawyers often get in the loop to try to create the attorney-client privileges, work-product; there's a lot of ways of trying to shield this. But I think on a broader point, from a policy perspective, if we're really now going to talk in terms of compliance, recognizing that responsible self-assessment and self-correction is a key component, how do we balance or deal with that vis-à-vis enforcement? Cari, why don't we start with you?

CHAIR DOMINGUEZ: First of all, thanks, Bob, for the observation. I think I was well trained at the Department of Labor when you were Solicitor, so I'm trying to take your lead at proactive prevention. But I do think that we're working very hard to keep a firewall, if you will, between the enforcement activities that drive the charges that come before the Commission, and the compliance assistance. I think, Gene, that's probably very consistent with Secretary Chao's efforts to create a separate unit that deals with compliance issues. I think it's very, very evident for us that it has a chilling effect.

We're considering separating, even more discretely, the enforcement arm of the Commission from the proactive prevention units, the outreach and the consultation. So, it's something that continues to need work.

I've been having these roundtable discussions all over the country. We continue to have the name recognition — somebody said you need to have a second label, EEOC, because when we come forth, the whole notion of enforcement comes up, as opposed to this consultation. So, it's clear that we have to separate the two.

MR. FORTNEY: To clarify that, the separation is not formal within the agency. It's brought forward preliminarily and it's agreed up front that these results, these discussions, will not be turned over to enforcement. Is that right?

CHAIR DOMINGUEZ: Right.

MR. FORTNEY: Gene?

MR. SCALIA: I think my answer in many respects is similar to Cari's. First, if indeed an employer has conducted a very thorough, good-faith effort to determine the law's requirements and its own compliance with those requirements, that's going to have a great deal of bearing on the exercise of our prosecutorial discretion.

As I've indicated, we're most interested in pursuing employers who show contempt for the law, and employers who are going to the kind of efforts you've described are less likely to be the target of more vigorous prosecution.

I think the answer to your question will depend, in part, on the use that an employer is making of an effort of that nature. If an advice-of-counsel-type defense is raised, if an employer is making an issue of the study and trying to make the study a defense, obviously, then, the privilege itself has been waived. But as a general matter, I think the Department has become more sensitive in recent years to not discouraging those kinds of internal audits and has tried to look for ways, if an action needs to be brought, to bring them in a way that does not punish the employer for having made that kind of assessment. That said, I don't think we can provide in all circumstances a guarantee that those studies won't end up being used.

But I appreciate your raising the point, and I think it is one that we need to be clear about as we go forward.

MR. FORTNEY: Arthur, are there any guarantees from the Board?

MR. ROSENFELD: Yeah, there are guarantees from the Board to go balls-to-the-wall to get everything we can possibly get in an investigation. We don't have the same problems. We don't do this type of outreach. Our type of outreach is to try to work with the local bar so that we can nip in the bud problems that may arise. But when we do conduct an investigation, we're going to go as far as necessary to get the answers.

MR. FORTNEY: Okay. I've got a question here with Roger, then I'm going to come over here to you, John.

AUDIENCE PARTICIPANT: I'm Roger Clegg with the Center for Equal Opportunity. I have a question mostly for Cari and Gene on the widespread consideration of race, ethnicity and sex in the recruitment, hiring and promotion decisions in the private sector.

Gene, the Department of Labor continues to require goals and timetables for companies in the private sector that do contracting with the federal government, and of course those goals and timetables encourage the private sector to take race, ethnicity and sex into consideration in deciding whom to hire. I wanted to ask you about that.

And, Cari, I wanted to ask you what the EEOC is doing and what its policy is going to be with respect to this kind of discrimination.

MR. FORTNEY: Gene, why don't you start that.

MR. SCALIA: Yes. Roger is referring to the Executive Order 11246, the so-called affirmative action executive order, which is enforced by our Office of Federal Compliance Programs (OFCCP). This obviously is an old debate. The Department is, on the one hand, very anxious to prosecute and discourage discrimination in the workplace, and at the same time it is important that we be careful, in the process, not to encourage so-called reverse discrimination or improper preferences.

Obviously, the Executive Order remains the law. The regulations that have been issued under it remain the law. For our part, among other things, we have been endeavoring to have our regional solicitors' offices work more closely with OFCCP as it conducts its audits and enters agreements with employers. This is an area where the law is often very difficult. We've found that it is helpful to OFCCP to have some early involvement by the Solicitor's Office, which is something we're trying to promote with a variety of program areas. So, that's one way in which we're trying to ensure that what we're doing is encouraging non-discrimination and compliance with the law.

CHAIR DOMINGUEZ: We have a less difficult task because our task really is based on the charges that are filed based on the individuals' allegations of discrimination. So, unlike the Department of Labor, in this role I don't look at goals and timetables or make determinations of under-utilization or any of those factors that are required, as Gene mentioned, by Executive Order 11246 and its implementing regulations.

Our focus is much more individual, which is extremely helpful to our ability to treat each case on its merits, and not based on blanket categories or groups.

MR. FORTNEY: Darren. Step forward, please.

AUDIENCE PARTICIPANT: My name is Darren Zeplin. I'm with the Society for Human Resource Management, which represents over 170,000 individual human resource professionals. My question is for Solicitor Scalia.

The Supreme Court, as you know has, been coming down with a myriad of employment cases. One of them was *Wolverine v. Ragsdale*, in which the Supreme Court, in a 5-4 decision, invalidated the Department of Labor's regulation dealing with the Family Medical Leave Act, specifically, the penalty that is coupled with an employer who fails to give notice designating leave as FMLA. I was curious about your approach, the Department of Labor's approach, to this decision and what you're doing internally and how you will proceed, if so, in changing what the Supreme Court has requested in the regulations.

MR. SCALIA: As you've indicated, the Supreme Court invalidated one part of the FMLA regulations. It's our legal responsibility to take a look at what they did, to see what its effect is for the regulation, and to see if there are any other very similar provisions of the FMLA regulations that may also be affected by that. That's something we're going to do.

MR. FORTNEY: Other questions from the audience? Yes, sir.

AUDIENCE PARTICIPANT: This is directed to Mr. Rosenfeld. Could you explain any major differences between your enforcement of the *Beck* decision compared to your predecessors.

MR. FORTNEY: And Arthur, if you would take 30 seconds for those in the audience who don't know what "*Beck* decision" means, explain that for us.

MR. ROSENFELD: *Beck* has to do with the use of mandatory dues in non-right-to-work states, being used for things other than the collective bargaining process and the representation by the union.

Keep in mind that you don't have to be a member of the union. But if you work in the unit, you're represented by the union; they represent you. You can't compel a unit member who is a non-member of the union to pay full dues, unless those full dues go to those representational categories.

We don't get a lot of *Beck* cases. There are some issues that are pending right now based upon decisions in the circuit courts, which I'm not going to get into now, where we are considering issuing complaints to give the Board a chance to reconsider some of the decisions that have been laid down by the board since California Saw. Does that answer your question? I'm not sure.

I am a Republican appointed by a Republican president. The only hearing on the Hill where I have testified was a hearing on the House side conducted by a Republican questioning the general counsel and the Board on *Beck* enforcement. So, it's a hot-button issue, to say the least.

But my concern has been and will continue to be with the resources of the Agency. For example — I'm going

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beyond your question — I issued recently a memorandum on benefit fund collection cases wherein the parties can have access to district court to enforce the collective bargaining agreements. It's just a matter of resources. I had the same resource problem with *Beck*. There are questions as to what is required of a union at the various stages of the process. We're looking at those.

MR. FORTNEY: Any other audience questions? If not, the prerogative of the Chair is to ask the final question, and that is for all three of the panelists.

Each of your have addressed enforcement with the notion of voluntary compliance being central. And it strikes me that you have somewhat different models of centralized versus decentralized enforcement. At one end of the spectrum, arguably, is the EEOC, which is a fairly decentralized arrangement. Policies are set within the regions, and the hinterlands are out there.

In the middle, it strikes me that the Labor Department has sort of a mixed bag, but Gene has referenced at least in one context OFCCP. His lawyers have become a little more involved in — these are my words — quality control. And presumably, that brings uniformity, which is an important point here.

Perhaps most centralized, although experiences may differ on this, at least historically, would be the labor board. And Arthur made clear, for example, in his most recent issuance on *Hoffman Plastic*, the emphasis that the regions are to check back in, in part to make sure there is uniformity.

Is uniformity important? Is the Labor Board policy a good one? Is this something to aspire to? How do you see your current enforcement mechanisms? Are they working well? Do you envision some changes? What can we look forward to on that front? Cari, we'll just go right down the line.

CHAIR DOMINGUEZ: Well, I think the models you've described are pretty much reflective of the types of agencies and commissions that we're running. You know, on the executive side, clearly, it's a more highly centralized part of the executive branch.

You have an independent commission with five commissioners who guide policy. The model we're operating on was a model that was voted upon by the previous administration, where after 35-some years of experience, they wanted to delegate litigation authority to the field while retaining some centralized activity on matters that may have been novel or may require some additional areas of further refinement from a policy point of view. So, that's the model we're operating on right now.

Whenever you delegate anything, you always run the risk of not having the consistency and uniformity that one would hope for. So, we're looking very closely at that model, and looking to see whether in fact, after these years, we need to make some adjustments to it.

The enforcement focus continues to be one where the effort is, "Let's try to bring these issues to closure pre-litigation." And the number of settlements that we've had, and resolutions under mediation — before litigation, speaks well. Because oftentimes, once you file a lawsuit, then when the judge mandates mediation or when the parties realize that we're serious about this, the majority of the charges become settled at that stage.

So, we're looking at all of these things and making a determination whether there are certain things that once again need to be brought back to a more centralized model.

MR. FORTNEY: Arthur.

MR. ROSENFELD: I guess you could refer to us as a centralized model, although John Irving might agree with me that, although supposedly we're centralized, we have 32 regional directors who often go off on their own. When I came onboard, we had a mandatory submission list of issues that had to be submitted by the regions, if the issues arose, to our Division of Advice. And it contained 64 items.

As a managerial tactic, I took that list and threw it out. I told the regional directors that they are the best and the brightest, and I trust their discretion. Then I issued what I think was a two- or three-page memorandum that says to them, you'd better tell me about anything that's going on, and you'd better call Advice if it's a unique or high profile issue. So, the results are supposedly the same.

I have had, and I will continue to have, and I'm sure John has had in his tenure, things happen wherein, if you were in the region, you might have called Washington. Ninety-five percent of what goes on at the Labor Board never gets to Washington. It's resolved in the region. These are the folks that the charging parties and the people who are impacted by the law see. These are the people that they know as the government, a federal agency.

Talking about *Hoffman*, for example. In *Hoffman*, the secret ballot election that we conduct may be the only time in their lives that persons from other countries get to vote in a secret ballot election. The point I'm getting to is, early on, in the 1930's, when we conducted elections, the Board agent would walk in carrying the American Flag to make it clear that even though the election was on the employer's premises, this was a government-conducted election, and don't mess around.

Maybe we should get back to something like that. I'm just not sure.

But centralized — yes, but with the freedom to create. Let me put it that way.

MR. FORTNEY: Gene, you get the last word.

MR. SCALIA: I guess I should be clear initially on what I was saying about OFCCP. I wouldn't describe what I was referring to there as centralization. I was trying to make the point that we're trying to have our lawyers out in the field work more closely with that agency, as well as with a variety of agencies. We found that early involvement by lawyers can be very helpful in identifying important, promising cases and also in identifying cases that ultimately will not be pursued, and therefore should receive less investigative effort.

I'm the Solicitor of Labor; my name is on scores of cases that are filed every day, every week, and I'm ultimately responsible for that and I recognize it, and I ought to recognize it. Having said that, I think most of the cases that we bring are brought under fairly clear, plain, non-controversial, circumstances. There's a violation; there's a rule; apply the law to the facts and the case ought to be brought. I could never review every case. Nobody would want me to do that, but what I can do is establish priorities, consult regularly, indicate what I'd like to see pursued more, what seems to be worth less time. And we certainly do all those things.

I meet quarterly with my regional solicitors. I've now visited half the regional offices. My deputy Howard Radzely's here today. Howard's been in place longer than I have, about a year now. I think he's been probably to every regional office, and some more than once.

One of the things Secretary Chao set about doing immediately when she came into office, was putting back in place the Policy Planning Board that I referred to earlier — a centralizing mechanism for review of regulations. And another thing that she told us was that she wanted us out there visiting the Labor Department's regional offices, and we're doing that. There's a senior-level political appointee of the Labor Department visiting every regional office every quarter now.

One of my colleagues was visiting our Philadelphia office and was approached afterward by a career employee with that office, who'd been with the Labor Department a very long time, and told my colleague, "I've been here for 15 years and until this year, I've never met a political appointee in the government. But in the last year, I've met four, including the Deputy Secretary." So, I think the Secretary's made a great effort in that regard, and I think it's been good for morale. As Arthur said, we have some terrifically talented, dedicated career people without whom we could never get our job done, and they like knowing that we appreciate their efforts. But secondly, it's very valuable in getting out the Secretary's message on compliance assistance and enforcement priorities and other things that are of importance to the President.

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GOVERNMENT BY LITIGATION: ARE CLASS ACTIONS SUBVERTING THE POLITICAL PROCESS?*

Rep. Robert Goodlatte *(Virginia)*
The Honorable Viet Dinh, *U.S. Department of Justice Office of Legal Policy*
Dean Mark F. Grady, *George Mason University School of Law*
Mr. Richard F. Scruggs, *The Scruggs Law Firm*
Mr. Brian Brooks, *O'Melveny & Myers, moderator*

MR. McCONNELL: My name is Bob McConnell, and I'm the Chairman of the Federalist Society Litigation Practice Group. On behalf of the Society and the practice group, I'm very happy to welcome you all here today.

I look forward to our panel discussion today, and to moderate and introduce our panelists is Brian Brooks of O'Melveny and Myer. Brian graduated from Harvard, and Chicago Law School. He's Co-Chairman of the Federalist Society Subcommittee on Class Actions, and his practice primarily deals with very complex class action litigation against highly regulated industries — banks, insurance companies, and telecommunications companies.

Brian will take over from here.

MR. BROOKS: Thanks very much, Bob, and thanks to everyone in the audience for coming to our panel discussion today. "Government by Litigation: Are Class Actions Subverting the Political Process?"

We at the Federalist Society are very, very excited about having such an extraordinarily distinguished panel of speakers today. Our first speaker will be Congressman Bob Goodlatte of the 6th District of Virginia.

When we first started planning this event a couple of months ago, we knew that the primary thing we needed for this to be a success was a leading congressional expert on litigation reform, and the very first name that came to our mind was Congressman Goodlatte. Congressman Goodlatte has emerged over the past several years as probably the House's most sophisticated and most serious student of the class action issue. Congressman Goodlatte is the primary sponsor of H.R. 2341, the Class Action Fairness Act. Among other things, that bill would expand federal jurisdiction over interstate class actions in cases where the amount in controversy, in the aggregate, exceeds $2 million, and the class members, or at least some of the class members, are citizens of different states from some of the defendants.

That sounds a little technical. Let me tell you from the defense bar that is the critical issue; it may well be the only issue in many lawsuits. As Congressman Goodlatte has recognized, there are fundamental justice issues in situations where a company may have to defend a nationwide class action which alleges damages in the billions of dollars in state courts some place. Congressman Goodlatte's bill will change all that — we in the defense bar think, for the better.

This legislation, as I say, is really considered critical by many of us in the business community, since the prospect of defending your nationwide business under one state's law in one state court really is perhaps the seminal class action issue of our day.

Congressman Goodlatte is a graduate of Bates College and the Washington and Lee University Law School, and practiced law in his town of Roanoke, Virginia for 13 years before being elected to Congress in the Class of 1992.

I am very pleased to have the Congressman with us today, if we could just give a warm welcome to Congressman Bob Goodlatte.

CONGRESSMAN GOODLATTE: Brian, thank you very much. I appreciate the opportunity to pitch this bill to you. I'm not sure this is the order that you originally wanted to have this go. I'm going to get very little lunch and do a lot of talking — and I have to warn you about that before I start.

I have to warn you that recently I spoke to a high school class in my district. At the end of the hour, I asked them if they had one hour left to live, what would they spend that hour doing. And a lot of hands went up and they had a lot of great suggestions about places they'd want to go or things they'd want to do. But one young lady raised her hand. She said, "Congressman Goodlatte, if I had one hour left to live, I would want to listen to you speak."

Well, I smiled and I said, "Well, now let me get this right. If you had one hour left to live, you would want to spend it listening to me speak?"

She said, "Oh, yes, because each moment seems like an eternity."

The bill that I want to talk to you about, the Class Action Fairness Act of 2001, is very similar to a bill that I introduced in the last Congress that passed the Judiciary Committee and in fact passed the House of Representatives with bipartisan support. We have introduced that bill with some new provisions, which we think enhance it and make it even better. But it still retains that core provision that Brian just referred to. And it's one that I think is very important. What we

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are intending to do here is to place complex class actions in the courts that we feel were designed to handle the most complex litigation involving parties from a multitude of different jurisdictions.

There are many federal laws that become the basis for class actions and are brought in our federal courts and do result in, effectively, legislating through our courts, through the class action process. I have my concerns about that, but that is not the focus of this legislation.

The bill's focus is to get into federal court questions of diverse jurisdiction that have a national impact, that can have the effect of legislating through our judicial system, and place them in courts where we think a more consistent standard will be applied, especially on the question of what class actions should be certified as a nationwide class.

The problem arises in this way. For a case that does not involve a federal question but rather simple diversity of jurisdiction, the federal diversity rules require that you must allege at least $75,000 in damages for each plaintiff in the case.

So, if you have a case that involves a million plaintiffs and the average claim is $50,000, or what is effectively a $50 billion lawsuit, that case cannot be brought in federal court under our laws. That is because it doesn't meet the $75,000 per plaintiff test to get into federal court, even if the defendants are all over the country, the plaintiffs are in all 50 states, and you have the diversity that would be required.

What this bill does is change the $75,000 per plaintiff requirement to $2 million for the entire class. That will bring the vast majority of these cases into federal court. Now, if you have a class action that clearly involves exclusively plaintiffs and defendants in one particular state, they will not be able to move their class action to federal court, nor should they be able to.

But what this will do is greatly limit the ability of plaintiffs' attorneys to forum shop. Forum shopping in class action suits is a lot different than if you're bringing an individual lawsuit, where you can choose between a few jurisdictions and maybe you can choose between state court and federal court.

That is something that, in my opinion, is wrong, where in a federal class action case, you can choose from literally 4,000 different jurisdictions in the country, so that one state court judge in a county in Alabama several years ago could certify more nationwide class action lawsuits than the entire federal judiciary combined. The attractiveness, for whatever reason, of bringing the cases in his court, whether he was more generous than anybody else in terms of certifying class actions, or juries were historically known to be more generous in that jurisdiction, I don't know.

There are particular jurisdictions around the country that are favored by class action attorneys to bring these suits. Once they are brought there, because of the current federal rules, there is no way to remove them into the federal system, which is designed to hear cases involving people from a variety of different states. That, I think, is something that we need to correct.

I do not believe this is a states' rights issue. In fact, if I were to call it a states' rights issue, I would say that our bill creates more states' rights. Here is the reason why. It is, in my opinion, improper for that state court judge in that jurisdiction in Alabama to be deciding state laws in the other 49 states without anybody having the option of seeking another jurisdiction, a federal jurisdiction, to hear the case. The federal courts — in my opinion and the opinion of many others — will more uniformly apply a standard that will limit some of these class action abuses.

You've all heard the abuses, of cases where an ingredient was left out of a box of Cheerios. No harm was shown to anybody, but the case was brought. The plaintiffs received coupons for Cheerios. The plaintiffs' attorneys received millions of dollars in attorney's fees.

We have a case, a class action, against mortgage lenders, in which the plaintiffs were required to pay $91 and some odd cents each to pay their class action attorneys, in a case in which they supposedly had prevailed. Even though they were essentially made a party to a class, they had no idea they'd wind up getting a bill for their endeavors.

Most members who are parties to these classes have little or no understanding of what is entailed in their being made a part of the class. Just last Fall, I received notice of a proposed settlement in a class that I was a member of and never noticed whatever original paperwork was sent to me notifying me that I was a party in this plaintiff's class action suit. I happened to have Massachusetts Mutual Life Insurance coverage, and there is a case pending in a state court in Santa Fe, New Mexico, in which I have apparently been, for quite some time, a plaintiff, but had no knowledge that I was. I did somehow get the booklet that announced the settlement of the case, and it concerned me greatly. Basically, the basis for the class action is that Massachusetts Mutual has not told me that if I pay my insurance premium in one payment at the beginning of the year, instead of four quarterly installments, I'll effectively save money. I'll be saving a little bit of interest based on the fact that I paid it in the four quarterly installments. I'll save a little bit of money by paying the whole thing up front at the beginning of the year. I already know that I have the opportunity to do that, but apparently they didn't disclose it in a way that may be required under some laws.

So, the settlement was that, as a member of the class, I would get notification in the future that I could do this. That's my settlement.

There were two named plaintiffs in the case. One would receive $100,000; one would receive $50,000. I'm not sure why because they have not suffered those kind of damages. And the plaintiffs' attorney would receive a structured payment of attorney's fees worth $13 million. That's the kind of abuse that we're concerned about. We just believe that bringing these

cases into federal court will achieve a more standard way of dealing with these cases. Judicial scrutiny of this will, I think, lead to a fairer system.

That's the principal provision. There are other provisions in the bill, and let me refer you to those. First of all, it has a provision for consideration of administrative remedies. The bill provides that a judge entertaining a class action must determine, as part of the certification inquiry, whether consideration of the issue by an administrative agency with jurisdiction over the matter would be preferable to class litigation. If so, the class would not be certified. This provision codifies a current best practice used by the federal courts.

Next, it has a plain English requirement. The bill provides that notices sent to class members, which usually are incomprehensible and often are thrown away by the recipient — and I may in fact be guilty of that myself — must be written in plain English and must present essential information in an easily digestible tabular format.

It has a provision for these famous coupon settlements. It has special judicial scrutiny that is required for settlements that provide for class members where coupons are the only relief for their injuries.

It has a provision that bars approval of settlements in which the class members suffer a net loss. That would deal with that case I just referred to where the plaintiffs ended up paying $91 each.

It has a payment of bounties provision that precludes payment in cases that would result in the interests of the class representative significantly diverging from those absent class members.

And, it has a settlement based on geography provision, which provides assurance that out-of-state class members are not disadvantaged by settlements that award some class members a larger recovery because those class members live closer to the state court. That is the named plaintiff that I just mentioned in the Massachusetts Mutual case.

It also deals with interlocutory appeal of class certification decisions. Because the court certification decision is often decisive, a decision to certify may place insurmountable pressure on the defendant to settle, while a refusal to certify may force the plaintiffs to abandon their claims. The bill permits immediate appeal of certification decisions, as a matter of right.

That gets, I think, to the core of what you are considering today. That is, the effect of class action lawsuits to litigate effective changes in the law without them going through the legislative process, something that is of great concern to me.

I see a tendency on the part of defendants to evaluate these cases strictly on an economic basis — an entirely understandable perspective that they have — if the litigation and the risk of paying just a few dollars to millions of plaintiffs adds up to more than what it would take to give a nominal settlement of coupons or, in the case of Mass Mutual, a notification to their policyholders.

But a large recovery of attorney's fees that makes it attractive for the plaintiff's attorneys and defendant's attorneys to urge the settlement on the court because they can get out for less than whatever they consider their risk to be has the effect of changing law based simply upon the attractiveness of the settlement to the litigators, as opposed to even the plaintiffs in the case.

Being able to remove these cases to federal court seems to me to be appropriate, and will result in a fairer standard. It will greatly reduce the ability to forum shop and it will assure that complex cases get into federal court. Right now, if you have a simple slip and fall case involving a Maryland plaintiff and a Virginia defendant, involving $75,000 dollars, that case can be brought in federal court.

But, if you have a complex class action case involving claims of hundreds or thousands of dollars by each of a million plaintiffs, totaling billions of dollars in claims and involving plaintiffs in all 50 states and defendants in a multitude of states, that action cannot be brought in federal court. It will be left in a state court, where a judge may or may not be qualified and equipped to handle the case but will definitely be empowered to make decisions not only for parties in his or her state but also in the 49 other states. To me, this is a states' rights issue as well. It is something that the federal courts were designed to handle, equipped to handle, and should be allowed to handle.

Thanks for letting me join you this morning.

AUDIENCE PARTICIPANT: Mr. Goodlatte, my question regards state cases with state plaintiffs and state defendants within the same state. I believe there's an exception in your bill for that. To the best of my knowledge, it requires a substantial number of plaintiffs and a substantial number of defendants. I'm curious as to how you would like a judge to interpret that language and how much discretion you have to give federal judges to interpret that.

CONGRESSMAN GOODLATTE: Well, the bill gives them considerable discretion, and it's a good question. I do not have a number that I can give you and say, under these circumstances, you have to have a certain percentage of the plaintiffs in that state. But what we intend to say is that if the case is overwhelmingly oriented toward that state and you just happen to have a few plaintiffs that are outside that state, we want to give the federal judge discretion to say "That case really does belong in state court, and I am going to send it there." But there are no hard and fast definitions that I'm aware of for that.

AUDIENCE PARTICIPANT: Thank you.

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CONGRESSMAN GOODLATTE: I also want to say that this is a bill that has strong bipartisan support. As I mentioned, it passed the House last time. Congressman Jim Moran, Congressman Rick Boucher, and a number of other Democrats are co-sponsors of this legislation, as well.

MR. BROOKS: Thank you very much for that terrific presentation on the bill. It reminds me of one of the formative experiences that I confronted as a young lawyer litigating the breast implant class action litigation in Louisiana.

In that case, a nationwide settlement class had been certified by a judge in Birmingham, Alabama, which did not deter the state judge in Orleans Parish, Louisiana from having her own state court proceeding at war with the federal settlement. And that has really shaped my view of the consistency issue ever since. So that is an exciting presentation.

Let me take a moment now to tell you a little more about the parameters of the discussion and the debate that we now hope to have on the topic of regulatory class actions — class actions that address policy questions that are often expressly covered by existing regulations or existing statutes at either the federal or state level, but that nonetheless are said to give rise to tort liability. That really is the substance of what we hope to get the remaining panelists to talk about.

We have on both sides of this issue, I think it is fair to say, the leading exponents of the opposing views — which is why we now have a chair between Mr. Dinh and Mr. Scruggs. That seems only safe.

Let me give you a few examples of the kinds of class actions that we are talking about today. Maybe the best example is the managed care litigation, which Mr. Scruggs and I are intimately familiar with, as are some members of the audience.

Managed care, in essence, argues that the use by insurance companies of certain practices, some of which are either permitted and blessed by state regulators, or even in some cases required by the Federal Department of Health and Human Services, nonetheless effectively amount to fraud if those practices are employed without express, detailed disclosures to the managed care subscribers.

To give one example, the Department of Health and Human Services requires that insurers that are Medicare providers in their part of the country use certain computer programs to review the claims submitted by doctors to make sure that the bills are submitted correctly. This is supposed to be a cost containment measure. They are required to do that by federal law. But one thesis, among others, of the managed care class actions is that doing so without expressly disclosing it to the managed care subscribers is fraud and racketeering conduct.

Example two — the national cell phone transactions pending in federal court in Baltimore. The allegation there is that manufacturers of wireless telephones, who are commanded by the FCC to emit power outputs at certain levels so that they can connect to the wireless network, are nonetheless producing an unreasonably unsafe product if they emit at their licensed level, unless they incorporate additional safety features.

Example three — the national litigation against the gun manufacturers brought by municipalities around the country. The theory here, at least in many of the cases, is that the manufacturers are liable if they fail to police the distribution practices downstream in the sales network, even though those kinds of requirements have been debated and rejected in various gun control legislation that has been considered at the federal and state level.

Example four — the rumored class actions, not yet filed, over the reparations issue associated with America's troubled history with race relations. Here is an issue that the country has fought wars about, passed laws about, and continues to debate in one of the most difficult social and political issues of our time. The question there is, is that an issue that ought to be hashed out by our elected representatives as part of the national debate, or is that an issue that ought to be resolved by an award of money through judicial fiat?

These are tough questions, and those are the kinds of class actions we'd like to talk about today. Now, I recognize that the cases that I've just described are each unique in their own ways. But there are common threads which I think this discussion will help us draw out.

One common thread that occurs in at least many of these cases is they challenge a practice that is expressly permitted or even compelled by existing law. Again, I think of the Health and Human Services example. If a Medicare carrier must use a claims review software or lose its Medicare license, how can it be fraud for the carrier to use that software? Another common theme is that a lot of these cases involve a novel theory of injury that the common tort lawyer wouldn't recognize. The traditional tort doctrine says that to recover in a negligence case, you must show that you have been injured by a practice.

Many of these regulatory class actions that we are talking about today, though, don't allege injury, and indeed they disclaim it. Here, the best example that comes to mind is the cell phone class actions. The class that Peter Angelos and others allege in that case is the class of all cell phone users except those who have acquired cancer. So it's everyone who hasn't been injured and who uses a cell phone. The allegation is that there is a forward-looking risk that can be compensated through damages today. That is a theory of injury which may be viable or may not but is certainly not an injury that a common tort lawyer would recognize.

And finally, the common theme is that these cases all involve very fundamental questions of public policy. We're

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not talking here about a plane crash or an oil tanker explosion — a product defect. That's not what we're talking about. We're talking about issues that are nationwide in scope, that are recurring, that don't associate themselves with any one instance of wrongdoing, but instead focus on broad questions and broad practice. Is managed care a good method for delivering healthcare? Are cell phones a reasonably safe means of communication, or ought there be a different means? Should there be reparations for slavery or a political and social settlement of that issue? Those at the nub are the issues that we're going to talk about today.

Now, the panel that we've assembled is, as I've said, truly distinguished. The first person who we're hoping will stand up and speak to the social issues today is Mr. Dick Scruggs of Mississippi. Mr. Scruggs, I think, can explain the good points of these kinds of class actions, if anybody can, which I take to be a debatable topic. Mr. Scruggs' achievements in the plaintiff's bar and in court are nothing short of legendary. Anyone who has seen the motion picture *The Insider* is well aware that although he did not get the movie part, he was nonetheless the architect of the highly successful plaintiff's class action structure.

I first became acquainted with Dick a couple of years ago when we met in a hotel in Miami preparing for the opening hearing in the *In re Managed Care* litigation, the plaintiffs' bar's assault on the nation's healthcare system. And his leadership in shaping the kinds of class actions that we're talking about today, his effectiveness, the fact that he beats us so often, has been recognized in nearly every major news outlet — *The Washington Post*, *The Wall Street Journal*, *60 Minutes*, *Forbes*, *Business Week* and others.

But I think the story of his career that I like the best, or that rings the truest to me as a member of the defense bar, was the December 1999 story, "Who's Afraid of Dickie Scruggs?" And that, as they say in the Academy, is the kind of question where to ask it is to answer it.

Dick is a graduate of the University of Mississippi and its law school. He is a fellow of the International Academy of Trial Lawyers and is a principal in the law firm in Pascagoula, Mississippi. He also is a noted civic leader, having received the 1997 Mississippi Citizen of the Year Award from the March of Dimes Foundation. And in my view, in my humble opinion, he is perhaps the most eloquent exponent of the plaintiff's side of the debate.

With that, I'd like to introduce Mr. Dick Scruggs. Thank you.

MR. SCRUGGS: You know, I want to thank the Federalist Society for having me here today. I understand we have a distinguished jurist here, Judge Boggs from the 6th Circuit. Judge, I appreciate your coming and indulging this. I don't know if there are any other federal or state court judges, but I want to recognize you, if you are.

Every time I've been to a Federalist Society gathering like this, I always felt a bit tarred and feathered when it was all over with — politely, of course. My wife, Diane is here today — my wife, who's joined me today for support.

Are there any other people here who claim to be trial lawyers? I talked to one person. Can I see a show of hands of trial lawyers. My goodness. There are four. I thought the alarm bells would go off in the Federalist Society if trial lawyers came in.

But, my wife always asks me why I come back for more. And I guess the best explanation I have for being here today, or in prior meetings with the Federalist Society, is it's sort of like professional wrestling. I'm the guy who dresses up like the Taliban, comes into the ring and flips everybody off to incite the crowd. So, that's me. I'm the Taliban here today. At least, I feel like a Taliban at a Bar Mitzvah.

But everybody has been very nice to me.

Let me see if I can say a little bit on Brian's message. And I would like to respond, maybe later on, to some of the Congressman's proposed reforms — what he terms reforms — to the class action mechanism that we have in place now.

As you already know, I was part of the core group of trial lawyers that, along with a group of attorneys general, took on the tobacco industry seven or eight years ago. It resulted in litigation, which was ultimately very successful — probably the largest monetary recovery, at least, in civil litigation history — some $250 billion. It could have been more if legislation had passed.

During that endeavor, I made friends with a number of other distinguished trial lawyers who cared about the profession, cared about advocacy of groups who had theretofore been inadequately represented due to money or cohesion or organizational skills. But when we finished that litigation, there was a belief among some groups that we were invincible, that litigation was a panacea for all social ills.

I, for one, don't believe that. I don't believe litigation is a panacea for every social ill, but I think it has a role. And the role of litigation, and class action litigation in particular, is one that I would defend. Although there have been many abuses of it, most of those abuses have been rectified on appeal. So, I don't believe there's a need for a fundamental change, except in one area that I'll cover in a few minutes.

My group and my firm have decided on basically three criteria for handling big cases like these that Brian discussed with you a minute ago. First, they have to involve a widespread effect on public health. I don't mean the *Microsoft* case. I don't mean cases that might be otherwise meritorious. But they've got to have some widespread effect on public health. Tobacco is an example; asbestos is an example; managed care is an example — a widespread effect on public health.

The second criteria is that they've got to involve some subjective measure of outrageous conduct; just some gross overreaching by whoever it was who sold the product or engaged in a practice that injured public health.

The third, which is probably the most important one for this debate, is that the issue must just be justiciable. It's got to be something capable of being fixed by the courts.

Again, I don't think every social issue is fixable in court. I shied away from the gun litigation, for example, because I didn't think there was any court order in the country that was going to get 3- or 400 million guns off the street. It's just not going to happen. You can make gun manufacturers pay something, but they don't have a lot of money.

Those guns are out there and they will be forever. They're not consumables like cigarettes, gone in a few months. These guns live for hundreds of years or however long somebody wants to keep one, and you can't get them off the street with a court order; nobody would obey it. So, I thought that was a bit of a windmill that I was not going to tilt at.

But litigation like the managed care litigation has come about, in essence, by default of the political branches of government, I should say, to distinguish both the legislative and executive from the judicial branch.

If you think about it, it's a natural consequence of our governmental system. We are a government of checks and balances. Our founding fathers created three separate branches of government to prevent any one branch or any one man or group of men and women from gaining too much power. It's an ecological system that's set up to prevent anybody from gaining too much power. And I know everybody here agrees with that because one of the Federalist Society principles is freedom.

The price we paid for that, though, was a large measure of inefficiency in government. It's hard, except on issues of the most compelling national interest, to get legislative action. There's a lot of action around the edges. But right now, and for the last decade or so, we have had very divided government. Republicans or Democrats narrowly control the Congress. One president got elected with fewer than 50 percent of the popular vote, or a majority of the popular vote. So, we have very divided government now, and it's very difficult without accepting errors of compelling national interest to get anything done legislatively. What has happened — and I think it's a bit unfortunate — is that fundamental issues of national importance are being defaulted to the courts. The Patient's Bill of Rights is an example. That thing has been all over the place. And I've predicted nothing's going to pass. No Patient's Bill of Rights is going to pass. It might, and I hope I'm wrong. But if it does, it'll be watered down, it'll be compromised and it won't be a fundamental fix for the healthcare system.

That's one of the reasons that litigation, I think, is important. The courts have always provided a safety net when the legislative or political branches of the government are stalemated. They've always provided a safety net. Now, it's not their job to do that but it's just a fact of life. And if the courts don't do it, is isn't going to happen.

I'm going to talk about class actions for a minute. Most of you in this room, I suspect, think class actions are bad because of some of the abuses that the Congressman talked about earlier, and others will talk about, and many of you have read about. There have been many abuses of the class action mechanism.

But right now, you're worried about class actions as a sword. It's a very effective — I won't say it's an effective sword. It can be an effective sword, properly used, to vindicate rights, if there are lots of people who have been injured. It raises the stakes very high for a company that might have to bet its existence on one trial before one judge.

What this bill the Congressman described a minute ago was intended to do was to essentially not to change that, but to put the debate from the state courts into federal court. And that's a political judgment actually, is what it is. It's not because the federal judges — Judges Boggs, no offense — are all smarter than state court judges or that complex litigation was designed only for federal court and not state court. It's because the political reality is that most federal judges over the last two decades have been appointed by Republican presidents. That doesn't mean they are not fair; it just means that they have a different philosophy of life and of society than of judges appointed by, perhaps, Bill Clinton would, who were are arguably more activist and more ready to change things.

So, the bill that I heard described before is designed to federalize it, just to gain an advantage of the playing field. The fundamental changes — the coupon settlements, those settlements — nobody's going to defend coupon settlements. I think you all know what that was, where all the alleged plaintiff or class member gets is a discount off the next purchase of whatever product it was that hurt him. Those things are preposterous and they don't speak well for the class action bar. I've only been involved in two class actions. One was the managed care litigation. In the other, I'm actually defending the company — I've gone over to the dark side of the Force. I'm defending an orthopedics company. It sold about 30,000 defective hips that had to be recalled, many of them after implantation.

One of the reasons that I think class actions are necessary is because there is no legal vehicle for a company to extricate itself from litigation, even if it wants to, even if it wants to pay substantial sums, if it wants to put all of its insurance in the pot, there's no way for a company who does business nationwide to extricate itself from mass tort litigation other than the class action vehicle, or bankruptcy.

I would argue that there should be an intermediate vehicle available for companies who have a manufacturing accident that injures a lot of people. There ought to be some intermediate vehicle for them to make recompense without going bankrupt.

Now, there's a lot of economic interest here, and some of this is inside baseball. There are a lot of economic interests

E n g a g e

that want to keep the current system, and there are a lot of economic interests that want to change the current system. Strangely enough, many of the proponents of class action reform are the traditional trial lawyers.

There are two camps of trial lawyers on this issue, at least. One is the traditional trial lawyers who want to try their cases one by one. Most of those are led by my good friend Fred Baran and others, who have developed relationships in rural counties or in other counties around the country where they have an elective judiciary.

Many of the judges were elected with voter money. So, they have basically what I call judgment bills. They can beat everybody in the country to trial, large numbers, huge verdict numbers. The jury will come back with whatever the lawyer writes on the board. What happens in the courtroom is almost irrelevant. These cases are won in the back roads of the counties.

They put a company in an impossible position to have to bond the huge judgment. They'll come back with a billion dollars in the most trivial case. And you put a company under pressure that won't even get a chance to appeal it and get it reversed. That group is opposed to the present class action system and would probably advocate many of the things that Congressman recommended a few minutes ago.

Another group that would oppose class action reform is the defense bar. Large defense firms — some of you may be here today — defense firms are structured to defend cases all over the country. They've got, in some cases, thousands of lawyers that they've got to feed. They're vested in the traditional trench warfare, case-by-case, run up a lot of money, discovery, make it as expensive as they can not only for the plaintiff but for the client until they have exhausted the insurance policy.

And the client, in most cases, like 70 percent of the asbestos companies, ends up going into bankruptcy.

The traditional defense firms are opposed to class action reform, many because it's their bread and butter.

But I'll close this part of what I'm saying by asking you to carefully consider the class action vehicle before you throw it out, or before you make fundamental changes that might have unintended results. It's the only present bill for settling mass tort cases short of bankruptcy. And I think if you throw the baby out with the bathwater, you're also going to be sorry about it.

Thank you.

MR. BROOKS: What I thought we would do is go through the panel presentations, and then take questions and we'll get into it a little bit, with some interaction among the panelists, if that is agreeable to everybody.

Our next speaker is an old friend of mine, Viet Dinh, and it is a real treat to be here to introduce him in his capacity as Assistant Attorney General of the United States. Viet and I started our legal careers together at O'Melveny and Myers back in the day. And even then, I must say it was clear that his intellect and energy would make him, one day, a leading force in American law; here he is today to prove that.

Viet's life story is an inspiration to me. He came to the United States at the age of 10 as a refugee from Vietnam. Twelve years after that, he found himself graduating magna cum laude from Harvard College. It took only three more years to graduate with high honors from Harvard Law School, two more to clerk for Justice O'Connor at the Supreme Court.

Since then, his rise has been truly meteoric, if you ask me. He has served as associate special counsel on the Senate Whitewater Committee, special counsel to Senator Pete Domenici on the impeachment trial. He was professor of law at Georgetown Law Center and now is Assistant Attorney General for the Office of Legal Policy at the Department of Justice. In that capacity, he is the nation's highest official on legal policy questions, such as those we're here to talk about today.

One reason I'm so excited to have Viet here with us today talking about this particular topic is that in 2000 he wrote a *Georgetown Law Journal* article entitled, "Reassessing the Law of Preemption," which I think to be an early classic in the field. When we talk today about the interplay of running a federal regulatory regime, on the one hand, and policing the conduct of regulated entities through the civil litigation system, on the other, there is not a lawyer in Washington more qualified than he is to talk about those implications.

So, with that, let me welcome Assistant Attorney General, the Honorable Viet Dinh.

MR. DINH: Thank you, Brian. And now I'm at the podium and have the honor of disproving everything that Brian just said about my capacity.

My name is Viet Dinh, and it's great to be here at the Federalist Society. I am looking forward to learning what the Federalist Society stands for. A little inside joke — sorry.

I think there's a lot of agreement here. Certainly, even if we play true to our role as the two primary antagonists — Dick Scruggs and I represent the two polarities on the topic of debate — I think there would still be a lot of disagreement. But the disagreements, while they are very vigorous and vociferous, will deal with the details and the margins, rather than over the broad concept.

After the famous B is greater than PL formulation of Learned Hand in tort law that we all learn in first yearand certainly with the law and economics movement that is championed by Mike Grady and so many others at the George Mason Law School, we all recognize that litigation is policy.

Litigation is regulation. Even minor litigation, single case litigation, is tort policy, simply because the judgment in any one particular case will affect future primary conduct. Otherwise, future actors will be subject to potential liability, and people want to avoid that potential liability. So, any single judgment, to a smaller or greater degree, has an effect on primary conduct and in that sense is regulation.

There is a role for litigation in shaping that regulatory policy. I think that one of the great advances in the law and economics movement and the legal realism movement of the last century is that people recognize that the tort system is not principally — and I would argue, not even primarily — about traditional remediation or redress, but by and large and increasingly so in many contexts, the primary purpose is for regulatory change and prospective relief.

There is a role for class action in litigation. I think the classic economic analysis, and even policy analysis, is Judge Posner's in the Rhone Pullane case. A number of articles came out of that, as progeny of that economic analysis.

Given those parameters, the question really comes down to, in what cases, in what circumstances, is a class action case the proper place to litigate policy? Again, in what circumstances is a case justiciable in a court, rather than in a policymaking context of the traditional type, like the political branches of Congress or the President.

As we all know, justiciability breaks down into two subparts,who decides, and under what standards? That's a strict constitutional justiciability standard. I don't mean to apply that legal framework to this discussion. It's more a way for us to shape the policy thinking. In what context is it appropriate for the courts to decide versus the political process to decide a matter of public policy, knowing that litigation affects public policy and political processes make public policy to be applied by the courts? And so, there is a symbiotic relationship among the three branches of government here.

Secondly, what standards would apply if the court were to adjudicate, make policy through litigation, or what processes or standards would come out of a political process? There are pros and cons on both sides.

I think that where I would ultimately come down, just to give you the bottom line, is that there is a very important role that class action litigation plays in our legal system. Otherwise, class action reform would not be taking the steps that Congressman Goodlatte has proposed and others have proposed in the past.Rather, such reform would simply eliminate the class action mechanism — take Rule 23 out of the Federal Rules of CivilProcedure and eliminate class action in all the 50 states. The role of class action litigation is why I have not heard anyproposal to do away with it, to throw the baby out with the bathwater. Everybody recognizes that class actions serve a very important function. That is, to solve the collective action problem in cases of numerous plaintiffs and de minimis or marginal remediation, and perhaps beyond.

The reform efforts have been to curb the abuses of the class action mechanism — that is, to answer at a more structural level that question of justiciability. Who decides, and under what standards? And I think that Congressman Goodlatte's bill and the equivalent Senate bill are very, very good proposals to answer those questions.

I constantly get questions, like just now, as I sat down with the Congressman. Where are we, where is the Administration and the Department on the views on those bills? I'm happy to say that the Department and the Administration support, in full, the bill as proposed by Congressman Goodlatte and its equivalent in the Senate.

The reason we support those identical bills is that they bring some rationality to this process and ensure that class action is utilized in a way that would advance the core purposes of the proper administration of justice and curb some of the abuses that exist in the system. I think the minimum diversity requirement for cases over $2 million is a good way to advance the classic rationale behind the diversity requirement: That is, to prevent forum shopping and local discrimination against out-of-state interests.

For the same reasons that the Congressman elucidated, minimal diversity makes sense in the class action context, especially as formulated in the bill, in order to discourage advantageous gaming behavior by disparate players, primarily led by plaintiffs' counsel and representative plaintiffs, to amass individual advantage relative to other plaintiffs and other lawyers, rather than the collective advantage of the entire class or the proper public policy. And so, these bills would go a long way to ensure that the system is not gamed, but rather that the administration of justice proceeds in an orderly way.

Likewise, the section of the bills dealing with the notice provisions ensures that the notice is properly given in plain English so that the class members understand to what they are actually agreeing, or what they would choose to opt out of. That way, we ensure a greater, but still very limited, degree of control of the management of the case to the actual plaintiffs themselves, rather than through obfuscation or legalese, thereby rendering control of that case only to the representative plaintiffs and to their attorneys.

I think these are some of the steps that go a significant way toward curbing the abuses, toward ensuring that those cases, as a policy matter, should be justiciable in court and remain in court. But these cases are adjudicated under a system that is orderly and ensures uniformity in the application of these particular procedural rules.

One other note and as an example of something in which Dick Scruggs and Iboth have personal experience is the Patient's Bill of Rights, which seeks to address some of the issues that are raised in the HMO litigation. Those cases, and especially the ones that are very successfully championed by Mr. Scruggs, reach the criteria that he sets out with respect to the widespread effect and subjective measure of outrageous conduct, depending on whether or not the allegations pan out in court. The question then becomes whether those cases and that kind of policy make sense as a matter of litigation to be made in court as opposed to policy to be made by a political branch.

Engage

I hope we all know, because I hope we listen to the President when he speaks — I listen to the President, the ultimate legal policymaker in our system, when he speaks— that he supports a Patient's Bill of Rights. Why does he support a Patient's Bill of Rights? Because some of the efforts in litigation have brought up the fact that our system of ERISA preemption may leave some patients without redress. A Patient's Bill of Rights is basically a relaxation of some of the preemptive effects of the classic ERISA preemption regime. He supports a Patient's Bill of Rights in order to assure that those who are hurt can be compensated and can get redress in a proper manner that advances the public policy. That's why he and all of us worked so hard in crafting what became the Bush-Norwood Compromise in the House, in order to find, through the political process, a solution to this very dramatic public policy problem.

If we did not step up to the plate, policy would be made by individual courts in various locales without assurance of proper participation of affected players, and without proper assurance of uniformity of policy across the land, and therefore fairness to all, which is where policy ultimately should be aimed. So, that is an area where I think that policy should be made, and is being made, at the federal level, in order to make sure that the policy that results is not an *ad hoc*, paperclip and band aid regime that plugs little holes in the system as it exists, but rather results from a comprehensive, duly authorized democratic process of policymaking, as envisioned by the founders of our country.

I obviously think that litigation is very important in filling out the interstices of public policy. But I do not think, where there is a public policy problem as dramatic as, say, patients' rights in the ongoing market redefinition that is shifting toward HMOs, that policy should be made by paperclips and band aids; rather it should be made much more comprehensively so that we address the entire problem from root cause to symptoms, rather than simply just addressing the boo-boos that may arise from case to case.

With that, I'll close.

MR. BROOKS: Having listened to Dick and Viet talk about these issues, I recognize the tantalizing nature of the rule I've imposed, where there won't be any questions until after our last speaker. Let me assure you, our last speaker is, in my humble opinion, the very most interesting legal academic working in America today.

Mark Grady is Dean of the George Mason University Law School, a law school that he has led straight into the *U.S. News and World Report* Top 50, an achievement of which Northern Virginia is justly proud.

Mark began his legal career in the Office of Policy Planning in the Federal Trade Commission, and went on to serve as Republican counsel to the Senate Judiciary Committee in the late 70s. He has been a law and economics fellow at my alma mater, the University of Chicago; a fellow in civil liability at Yale; and a faculty member at the law schools of the University of Iowa, Northwestern University and UCLA.

His *Yale Law Journal* article, "A New Positive Economic Theory of Negligence," really has profoundly affected the way that I understand and think about tort law. And his work exploring the nature of the common law generally is perhaps the basic underpinning of today's conference.

In an article entitled "Positive Theories and Grown Order Conceptions of the Law," Mark develops the notion that was first expounded by F. A. Hayek in the '60s and '70, that systems that grow by small evolutionary steps tend to be more efficient than systems that proceed based on a comprehensive master plan. The implications of that idea for a class action practice should be obvious, or at least in 15 minutes will be obviously.

DEAN GRADY: Well, thank you very much, Brian, for that very generous introduction. I think part of its generosity may derive from the fact that Brian actually met his wife in my torts class. They were both students one year. And in fact, I went to the wedding. They were both wonderful students, and I still remember how enthusiastic Brian was about torts, and the wonderful discussions that we had in that class.

I'd like to recognize some of the George Mason people here. I notice Michael Kraus in the audience, one of our professors. Nice to see you here, Michael. And some of our students over here — Miss Crawford and your colleague.

I'm sure there are many others of you out in our audience because amazingly, although we are only 20 years old, we have the third largest contingent of lawyers up here on Capitol Hill. And considering that the law schools ahead of us are Harvard and Georgetown, on a per capita basis we are clearly the first. So, it's quite a presence that George Mason does have up here.

I was going to say, I feel a little bit conflicted about debating or even commenting critically on what Mr. Scruggs has said because I took the liberty of asking him whether he and his wife Diane would like to put their name on our law school. And he's considering that proposal. He's a very generous donor, which is what gives me hope. I understand he's made a very large gift, both of them, together, to the University of Mississippi, and I congratulate you for that.

It's also nice to see Judge Boggs, who is an alum of George Mason Law School programs offered through our Law and Economics Center. And Viet Dinh, it's very nice to see you again. So, this is a very distinguished panel, and I'm so glad that Brian, my former student, has allowed me to be on it.

I am sure many of you would like to get to the question. I'm a big fan of tort law. The substitute for tort law is none other than command-and-control regulation. And, to the extent that we would lose tort law, I think we would encounter more

of this command-and-control regulation.

The tort system plays a very valuable social role. Certainly, there are abuses and I would like to talk a little about these, too. I don't believe that Mr. Scruggs is responsible for all of them, and maybe not any of them. But many do have the idea right now that there are abuses in the tort system, and perhaps there are. But overall it's a very, very valuable system. The reason it is so valuable is that it is such a flexible system of social control.

If you look, for instance, at when negligence claims became very prominent, it was even before the automobile became common in London. The first negligence cases were basically carriage accidents. In other words, people in an increasingly crowded London were not using enough care. And so, tort liability became prominent then. Then and now, tort law is our leading social control on inadvertent behavior.

I could give you a couple of short examples. One famous case, *Lynch v. Nurdin*, comes from the early part of the 19th Century, when someone left a cart on a street where children played. These were very curious children, and when one of them jumped on it — this is a case from about 1830 — and hurt his playmate, that was a case of liability for the carriage owner, the person who had left that dangerous instrumentality on the street.

If you fast-forward to 1960, we had the famous case of *Richardson v. Hamm* out in California, where a contractor left several bulldozers with the keys in the bulldozers by a school yard, and curious children got into these bulldozers and knocked down several buildings. That was also a case of liability very similar to *Lynch v. Nurdin*.

And lately, I have been reading in the newspaper that there is a dam out in Arizona and, like everything we've got, it was controlled by a computer. This computer's defenses were very slack. They were negligently slack and because of that, a kid was able, with his home PC, to break into this computer controller and actually was able to adjust the floodgates. I told my students, that this gives "opening the floodgates" a whole new meaning in tort law because he reported to have been was in a position to do that. Luckily, he did not. There was a huge community of farmers down below that he could have easily opened the floodgates upon. It was a large dam. And I believe there would have been tort liability in that type of situation, too.

So, you ask yourself, what would the world look like if there were not tort law? We are a country now very much looking for standards in the cyber-security area, and the legislature cannot move fast enough. What we have in this country is basically a social control system, a very elaborate social control system, that is decentralized, that depends on the individual decisions of courts, and that works together with insurance companies, for instance, because ultimately they would be examining these computers and they would be writing insurance policies upon these break-ins and establishing standards for the owners of computers and enforcing those standards.

It all works much better than if we had NHTSA doing the same thing, or some sort of Department of Computer Safety doing this kind of activity. Or on I-66, if there weren't a decentralized tort system — if it were entirely up to the Virginia State police, I would think that many libertarians would be very concerned about the prospect of adding so many more police to the system, and all of these obligations that are enforced in a decentralized way would be enforced by federal agencies or by police officials. Certainly, we would encounter many more police and regulators if we were to move into that type of world.

Let's think about the common law and its strengths. One of its strengths has been remarked upon by many libertarians and conservatives, for instance, by Bruno Leoni. I feel I have almost got to make a defense of the tort system. I mean, you are not the only one who feels embattled here, I think, Dick.

What they have stressed, and what Lord Coke stressed before them, is the extent to which all common law embodies a kind of artificial reason, a kind of artificial intelligence, I think we would say. The reason for that, Coke, and many more modern Libertarian and conservative commentators have thought, is that a case-by-case litigation process allows judges to decide issues and compare their decisions to other difficult cases, and through that slow, incremental process, a rule emerges – a rule that is in many cases much wiser than the rule that a legislature could develop.

I personally think there is a kind of equilibrium process that is involved in this. Here is one example. Harry Kalven of the University of Chicago said that the common law works itself pure. I think maybe what he meant by that is if they decide a stupid case, they can fix it. Certainly there are many stupid cases decided in my home state of California in the products area. I'm thinking specifically of *Barker v. Lull Engineering Co.,* which was a case where a high-lift loader collapsed on its operator with everyone around. They fully expected that it was going to collapse because the operator, who was also the plaintiff, was attempting a load that the loader was obviously not designed to carry. In fact, the regular operator called in sick because he refused to lift that load. They recruited the plaintiff. Everybody was standing by at the time of the accident waiting for the plaintiff to be injured. When he was injured, the Supreme Court of California held that the loader manufacturer was liable because of strict liability and in tort.

Well, that is a pretty bad case, but how about the case after that where a plaintiff who was feeling a little bit depressed got into the back of a very commodious — she said inviting — trunk of a Ford LTD, a very large trunk that she took as an invitation. She shut the trunk door thinking to end it all, and then, after she was inside, thought better. She later sued Ford Motor Company for failing to have an interior latch. I have noticed that they have put those latches on these Fords at this point. But I think, if I'm recalling correctly, that is a case of no liability. So, that is really the equilibrium process that I think exists in the common law.

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In other words, if they decide a stupid one today, they're going to get an even more stupid one tomorrow. And the fear is they won't be able to distinguish it. But often what happens is they will use that second case to overrule or strongly limit that first case. So, there is a kind of equilibrium, again, that depends on this case-by-case litigation process.

What I worry about with class actions — and it's not just class actions, frankly, that I have this worry about — is legal actions that are based on extremely novel legal theories. If we have a class action that is aggregating a number of claims that have been recognized by the common law courts in individual cases, then it seems to me unproblematic to aggregate these plaintiffs into classes.

What happens — perhaps this is the situation with the managed care cases and some of the other cases that Brian mentioned — when the purpose instead is to vindicate through a class action a totally novel legal theory? The legal theory, I believe, with managed care is quite novel, from what I understand of it. The best analogy to it that I've heard is the "Chevy-mobile" case. This was a situation where disappointed Oldsmobile owners discovered that they actually had Chevrolet engines in their cars. And although they had not suffered any damages of the type that would be cognizable as a traditional tort, nevertheless they were able to recover. I don't know whether that is the only analogy, or whether there are other analogies in this particular case.

Let's face it. Managed care was a big problem for our country. Ten years ago, we were in a crisis because medical costs were skyrocketing. So, of course, there were limitations, contractual limitations, that were proposed in these managed-care contracts to control those costs. From what I understand, the problem of skyrocketing costs was largely solved by these restrictions.

If some of these restrictions are less than perfect, to now expose these same managed care operators to massive liability — I mean, let's face it, that's what it would be because of a mistake in a relatively new system — would tend to, as all similar liability tends to do, create a kind of brownfields in what could be a very important industry, namely, healthcare or managed care.

I have no doubt of the motives of anyone involved in these cases, but we ought to proceed very carefully. This is the type of situation where, if we want a new rule, we really ought to proceed in an incremental fashion so each court can benefit from what other courts have decided. They can distinguish cases. They can decide in individual cases that maybe they've gone too far, rather than solve a massive issue in a very sensitive industry, as if a court were a kind of philosopher-king.

Courts are not philosopher-kings. Even Judge Boggs, although he knows quite a bit, does not pretend to be a philosopher-king. He is aided by the system of precedent, and these massive cases really cut judges loose from that system of precedent. That, from my point of view, is really the vice of them. So I think we ought to proceed very cautiously in this area.

I should say another thing, just one final thing. I think that many of the important rules of the common law are unglossed. In other words, there are many quirky things that are designed to avoid these brownfields problems or, as economists put them, activity-level-reduction problems. These are often very quirky limitations.

One limitation is that if you've got correlated financial losses, there's hardly any recovery for that. So if you look at the *Chicago Flood* litigation from 1991, when the waters yet again burst forth from the deep and flooded all the basements in Chicago due to the negligence of the City of Chicago — really almost the conceded negligence of the City of Chicago. They knew about the problem six months ahead of time. There was hardly any liability for the financial losses, the purely economic losses. Waterlogged Frango mints, yes — Marshall Fields was able to recover for those. But lost business, no. And the reason for that type of quirky limitation I think, and other economists think, is when these economic losses are correlated, they become very uninsurable not only for the companies themselves but also for insurance companies.

Insurance works on the principle of large numbers, which really depends upon uncorrelated losses. Some automobile accidents occur today; others occur tomorrow, and so on. If the insurer has a whole book of policies on these losses, then under the law of large numbers, it becomes almost totally predictable to insure that book, and a very valuable social function is carried out.

If all of the losses are happening on one day, then insurance fails. It fails not only for insurance companies, but it also fails for people like managed care companies that might be exposed, or automobile companies, or asbestos companies, that might be exposed to that same type of massed liability for financial losses.

So, we want to be very careful when we depart from the traditional standards of the common law because there is a potential to do great harm. I'm sure that no one would do that intentionally, that everyone is acting from the best of motives in these cases, and there are certainly legitimate reasons for class actions. But I think that it is really fraught with peril.

MR. BROOKS: Well, if anybody else had a law school professor like that, let him stand now or forever hold his peace.

Let's take some questions. And I would like to exercise the moderator's prerogative to ask the first question. This is a question that each of the panelists might want to address.

My question is this. All of the panelists agree, from both the left and the right, that there are efficiencies to bringing similar claims together. It doesn't make any sense to have the court try the same set of facts and the same legal issues over

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and over and over again. There are some cases where a class action makes sense. We also all agree that there are situations in which the injury theory is unique; novel. And in all of the examples that we've talked about today, that is a common theme.

In managed care, the allegation is not that anybody has been denied covered services. The allegation instead is that, simply by virtue of holding a policy, you are at risk, that you have suffered some monetizable risk that you might be denied covered services, and that risk somehow affects you in an economic way.

In the cell phone cases, it's the same issue. No one alleges that they were actually injured or have brain cancer as a consequence of cell phone use. They instead say that there is a risk that I might in the future be hurt.

In terms of performing the socially valuable function of making companies internalize the cost that they actually foist on people, making them actually pay for the injuries that they cause, aren't there other mechanisms short of this class action mechanism that would perform that function?

For example, punitive damages. To prove up a case of punitive damages, one would have to first show an actual injury. Somebody would have to be hurt. But once you have proven the actual injury — you know, the oil tanker explosion, the plane crash, etc. — the punitive damages device permits you to force the company to internalize all the costs of its conduct, but only in the context of an actual present injury. Isn't that preferable, I ask the panel, to a class action regime, which fuzzes the question of injury? Whoever wants to go first.

MR. SCRUGGS: I believe you guys are dodging the punitive damages question. We had an opportunity to really hold forth there.

The short answer to the punitive damages question — and then I want to respond to one other thing — is that punitive damages in the modern world will reward the first few plaintiffs to get the courthouse and break the company, usually, so that if there's a disproportionate, widespread injury, only the first few that get there will get disproportionately compensated at the expense of others who may have equal injuries but don't get there first. So, I think punitive damages play a role in deterring aberrant behavior, but I don't think it's the answer to this question.

The theories of recovery that we are putting forth in the HMO litigation, the managed care litigation, really aren't new or novel. They're being characterized that way, but they're not. There are very few things that are new. What they boil down to is that the HMOs are essentially selling patent medicine and calling it a cure for cancer.

There's a guy being prosecuted out in Kansas City, a pharmacist, who diluted cancer treatment drugs to his patients to save money. He only gave them a tenth of what they were paying for. It is logically no different from what the HMOs are doing now. They are selling you a health package, a benefit, that they indeed have every intention of avoiding.

Some of the practices that these companies are engaged in — paying bonuses to claims examiners based on how many claims they deny, without reference to whether they're valid or not; paying doctors bonuses for doing less; gagging a doctor from telling his patient that other treatment modalities may be preferable to the one that he's going to prescribe — are built-in abuses that are designed to give less care than is being advertised.

Yet in all their brochures, in all of their advertising, everything they send to their patients, they are guaranteeing, bragging about quality care, calling it managed care. Really it is managed cost. This is litigation against the insurance companies is really what it is. Insurance companies don't make money paying claims. They make money by not paying claims. It's just that simple, and it always comes down to an economic incentive.

So, there is nothing new or novel about the litigation against the HMOs. Brian mentioned the Chevy mobile case. I don't know what Brian drives — a big firm like yours, you've probably got a nice big Mercedes. But if you bought a Mercedes Benz that had a Yugo engine in it, maybe you like Yugo. Would you be precluded from suing the company for fraud just because the engine hadn't quit yet? Would it be a defense that, "Yeah, the engine's running just fine. Until that engine quits on you, you haven't any injury?" That's the same thing with the HMO litigation. You are buying a parachute that is supposed to have a canopy of a certain circumference. But if you ever need it, it doesn't have it.

So, it is clearly actionable and there was nothing new about it. It's patent medicine litigation. It is just garden variety fraud.

DEAN GRADY: Let me just say one thing briefly in response to that. I understand that the Mall of America, this is the largest mall in the United States, out in Minnesota, is finding it very difficult to get insurance. The reason is that their notoriety creates a kind of target for terrorists. And insurance against it is very expensive because of this correlated losses problem. It's like earthquake insurance or hurricane insurance, only worse.

I understand there's also the same problem now with the construction work at Ground Zero in New York, in providing insurance. That is also a target for terrorists. So, we are acquiring a lot of sites where it's going to be very difficult to do business. The question is, do we want social sites of that type, too?

Every time we have a particular political issue, something that is very controversial among us — for instance, managed care — for that industry to be exposed to mass tort litigation, it creates the same problem that the Mall of America is having. That's really one of the arguments against that type of class action litigation.

MR. DINH: I think I agree with both comments, even though they are in disagreement. Let me tell you why I think that. Brian put the finger on the problem by asking the question, although the proposed solution may not be so readily apparent.

The problem is that if you have a classic denial of coverage case — that is, particular facts, whether or not this policy covers this particular claim— the adjudication of that case depends on the terms of the particular policy and the particular facts of that particular case. That would not, obviously, satisfy the commonality standard, if you're trying to aggregate a whole bunch of these claims under traditional class action mechanisms.

So, there is a tort system for you to get recovery, if that is actionable. But in order to get into a class action mechanism, you have to allege certain commonalities, and there have to be theories in order to allege those commonalities.

I will note that I don't know anything about the theory of the law and whether the theory passes the legal laugh test to satisfy the commonality standard. But there, I think, is where the difference between Mark's comment, which goes more to the core of the tort system, and Dick's comment, which goes more to the class action mechanism and the theory that you have to allege in order to get a class action mechanism, is elucidated.

DEAN GRADY: By the way, Dick, I hope that by my last comment, I didn't ruin the chance to create a Scruggs Law School.

MR. SCRUGGS: The price has gone up. Actually, the contribution's going down.

AUDIENCE PARTICIPANT: All three of our remaining panelists had alluded to the role of the courts as self-conscious social regulators self-consciously setting policy. My understanding of the predicate of common law decisionmaking historically was that it arose in a system which, one, it wasn't believed that political power derived from the people; two, there was really no system of statutory law; and three, it was believed that judges were not setting policy, but were rather discovering a pre-existing natural law or natural rights. I don't think any of those three hold up anymore.

Our system is based on the idea that political power derives from people. We have an extensive system of statutory law, and outside of a certain wing of the Federalist Society and the Cato Institute, no one believes anymore that there is an objectively knowable set of natural rights or natural law.

Also, for the federal government to invest the judicial branch self-consciously with legislative power I think is violative of both the letter and the spirit of the Constitution. Doesn't this lack of legitimacy pose some sort of problem, and shouldn't we, rather than nibbling around the edges of the class action system, be thinking about restricting or perhaps even eliminating the ability of judges to define broad new areas of non-statutory liability, and perhaps concurrently with that codifying some of the existing bases?

MR. DINH: God, it's great to be with the Federalist Society.

First of all, the short answer is "confirm the present judges." That's the easiest answer that I can give you — in particular, confirm Judge Pickering, somebody about whom Dick Scruggs and I both agree, very vehemently: he is a great man.

That's a great question. I think that I'll answer it by joining issue and agreeing with Mark's comment on incremental changes in the law. I do agree, although I'm probably less sanguine than Mark and some other adherents of the school, that the common law is almost by definition rational and optimal. I do agree that an incrementalist approach to the development of the common law, given the whole experimentation approach, is preferable to a command and control type of system. But that is not what we're talking about with this particular debate, where we're talking about basically institutional class litigation, the making of policy through litigation.

The question then is not incrementalism versus command and control policymaking. The question is who makes the policy? An unelected judge and a single jury or a duly elected and politically accountable policymaker or set of policymakers?

And with that, I think I agree with you that there is a role for law to be developed through a common system, the classic Anglo-American system of common law at the interstices. But I think, even now, there are very few of those interstices left.

The easiest explanation of this is in the difference between the last and the current edition of Hart and Wechsler, the classic casebook on the federal courts. There is a classic note called "The Interstitial Nature of Federal Law." It said that where there are gaps to be filled, Federal law would fill them to vindicate state-law-based rights. This is right after the *Erie v. Tompkins* discussion, for obvious reasons.

But the current edition basically backs away from that note and says that in the current modern post-welfare state world of federal regulation, everything is regulated and heavily regulated, so there is very little area for interstitial regulation.

MR. SCRUGGS: I think the fundamental premise of your question — if I state it wrong, you can correct me — is that under our system of government, the political branches make the laws and the judicial branch interprets the law. What has happened is encroachment back and forth over the centuries of this country, where judges make more or less law depending

on what the issue is and what the political climate is.

I would ask you if that isn't an argument for elected judiciary as opposed to an appointed judiciary. Right now, you have a majority of judges that are appointed by presidents that you probably agree with. But you might end up in another day, as we were in the 1960s, with a group of judges who were appointed by judges that you probably don't agree with — Kennedy, Johnson, Carter.

So, I think your argument that power derives from the people, with which I certainly have no argument and totally agree, would argue for an elected judiciary, and one that's not insulated by lifetime tenure so they can do whatever it is that they decide to do.

The tendency today is to appoint federal judges who are young, who are ideologically pure and who have no life experiences, unfortunately, or not many, and who have no track record with which they can have their confirmation denied.

That's what is going on with Judge Pickering right now. One of the reasons I am trying so hard to get him confirmed is because this is a man who has a variety of life experiences. If he is defeated, if his nomination is defeated, then what's going to come behind him is somebody that you would be more likely to agree with, and someone who is about 35, maybe 40, and who has never done anything that anybody can question. But you have no idea what he's going to do when he gets on the bench, other than to fulfill whatever discrete pledge he gives if he's appointed.

I think that your basic premise argues for an elected judiciary at every level.

DEAN GRADY: I really question whether judging has changed so much over the years. I wonder if it makes so much difference what judges have as a self-conception. I am an avid consumer of their work product.

You know, I actually test my students on case results. So, for instance, part of the examination would be for them to predict how courts will have come out in actual cases. This is total heresy in terms of what the legal realists have convinced us is true of the common law. And I really wonder why conservatives also believe it because I don't think it's true at all that common law is heavily influenced by the politics of the judges.

In fact, the difficulty is finding cases that are hard enough and close enough to the edge so that 100 percent of the class or 97 percent of the class won't tell you exactly what the right answer is. That is exactly what you'll find, which is something you would never predict if you relied totally upon this notion, which is so commonplace now, that judging has become a matter of politics, that the judges of the left will decide each and every case quite differently than the judges of the right. I really don't believe that. In fact, I've got ten years of examples from my classes that indicate that there are a lot of problems with that. Believe me, these students predicting case results on my exam don't know whether the judges were conservative judges or whether they were liberal judges.

You see these lists on the Internet, where someone does something stupid and then there's alleged to be a very large recovery. Are those appealed cases? I think there ought to be some sort of truth in torts for the newspapers. It's quite possible, of course, and Dick can tell us because he's got more experience than any of us, to get a plaintiff's victory in a crazy case before a court of first instance. But to have that stand up through the system, that's quite a different thing.

Personally, when I read these cases, they were among hundreds of thousands of cases that are tried in the U.S., the craziest fifteen. And I bet that almost immediately, all of these crazy cases were overruled. It seems very odd to have a political debate and to assail one of our most fundamental institutions of liberty based upon these hearsay accounts. I think it's quite irresponsible.

AUDIENCE PARTICIPANT: A couple of you are defending class actions on the basis of something I'd say is equivalent to either market failure or, in one case, failure on the part of the legislature. But I have seen a couple of instances of class actions — I'll be like Congressman Goodlatte and use an example because I think it fits — where I see the system breaking down.

I am a policy holder of a mutual insurance company that was sued. I was a member of the class. I supposedly benefited from the settlement by having a very small increase in the amount that I would be insured, for something like six months. So, if I'm fortunate enough to die in the next six months, I'm clearly better off than I would have been.

So, to me, the net effect is that my mutual insurance company is worse off and, consequently, I, as a policy holder, am worse off economically, personally.

If we are talking about torts and the ability for people to recover for their losses, why isn't there a mechanism for people like me who were injured by that suit to recover their loss?

MR. SCRUGGS: Well, you're representing them.

AUDIENCE PARTICIPANT: Of course.

MR. SCRUGGS: In fact, there's a mechanism. You can opt out of the class and file your law suit. You can do that.

AUDIENCE PARTICIPANT: But I can't recover my loss because the company is still out the attorney's fees.

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MR. SCRUGGS: Well, you don't really care about that as an individual plaintiff. You want to recover your loss, and that is the company's problem to pay your claim, if you prevail on it.

The other remedy you have for that is, during the class action settlement process, you can object to the settlement. You can object to the fairness; you can object to the amount of attorney's fees. It is done every day. Class action settlements are one of the most contentious procedures in court. We're going through one right now in an MDL case up in Ohio, on the *Salzer* case. These settlements are very, very contentious, and you can either opt out, you can object, you have a number of remedies if you don't like the settlement.

AUDIENCE PARTICIPANT: That leads to my question. He can opt out. But what about the point that we're making policy by these large class actions — we're doing this politically. Let's say I just like stopping stuff. I should be allowed to stop stuff in the political process, and that's a win. That's not a loss that, "Oh, the system isn't working." The system's working great for me. So, the question is, aren't these class actions a way around the political process? I might not otherwise have the standing to intervene; I might not otherwise have the ability of getting the case.

Today, we see Arthur Andersen being sued. They would love to get out the way Mr. Scruggs was suggesting. And we have plaintiffs who obviously want to get money. We have lawyers who want to get money. But the public interest is not represented. A lot of people who might be affected have no way to intervene in a class action. They do have a way to intervene in a political process but don't have it in the class actions.

MR. DINH: It's a great question. It is absolutely a great question. But I'll start unpacking, again, what a substantive claim is versus the procedural mechanism of the class action, and they are intertwined.

There may be, and there are, problems with the existing procedural class action mechanism. I think Congressman Goodlatte's bill goes a long way toward correcting some of those problems, the notice in plain English, and provisions to ensure that any settlements are not coercive or to prevent side deals between the plaintiff's lawyer and the company that takes away the ultimate recovery from a plaintiff.We can tinker around with the procedural mechanisms to take care of objections to the procedural mechanisms.

On the other side are substantive claims that Congress or the state legislature have established as torts or as wrongs that are actionable, and if one disagrees with them, then I think that one properly brings that disagreement to the political process to repeal those rights. Or if a common law tort arises that seems wrong, the legislature can pass a law to override that establishment of a wrong common law tort. We have seen that happen from time to time in various legislative contexts.

But where the two meet, of course, is the fact that the class action mechanism is, in and of itself, a coercive mechanism in settlements that may have an effect on policy. It may not be meritorious, but simply too costly to defend. These are what are sometimes called strike suits, if you will, in order to get settlements. They may not be ultimately meritorious but the risk is so great and the downside is so great that the defendants simply want to settle.

That is where other reforms, like the immediate appeal of a class certification decision, would have dramatic impact on the dynamics of settlement negotiations. Immediate appeal is one of the changes to correct some of the procedural defects of this mechanism so that it does not bleed into substantive settlement coercion that influences the ultimate policy as to whether the claim is sustainable.

MR. SCRUGGS: I think part of the question implied that no decision by the legislative or political branches of government was a decision. It is an issue that is a good argument, that failure of Congress to change the laws is a decision that the law is good.

I don't think anybody in the public health debate likes the current law. Nobody likes it. So, it may be that there is mutual dissatisfaction. But it certainly reminds me of Will Rogers or somebody who said that — and I'll analogize the HMO enrollee with the guy who's got one foot frozen in a bucket of ice and the other foot in a bed of hot coals. His temperature may be normal, but nobody can say he's not in a lot of pain.

That's the situation right now. Nobody likes the current system except for a narrow interest that's trying to defend it because the cards are stacked in their favor, because of ERISA and other issues.

The bottom line with the ERISA preemption is that if a managed care company maliciously and wrongfully denies your claim, they take your premium and arbitrarily deny your claim for no reason at all, the worst that can happen to them, if you sue them, is that they have to pay you the cost of the claim of they denied. If they deny your children and you die as a result of that, they'll pay you for the x-ray and that's it. No liability.

No other industry in America has that kind of protection, nor should it have that kind of protection. There is absolutely no mechanism now to compel that industry to do the right thing.

MR. BROOKS: I think we have time for one very quick one question, and then we'll thank everybody.

E n g a g e

AUDIENCE PARTICIPANT: There has been some discussion here about having an alternative between class action lawsuits and command and control regulation. One of the interesting things about insurance, which has been mentioned several times here, is that it's a very, very highly regulated business.

So, the kinds of things that Mr. Scruggs is talking about — and I don't agree with his characterization — he said that these things have been highly regulated at the state level, and there's a question about, he may not like it but, who died and made him God? I didn't vote for him.

There are people who are making these decisions at the state and federal level that we did vote for. So, we have a highly regulated business that is still going through a very brutal, coercive class action process. Now, that doesn't seem to be quite right.

MR. SCRUGGS: Am I all by myself on this one?

Of course, nobody elected me God or judge or jury or decider of law or fact. I'm an advocate. And I've got to tell you that the legal resources available to the insurance industry far exceed those available to the ordinary plaintiff. Sometime we can match up well and sometimes we can't. But you have enormous resources available to you legally.

Just because I take a position as an advocate doesn't mean that is going to be the result. It has to be decided by a court, in an appellate court, and usually another appellate court.

In terms of the degree of state court regulation of the insurance industry — I knew that would come up today; I felt like it would, and you posed the question very well — there is a huge degree of regulation, more or less, of the insurance industry. They're regulated for a reason, because of past abuses. But merely because they are regulated doesn't immunize them from the same sorts of judicial resolutions that any other industry that is arguably regulated has to face.

Just because you are given a driver's license and certified by the state to be a good driver doesn't immunize you from reckless driving and being sued for carelessness. In some cases — in fact, in the HMO litigation, our judge ruled just last week that in some states, the insurance industry there is so heavily regulated as to be preclusive of the common law lawsuits. I don't necessarily agree with him, but that is what he ruled.

Also, because you're regulated for one reason doesn't mean you're regulated for another.

So, I'll just go back to the basic issue. Just because you are given a license to do something by the government does not give you a license to do anything.

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PROFESSIONAL RESPONSIBILITY

JUDICIAL SPEECH CODES: SUPREME COURT REVIEW OF *REPUBLICAN PARTY OF MINNESOTA V. KELLY**

Professor Lillian BeVier, *University of Virginia Law School*
Professor David McGowan, *University of Minnesota*
Erik Jaffe, *Law Office of Erik S. Jaffe, P.C.*
Jan Baran, *Wiley, Rein & Fielding*
Marie Gryphon, *The Cato Institute, moderator*

MS. GRYPHON: *Republican Party of Minnesota v. Kelly* arose when Mr. Wersal, who was running for the Minnesota Supreme Court, filed an action in District Court. He did so after running a campaign during which he publicly advocated strict construction and criticized several opinions of the Minnesota Supreme Court.

Among other things, he challenged a canon of the *Minnesota Code of Judicial Conduct*. That canon prohibited a judicial candidate from expressing any views on any disputed legal or political issue. Mr. Wersal has argued that this provision, usually referred to as the Announce Clause, violates the First Amendment of the United States Constitution.

The District Court responded by construing the Announce Clause very, very narrowly, construing the clause as applying only to matters likely to actually come before the candidate if elected to judicial office. The provision was upheld. The plaintiffs appealed, and the 8th Circuit affirmed in a split decision, and *certiorari* to the U.S. Supreme Court was made and granted last year.

In the words of one panelist, this case was about where free speech meets due process. How can we ask candidates to run for office and then prohibit them from announcing their views on disputed issues? On the other hand, doesn't the state have a compelling interest in maintaining the integrity of its judiciary for the benefit of the parties who come before it?

Our first distinguished panelist today is Mr. Erik Jaffe. He is a practicing attorney in the area specializing in Supreme Court advocacy and other appellate advocacy and former law clerk for Justice Clarence Thomas and Judge Douglas Ginsburg of the D.C. Circuit. Mr. Jaffe practiced as an associate with Williams & Connolly for a number of years and now maintains his own practice. He has offered briefs for numerous Supreme Court cases, including most recently an *amicus* brief in *Republican Party of Minnesota v. Kelly*.

Please welcome Mr. Jaffe.

MR. JAFFE: My view on *Republican Party of Minnesota v. Kelly* can be summed up based on two of what I consider the essential factors of the case. One is that these judges face repeated elections — something that many of you might think is an abomination; something that I might think is an abomination. But it is in fact an assumption of this case. It is the core fact of this case. Therefore, it has to be considered.

The second thing is that, in state courts at least, there is a substantial amount of policy and value-based discretion. Those two facts, in innumerable ways, influence how one would analyze the First Amendment question.

So, first of all, I think they impact the level of scrutiny. The fact that there are elections means that you have to have strict scrutiny. I don't think that's terribly controversial, although periodically you will see some courts, and particularly the 8th Circuit below, questioning whether or not real strict scrutiny is appropriate — trying to diminish the level of strict scrutiny by analogy to civil servants, for example, where you don't quite have strict scrutiny, even though you're dealing with public speech. I think this is a mistake. I think it needs to be full-blown, pedal to the floor, strict scrutiny. This is a campaign; it's an election; it's to the public. I don't think there's any scenario under any theory of the First Amendment in which this would not be the very heart of what the First Amendment is about.

The second thing I think they impact, both the elections and the policy-based discretion, is the magnitude of the asserted state interests. People very casually say that there is a compelling interest in judicial integrity or there is a compelling interest in judicial independence. I think that's wrong. I don't think there is a compelling interest in judicial independence, certainly not in states that elect their judges. And, I do not think that what most folks think of as judicial integrity is actually what is at stake in this case.

So, judicial independence is the easier example to explain. Judges are supposed to be independent, but nobody bothered to ask, independent of what? Independent of political pressure? Independent of other elements of the government? Independent of personal bias? Independent of family bias?

I think most people want to say, independent of political and public pressure. And if that is the interest that we are asserting, it's a lie in states that elect their judiciaries because, by definition, those judges are not independent of political and public pressure. They are fully and completely and irrevocably dependent upon public pressure and politics for their jobs, for their continued tenure in office.

That strikes me as the most unbelievably obvious truism that I can think of, yet it seems to get overlooked in almost

every opinion where people wave their hand and say, judicial independence is a compelling state interest. If it were so compelling, we wouldn't be electing our judges. The fact that we are electing our judges suggests that the competing interest of judicial accountability has outweighed many interests in judicial independence.

So then, we are met with the question, in states that find judicial accountability, which is the antithesis of independence, to be of value, what is left of the interest or the concern for judicial independence. I do not go so far as to say it counts for nothing; I actually think there are some aspects of judicial independence that necessarily must be considered important, though perhaps not compelling.

The simplest example is the judge must be independent of personal bias as to the litigants in a case. You may not rule on your brother's lawsuit. You may not rule on your parent's lawsuit. I think that is a given. I think that's obvious. You need to be independent from those personal involvements that deal with the litigants before you.

I don't think a judge who has displayed a manifest bias toward a particular group in a case, for example, ought to sit on a case and evaluate that group. That is the kind of case-specific bias or group-specific bias that we would want judges to be independent of, and that I do not think the political process invites by its very existence in the electoral process. But that only goes to a very narrow portion of what judges do.

Judges look at the facts and decide who's telling the truth and who's lying. Judges take the laws and apply them to a given set of facts. And we expect them, if the law is clear, to not say in one case, "I think this law definitely means X" and in another case "I think the law definitely means Y," because you don't like the litigant. Those aspects of judging are plainly things that I think most people, maybe all people, would agree need independence from the judge.

The vast majority of what judges do, and in fact what we intend to fight about in elections, has nothing to do with that. It has to do with whether you are a strict constructionist. Are you a narrow constructionist? Do you find a penumbra around the Due Process Clause that is going to give you more room to create individual rights? Do you find affirmative action to be something that is important and compelling or not important and compelling? Do you find a woman's right to choose to be something that is of significant interest or not of significant interest?

Those are political choices. They are choices made in the interstices of otherwise clear law. It's where the law is not clear; it's where we expect judges to exercise discretion, to exercise judgment, not merely to act in a ministerial capacity.

In state courts, in particular, that happens all the time. The common law is the easiest example of that. Ambiguous state constitutional law is another easy example of that. But I think the common law probably is best. We expect judges to make the law. I know that sounds terrible in a Federalist Society convention, but we expect judges to make law.

Nobody told anyone that contributory negligence had to be there. Some judge thought it up. Nobody told him that it had to be comparative negligence. Some judge thought it up. And until a legislature says otherwise, that is the law, and the judge made it. If we are going to vote on legislators to make law, we are sure going to vote on judges who do exactly the same thing.

I think that is why you have a lot of states that elect their judges. It's not crazy — it's problematic, but it's not crazy, because they understand that judges create law, and therefore the public ought to have some say in who is making the law.

So, I think the interest, broadly defined, in judicial independence is not compelling. I think the interest is, in fact, one of judicial independence from individual biases, from biases that relate to specific cases; not from biases that relate to macro issues or to policy issues that relate to values. I think those values are an intrinsic portion of being a state court judge. So, that is how policy-based discretion plus the electoral process impact that.

The other way that those two facts impact the First Amendment analysis is that they impact narrow tailoring. We routinely say that there is a compelling state interest, but we narrowly tailor any restriction to achieve that interest. The simple answer in the narrow tailoring context is to say, well, there's a far narrower way to stop this judicial bias that everyone's worried about: appoint your judges. Or elect them once and never again.

The bias creeps in because there are recurring judicial elections, because if you say something the public doesn't like, they're voting you out of office. Well, if you want the public to have a say, give them a say once and make them elect someone for life or give them a say once and make them elect someone for 14 years with no recurring term.

All of those things will give you the right kinds of judicial independence without having anywhere near the impact on First Amendment rights that you have when you tell judges "you have to run for public approval but you can't tell them what you think about issues that they care about." That's a much greater burden on speech, and I think there are much easier ways of solving that problem.

Of course, we can eliminate elections entirely. We could have no elections of trial judges, for example. That, I think, is an interesting alternative, in that trial judges are the ones who are most immediately concerned with the individual litigants and the facts in the individual case, hence the type of bias that we are worried about most manifests itself at the trial level.

Once you hit the appellate level, of course, you are dealing much more with macro issues, issues of precedent. You are creating precedent. Perhaps in that situation, we're much less concerned with these supposed independence concerns than we would be about independent trial decisions.

The next thing I would like to point out about this interaction between elections and policy discretion, aside from how it impacts the First Amendment analysis, is that the balance between accountability and independence is actually a little

Engage

bit more difficult than I presented. It is troubling. It is very troubling that the same way that the public gets to influence judges in terms of their policy choices — in terms of being strict constructionists, in terms of having a more liberal or more conservative view of the constitutional provisions — that same policy concern could very well influence them over individual litigants.

The public could decide that John Doe was a horrible axe murderer who chopped up his six kids and wife, and you've got to convict him without looking at the evidence because the lurid TV shows and the lurid newspapers make the public go crazy. We don't want judges responding to that, but how do we balance?

We can't tell the public, exert your influence only on those discretionary items, but stop where you would exert influence on how you think the case ought to come out because you hate the particular litigant. There is no way of controlling and segregating that public influence.

I suppose the answer at the end of the day is that is troubling, and you may have a spillover in independence and accountability and you may have a spillover on things where judges are becoming accountable for the wrong things; they are becoming accountable for results rather than reasoning. But states that have chosen to elect their judges anyway, notwithstanding that concern, which is palpable to everyone and is laid out in the elections themselves, have made a judgment, a choice, that their judges are strong enough and strong-willed enough and honest enough to resist that. And if that choice is wrong, then the choice to have elections is wrong — not the choice to have free speech. I think with elections necessarily comes free speech. I think there is no way to separate the two.

The final point I would like to address is the point that you occasionally see in some of these decisions that public perception of integrity is as important as the reality. Even if there is no harm to actual judicial independence, the fact that the public might think there is harm is enough to regulate speech. My answer to that is nonsense. Nonsense, nonsense, nonsense. It's just not true. It's not even remotely true.

If the public incorrectly perceives a flaw, it is no basis for restricting speech; it is a basis for more speech. If they correctly perceive the flaw, that's a basis for fixing the flaw, for getting rid of elections; not for stopping the speech.

If what we are trying to do is to say, there's a real flaw there but we don't want the public to recognize it, we want to mask that flaw so there is confidence, my answer is instilling false confidence in the public is, in fact, the worst First Amendment violation. Masking the reality, deceiving the public into thinking their elected judiciary's actually independent, is a First Amendment abomination. That is not a compelling interest.

So overall, what I would do is I would like judges to speak out on anything on which they have discretion. If they have discretion to do something, I would let them express their views in ways that influence that discretion. That means policy choices, that means sentencing ranges within parameters. What I would not let judges do is promise to decide a specific case in a specific way or refuse to consider an issue. Refusing to consider an issue — that is a violation of the core of the judge's obligation.

The judge's obligation is to consider the arguments and decide, not to come in with an empty mind.

MS. GRYPHON: Next we'll hear from Professor Lillian BeVier. Professor BeVier is a professor of law at University of Virginia School of Law. She studies and teaches constitutional law with a special emphasis on First Amendment issues, among other subjects.

Professor BeVier also works on issues related to professional ethics. She has recently testified before the Senate Rules Committee and the Senate Judiciary Committee on the constitutionality and advisability of proposed campaign finance regulations.

Please welcome Professor BeVier.

PROFESSOR BeVIER: Thank you. I am very glad to be here among you today. What I want to do is warn you that I am going to take a position that even I am not sure I agree with.

As I came to this topic, really for the first time this fall, I was very surprised where I came out on it. You know, the Federalist Society always has one good guy and one bad guy and one good guy, one bad guy. I'm a bad guy today which is unusual for me—at a Federalist Society event anyway.

For my money, most of the approaches to the constitutionality of regulating judicial campaign speech try to fit a square peg, which is the speech of candidates for judicial office, into a round hole, namely First Amendment doctrine concerning candidates for legislative or executive offices.

It seems to me that neither First Amendment doctrine in general nor particular First Amendment cases, such as *Brown v. Hartlage*, for example, are quite adequate to the task of identifying, much less of satisfactorily sorting out, the interests that are in conflict when the subject is regulation of speech of candidates for judicial office.

One reason for this, to be sure, has to do with the fact that the First Amendment doctrine has become so formulaic, it pretends to invite analysts to play a sort of paint-by-numbers game and seems to promise that if one conscientiously recites the litany — is the regulation content-based? — does it achieve a compelling state interest by the least restrictive means? — then the questions will practically answer themselves.

In fact, however, far from eliminating First Amendment indeterminacy, the current doctrinal formulations tend only to disguise it, for they give little useful guidance about how to answer the hard questions. And this question before us today is a hard question. The doctrine, in other words, is like the Emperor who has no clothes—or like Burbank: there's no there there.

Of course, this aspect of First Amendment doctrine isn't unique to judicial campaign speech, but I think it is exacerbated in the context we are discussing. It is probably fair to predict that the Court is likely to say something to the effect that restrictions on judicial campaign speech are content-based restrictions on quintessential political speech at the very core of the First Amendment and thus are entitled to the strictest scrutiny.

But this approach has the potential to misrepresent, I think, the nature of the First Amendment stakes, even while it yields no clue as to the nature and weight of the interests on the other side. I would argue that the First Amendment interests at stake in judicial elections are, in fact, different — different in kind and not just in degree — from those that the Court has had before it in prior cases having to do with candidate speech. I would claim that candidates for judicial office are not legal or constitutional equivalents of either ordinary citizens or other elected officers, or candidates for other elected offices.

The extent of their First Amendment rights — in particular, their right to speak in their own behalf in their own election campaigns — ought not, in the first instance, to be measured by the same yardstick that applies to candidates for legislative or executive office. In other words, I take issue with the proposition that candidates for judicial office "no less than any other person have First Amendment rights to engage in the discussion of public issues and vigorously and tirelessly to advocate their own election."

Although it is constitutional, and I know quite common, to elect state judges by popular election, judicial elections are not the same at all as elections of legislatures and presidents or governors. Indeed, as Erik, I think, recognizes, judicial elections are an anomaly when considered both in the full context of our legal and political traditions, and in terms of separation of powers principles and the function of judges within a separated powers regime. Judicial elections put both rule of law norms and the Due Process Clause at substantial risk, and they invite judges to become embroiled in explicitly political pursuits. Thus, neither the First Amendment rules of the democratic political game nor its solicitude for individual speakers are necessarily the appropriate starting point of analysis when it comes to regulating the speech of candidates for judicial office.

I take up the first point first and ask you to consider what our rule of law tradition requires. Essentially, the goals to be advanced with the rule of law are regularity and even-handedness in the administration of justice and accountability in the use of governmental power.

The rule of law designates a whole cluster of values that are associated with conformity to law by government, and that includes, most particularly, conformity to law by judges. And consider, too, the Due Process Clause, which gives litigants the right to an impartial judge, to a decision based on facts presented by the litigants, evidence constrained by rules of relevance, and arguments of counsel based on the commands of existing law.

Fidelity to these norms is, in my view, central to our continuing as the nation that is governed by laws and not by men, where clear, impersonal, universally applicable general laws constrain the conduct of both individual citizens and those who govern them, and which secures to all citizens the promise that law itself and those entrusted to apply it will exhibit qualities of regularity, certainty, transparency and so forth. For all of its platitudinous quality, the boast that we are and relentlessly aspire to be a nation of laws, not men, is the bedrock of our entire legal system.

Those that argue that regulating the judicial candidate speech violates the First Amendment claim that simply by virtue of having to stand for election or retention, judicial candidates have become politicians by definition, indistinguishable in any meaningful sense from legislators or governors and accountable to precisely the same extent and in precisely the same way to the public. Moreover, they claim, judges are like other elected officials in that they often exercise discretion, and they naturally have personal views that are likely to affect their decisions. It seems to me, though, that these claims induly disregard institutional context and the constraints imposed on judges by the judicial office to which they aspire.

Practically everything about the structure of courts' decision-making processes and the role of judges within the judicial system differentiates courts from legislatures, for example, and judges from legislators. Elections for legislators is just one aspect in an ongoing conversation between citizens and their government, but judges do not engage in such a continuous dialog with the public at large.

As Roy Schotland has pointed out, other elected officials are open to meeting at any time, either openly or privately, with their constituents or anyone who may be affected by a decision in pending or future matters; judges are not. Other elected officials are free to seek support by making promises about how they will vote; judges are not. Other elected officials are advocates free to cultivate and reward support by working with their supporters to advance shared goals; judges are not. Other elected officials can pledge to change the law, and if elected, they often work unreservedly toward change; judges do not. Other elected officials participate in diverse and usually large multi-member bodies, and they do a lot of explicit compromising and vote trading; judges do not. Other elected incumbents build up support during their tenure through constituent casework, patronage, securing benefits for their communities and so forth; judicial incumbents do not.

Rule of law norms and the commands of due process imply, to me anyway, that judges are not supposed to be accountable for their decisions to public opinion about whether they are correct or not, no matter how well- or ill-formed public opinion may be. (Actually, I think the question of judicial accountability is huge here. I think it's one of the trickiest notions to get a handle on, but I certainly can not get a handle on it today!)

But judges do owe allegiance to the legal system itself, to the precedents and rules that are supposed to guide their decisions; and to the litigants whose cases come before them and the lawyers whose arguments they must consider.

Legal realists insist that judges have personal views that affect their decision-making. And those who would oppose restrictions on the speech of judicial candidates contend that this reality entitles the public to learn the candidate's personal views. With all due respect to the legal realists, judges still owe a duty to try cases impartially and, insofar as possible, to apply the law without regard to their own personal views, rather than straightforwardly to make it as politically accountable legislators.

It is not the judicial duty to attend to the policy whims of the political majority at any particular moment, except insofar as they have been duly enacted into law. Our system of representative democracy permits the majority's policy to be enacted into law by legislators and provides for judges to apply the law the majority passed. But at any given time a different majority may prefer simply to ignore existing law rather than to expend political effort to get it changed. That they may thus reward the judicial candidate who promises, even implicitly, to ignore it rather than to abide by it, ought to be irrelevant to the question of whether the First Amendment permits candidates for judicial office to speak as a candidate without restraint about legal and political issues.

In conclusion, let me indulge in a bit of legal realism of my own by acknowledging that, even if one were to accept my view of how we ought to frame the constitutional issue before us, I don't think there's a chance that that's going to happen, so you needn't worry. The question will remain whether we can inhibit the politicization of the judicial process with rule of law norms and due process constraints. It is not merely First Amendment doctrine or an indiscriminate insistence that judicial elections, because they are elections, must operate free of government distortion or control that stands in the way of achieving this objective. Other forces than the First Amendment have brought us to the point where judicial election campaigns threaten judicial impartiality. In recent decades, law has become ubiquitous, and legal rules and regulations govern seemingly every facet of American life. American citizens are notoriously litigious and show tendencies to become even more so. Courts place themselves at the center of most of the major social controversies of the day. Thus, the stakes in judicial elections are increasingly high for those individuals and groups who believe their interests are potentially at risk if the wrong candidate prevails. With the stakes becoming ever more significant, the prospect of inducing restraint on the part of judicial candidates or their advocates and opponents does not seem to be a bright one.

Thank you.

MS. GRYPHON: Next, I'd like to welcome Mr. Jan Baran to the panel. Mr. Baran is a partner at our host firm, Wiley, Rein and Fielding, where he is head of the firm's election law and government ethics practice. He is also a member of the litigation practice here. He is a former chairman of the ABA Standing Committee on Election Law and is a member of the ABA Commission on Public Financing for Judicial Elections.

He's the author of an *amicus* brief in this case, *Republican Party of Minnesota v. Kelly*, which he filed on behalf of the National Chamber of Commerce.

Please welcome Mr. Baran.

MR. BARAN: Thank you very much, and welcome to Wiley, Rein and Fielding.

I would like to start where Erik started, but I am going to take a slightly different tack than either Professor BeVier or Erik. I am going to start with the proposition that the people want to elect judges. Notwithstanding a Washington lawyer's view of the judiciary, which is enshrined in Article 3 of the Constitution, the citizens of 39 states insist that judges should be subject to electoral accountability and not be given lifetime appointments by the government.

For that reason, 53 percent of state appellate judges must run in contested elections for any initial term on the bench. That's 1,243 judges. Likewise, 66 percent of state trial court judges, which is almost 8,500 judges, must run in popular elections. Eighty-seven percent of all state appellate and trial judges in this country face some type of election for subsequent terms.

The fact is that elections create tension, which Professor Stephen Gillers of NYU calls the "one hand and the other hand dilemma." On the one hand, you expect judges to not make extra-judicial or prejudicial statements about the law, particularly about the controversial legal principles. At the same time, voters must obtain information in order to cast an informed vote. Likewise, there is a constitutional dilemma, which has already been referred to. The due process rights of litigants must be preserved and the First Amendment rights of candidates and their supporters must be honored.

The *Minnesota* case brings these dilemmas into focus, but unfortunately not in the best of circumstances. First, the version of Canon 5 used by the Minnesota courts is the broadest and the most unreasonable. Canon 5, for those of you who haven't read it all, is a very lengthy canon of the courts. It contains many, many restrictions, including restrictions on

Engage

candidates collecting contributions and how they can go about fundraising.

There is also a provision in there that prohibits candidates from making promises or pledges on how they will rule on specific cases. That provision is not at issue in this case. The only issue in this case is the Announce Clause, a version that was adopted by the ABA in 1972 and has since been abandoned as being extremely too broad.

The disputed clause prohibits any candidate for election to judicial office to announce his or her views on disputed legal or political issues. This clause can be read in Minnesota, and has been read by the Minnesota disciplinary committees, to prohibit any commentary about legal or political issues.

This results in what Professor Gillers has described as "the rule of silence." In order to avoid any possible claim of a violation of Canon 5, a candidate must limit herself to discussing safe topics, such as one's credentials — "I graduated from the state law school; I was on the Law Review; I was elected to the Order of the Coif." All of that is safe.

A candidate can comment, perhaps, on very innocuous dogmas, such as a promise to uphold the rule of law. Obviously, Mr. Wersel couldn't. He was a strict constructionist. And you might not be able to say "promise to uphold the rule of law" if you are saying that in response to a question about abortion rights, for example.

There is an observation by Judge Posner in the 7th Circuit case of *Illinois v. Buckley* that every potential subject of litigation can come before an elected judge. At the same time, this rule of silence may be impractical because it gives voters no valuable information and actually distorts the sources and flow of information — not from the candidates in their campaigns but from others, so-called third-party independent speakers, or in the modern vernacular of campaign finance reform, the "special interests".

I suggest that the reason the Announce Clause is now so common, and perhaps even the reason the court took the *Minnesota* case, is that judicial elections have become more like all other elections. In more and more states, the courts have become lightning rods for dissatisfied constituencies. As the result of public policy issues being resolved in courts rather than in legislatures, the bench is increasingly viewed as a political participant.

In saying this, I am not taking a position that any particular judicial decision is wrong or not within the province of the court, assuming the courts are performing their proper roles. They nonetheless are making big policy decisions that are leaving large, dissatisfied groups of the public, which is responding by mobilizing in these elections.

The Consequences are many. First, it means that judges, particularly statewide elected judges, must raise more and more money. Second, in those states with partisan elections, the political parties see judicial elections as part of the overall political agenda. This has made races for the bench in some states part of the overall partisan electoral warfare. And finally, independent groups are starting to wade into the breach with more and more spending.

In this escalating environment, the question now raised before the Court is what can the candidates themselves say about their own campaigns when more and more other voices are commenting on their races. Can the rule of silence silence everyone?

Thus far, there has been no attempt to impose restrictions on persons other than candidates, lawyers and those acting on their behalf. Yet the *Minnesota* case implicitly raises an important question. If candidates can be restricted in what they say because due process requires it, then to what extent does preservation of due process rights justify restrictions on what others say?

Thus, the two greatest issues that can come out of the *Minnesota* case are these. Assume that Minnesota's rule of silence is struck down. Where can the line be drawn? And if it is not struck down, then what are the implications for restricting statements in advertising by persons other than judicial candidates? As to the former question, it seems to me that Professor Gillers proposed a possible revised version of Canon 5's Announce Clause. His proposed rule is as follows: "A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views may only be tentative and subject to arguments of counsel and deliberation."

The proposed Gillers rule has an advantage of permitting candidates to speak, but also reinforces for the voters the fact that judges must judge; they cannot prejudge.

On the other hand, if the Supreme Court upholds Minnesota's version of Canon 5, there will be no need for the Gillers rule or any other revision of the Canon. Indeed, the effect of an affirmance will be potentially quite great. It would almost certainly require a holding that the due process rights of future litigants are greater than either the candidate's right to communicate legal opinions or the public's right to hear them. If so, such a constitutional conclusion would, at the very least, uphold the scheme of regulating judicial elections in ways that other elections could not be regulated.

In light of the dearth of Supreme Court decisions in the area of judicial elections, this case in my view may be only the first of many to address the constitutional and practical implications of the public's insistence on electing judges.

Thank you very much.

MS. GRYPHON: Finally, I'd like to welcome Professor David McGowan. He is an associate professor of law at the University of Minnesota School of Law.

Professor McGowan was a former law clerk to A. Raymond Randolph of the D.C. Circuit, and practiced with Skadden, Arps as well as with Howard Rice Nemerovski, before the move to pursue a career in academia.

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Despite living in the state where *Republican Party of Minnesota v. Kelly* originated, he assures me he has no interest in the case, other than that which is purely academic.

Please welcome Professor McGowan.

PROFESSOR McGOWAN: Thank you. I was thinking I would come here and try to explain to people who might not understand what it is that the people of Minnesota are trying to do with the Announce Clause, but I'm a native Californian, and I've been trying to figure out for four years, since I've been there, what the people of Minnesota are trying to do, and I don't know yet, so I can't explain it very well to you. But I'm going to give it a shot.

I think the debate of the clause really comes down to whether you can have an election without electioneering. Erik says, no; an election is an election is an election. That is one way to look at it. That is not the only way to look at it. You cannot understand what an election is without having some sort of underlying theory of representation.

Perhaps, and I think this is particularly appropriate for a Federalist Society gathering, I can best summarize what Minnesota is trying to do by referring to Burke's Speech to the electors at Bristol, in which he said, "Your representative owes you not his industry only, but his judgment, and he betrays instead of serving you if he sacrifices it to your opinion."

What sort of reason is that in which the determination precedes the discussion? That is what is at stake. That is what we are talking about.

Now, I'm interested to see in the briefs, and I'm interested to see in the general discussions, people confidently asserting that Minnesota must have sacrificed any but the speaker or the analysts' version of elections by choosing to elect judges. If you elect judges — boom — you're going into full lock-stock-and-barrel Rococo free speech analysis that doesn't mean anything whatsoever, these verbal tags that the court throws out in the cases. They don't help you very much. But people define the state's interest for it. Think about that.

Minnesota both has elections and has Canon 5. Both of those are acts of the state. It is inadequate to deal with this problem, simply to declare that you look at one of them, load it up with your own normative presuppositions about what an election is, and then claim the problem is solved. It will not do because it ignores half of the state interest that you're talking about. I dare say that in other areas, particularly people associated with Federalist Society, would be hesitant to define the state's interest for it by ignoring half of its enactments.

So, that doesn't get us very far but at least frames what's really at stake. Now, when let me pick up on representation again. Let's say there is a theory; an election is an election is an election. What follows from that? First and foremost, why should we prohibit judges from making pledges? It's an election. Electors need to know, don't they? That implies a correspondence between the statement in the election that informs the electors and the performance of the judge after the electors have voted, based on that statement.

Why do voters need the expression? To make an informed decision. What makes the decision informed? The follow-through — which incidentally points out a great irony. It's often you see it in briefs and you see it in discussions over this. People say, well, you can recuse. If you've made a statement that goes too far, you can recuse as a judge, which means, if you put it plainly, you can make promises so long as you never put yourself in a position to carry them out.
This is all very grand.

May Minnesota have elections without electioneering? I haven't purported to answer that question yet, but it has to be answered that way, I think.

I'm going to make a couple of points, but let me interject some set of people who haven't been talked about as explicitly as they should be, and that's the litigants. There are electors and there are litigants.

I think Professor Fuller has a famous article in the *Harvard Law Review*, called "Forms and Limits of Adjudication", in which he pointed out that litigation is simply one form of social ordering. There are lots of forms of social ordering. There are elections. There are negotiations. There's collective bargaining. There's litigation. "What distinguishes litigation from other forms of social ordering?" Professor Fuller asked. He said, "It is the participation of the parties in a particular way by the presentation of proofs and reasoned argument based upon the proofs. Anything which diminishes the significance of the parties' participation through the presentation of proofs and reasoned argument diminishes litigation".

So let me pose this as a rhetorical question; I'll try to answer it at the end — I believe inadequately so because there aren't very good answers in this field. From the litigant's point of view, what is good about these veiled promises that we are talking about? What is good, from the litigant's point of view?

Now, we can talk about shades of gray and promises that aren't really promises and winking and nudging and all of the usual sorts of things that you do in campaigns. There wouldn't be an issue here, by the way, if candidates really just wanted to make anodyne promises of general, generic things. They want to convey real information to go to the reliance interest for the strong representation theory that I was just talking about.

So, all right. That's the bad crowd. Let's talk about the case. There's not a lot at issue here, and I mean that in the strictest sense. One of my favorite quotations is from Dean Acheson, who looked at people running around during crises and said, "Don't just do something, stand there." Think about it.

The clause in the American Bar Association Model Code of Judicial Ethics that corresponds most closely to

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Minnesota's Canon 5 prohibits statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come up in court.

The Minnesota Canon prohibits a candidate from announcing his or her views on disputed legal or political issues. We've heard that. The 8th Circuit narrowing of the Minnesota standard said, "The restriction prohibits candidates only from publicly making known how they would cite issues likely to come before them as judges. General discussions of case law or tenets of judicial philosophy would not fall within the scope of the Announce Clause." That's out of the 8th Circuit.

The Minnesota Supreme Court, on January 29th of this year, issued an order adopting the 8th Circuit interpretation of the Canon as the governing aspect of the Canon in the state.

You can go after the ABA narrow 1990 version because it is very close to the narrowing construction that the 8th Circuit adopted. But I'm not sure why the Court would want to do that. If you try to distinguish between the set of verbal communications prohibited by the ABA Canon and the set of verbal communications — or any expression, actually — prohibited by the 8th Circuit narrowing construction, it is not at all clear to me that there is a difference in those sets; if there is, it's very slight. So, what are we going to do here?

You will notice the briefs for the petitioners in this case, if you read them. I cannot think of a way to state a premise to decide this case based on the strong theory of representation that we were just talking about that does not also logically compel one to strike down the pledge clause, which is not at issue in this case. Meaning that, a conscientious district court judge getting an opinion out of this case based on the notion that the electorate has a right to information would take a subsequent case challenging the pledge clause and using the logic that it would take to write this opinion and strike it down. That is based on the briefs on behalf of the petitioners.

What that means is that we are not going to get very far dealing with abstract, logical approaches to this. We are going to have to work in a sort of grubbing along fashion from the bottom up. Let me throw out a couple of things that we know doctrinally already about the speech clause. *Seattle Times v. Reinhart*, prior restraint — "A court may prohibit a party in litigation, even a newspaper, from publishing discovery materials gained through that litigation" — I'll ask afterwards if anyone disagrees with that.

United States v. Aguilar — we know that judges may be prohibited or sanctioned for disclosing wiretaps when they are judges, no First Amendment right there.

I won't mention *U.S. v. Microsoft*, except in passing — no first amendment right there.

Gentile and *Shepherd* both carve out some zone of permissible prohibitions on parties and counsel in pending cases.

All of those are different approaches to trying to protect in some sense the integrity of the judicial process, whatever that might mean, relative to the expression of people involved in that process. Those are all pending cases; those are all people involved in pending cases. So, you've got a much stronger poll there.

Those suggest that merely invoking the words "free speech" or this multi-tiered structure of doctrine that we got after *Police Department of Chicago v. Mosley* incorporated all this equal protection analysis of the free speech doctrine is not enough. What you are going to have to do is look at the facts and try and work up some way, taking into account that this is both an election and an election for judges.

Incidentally, there are plenty of people who get elected on promises or at least run on promises in a strict representational context that arguably entail the non-performance of the duties of office. That is not that uncommon. So, it is not enough simply to say, well, this is judges.

I think that you have to take into account the notion that you cannot isolate the campaign from the office. You have to take into account the notion that somebody who publicly makes this statement might think about that statement at a later time when a case pertinent to that statement comes before them. And the fact of having made the statement would reinforce a position to a greater degree than otherwise would have been the case without the statement, and therefore Professor Fuller's framework on diminishing the parties interests in presenting proof and reasonable argument comes into play.

I am going to leave you with this because I'm out of time at this point. Consider what verbal standard you adopt, if you apply standard First Amendment tools of vagueness. For example, let me read to you again the ABA Canon: "statements that commit or appear to commit the candidate" — appear to commit? Standard free speech analysis — you want to trot that out? Appear to whom? What does "commit" mean? I can strike that down in a half-heartbeat.

We are going to have to mow the lawn with reconciliation as best we can. But we're going to have to do it in a way that recognizes a state's interest in trying to preserve some zone of less than free-for-all discourse, whether it's only pledges or something else, when judicial candidates are involved. That is the only way to preserve that which makes litigation a distinct form of social order.

Thank you.

MS. GRYPHON: At this point, we have a brief opportunity for optional two-minute rebuttals by our speakers in the order in which they originally spoke. Mr. Jaffe, you'll have the first crack.

MR. JAFFE: Oh, there's so much to answer. But the easiest one to pick on is that neither Professor McGowan nor Professor BeVier spent much time talking about the fact that judges make law. State judges make law.

This notion of what it is to have a party-focused or litigant-focused judicial process completely ignores the existence of common law, and I dispute that model of state court litigation. It's simply not true. Parties have an interest, a very strong interest. I concede that much. It's just that they don't have the exclusive interest. They don't have the only interest, and this is, for all practical purposes, legislation by judging, not merely the resolution of individual disputes. The existence of precedent and the existence of rules that say you have to follow precedent, particularly if you're a lower court judge, I think make that indisputable.

As for Professor McGowan's Burkian theory of representation, I agree. You do owe your constituents a duty of judgment and not to bias or foretell your opinion. But you also owe them information on how you are going to exercise your judgment and what informs your judgment because you owe them the right to kick you out if they don't like what it is that you are bringing to your judgment.

There is a difference between promising a result in a particular case and telling them what will influence your judgment. You owe them that. The notion that we could enforce that in some reasonable way would say that this rule should apply to legislators just as much as it should apply to judges. And in fact, it should apply even more to executive branch elections.

The last thing I want to say is the analogy here that I would like to draw to election for state attorney general. There is no difference. State attorneys general have dual capacities. They create law, they exercise discretion and they also apply the law and are expected to do so in a fair, even-handed, impartial manner, and those things conflict when they have to run for election, and they have that dual capacity. I do not think there is realistically any difference between a judge and a state attorney general on those kinds of issues.

So, what do I think the role of the judge is? I think the role of the judge is to listen to argument, to consider the argument and to decide. I think those are the three defining features of a judge in any paradigm — federal, state, anywhere. And that's it.

The rest of this stuff, I just don't buy it. It's not true. I agree with Professor McGowan that we have to look at all of the state laws. We can't just look at Canon 5. We'll look at both, and the elections put the lie to what Canon 5 says.

Does that mean Canon 5 doesn't exist? No. It means the state has conflicting interests, and those in traditional First Amendment jurisprudence, whether we accept it now or not, make that interest non-compelling, even if it is valid. Those interests are perfectly valid. They're not compelling. They wouldn't be even substantial in a commercial speech matter. I don't deny their existence. I deny their magnitude.

MR. BARAN: I just have a couple of short comments.

First of all, with respect to Minnesota and Canon 5, I think Professor McGowan has equated both the will of the electorate to have elections with the decision of the Supreme Court judges to enact Canon 5. I mean, Canon 5 is an enactment by the Supreme Court and imposed on all the judges and, of course, their potential competitors for election. It does not represent the will of the electorate.

I agree with him in terms of the pledges and promises issue. Is that at risk in this case if the Announce Clause goes down? I think it is more defensible. I would agree if the Announce Clause goes down and even with the assistance of Professor Gillers of NYU, we really cannot create an Announce Clause that would work.

I do not think we are left sort of hopeless with candidates going out and making statements that we might not agree with because ultimately it is still going to be the judgment of the voters to decide whether statements, even if permitted under the judicial canons, are really becoming of a judge or a potential judge.

There is nothing, first of all, that compels judges to make prejudicial statements, even if that was allowed under Canon 5. Secondly, if they did, I believe that misstatements or bad statements by a judicial candidate are a reflection on him or her which will be taken into account by the electorate, which after all makes a decision on that individual.

PROFESSOR McGOWAN: I'll just say a couple of things. You can tell Erik and I are both former debaters.

On Jan's point on potential competitors, I forgot to say one thing, and I think this is terribly important. Probably, the best argument that I can think of for striking down this Canon is that if you get an incumbent judge who doesn't take the opinion writing task very seriously and thinks opinions are open letters to different constituencies, then there is a skew here because judges can electioneer, as Justice Blacking did in *Casey*, through opinions. I've got an article out there somewhere, if anyone's ever interested, suggesting ethical rules, and trying to get at that problem. They suffer from all the same deficiencies that these rules do. But that's a fair point.

It is an unlevel playing field, and I think that no matter how you come out on the campaign speech, we need to rein in some of these amazing opinions that say, "oh, the parties are here; that's nice. Now here's what I think about something."

On Erik, for most of the history of the republic, federal courts had common law-making authority, so you can argue about *Erie* and all of that but I don't know that there's a stark distinction. Holmes said that Congress makes laws wholesale

E n g a g e

and judges make it retail. I think it would be hard to deny that there is interstitial lawmaking going on at the federal level, so I don't know that there is a hugely stark distinction.

But I take the point that there is, to some degree, some sort of evolution of law going on in any court. It may be greater in common law courts. I don't know that it has to be. I'd like to think that judges actually look at the parties and focus on the facts, and what you get are laws and externality, a byproduct of deciding a concrete case. But I know that that's something of a fiction.

On the magnitude of the interest, I think Erik is coming at the magnitude, working down from the democratic theory, and that is actually "what I'm saying is up for grabs here." What we are talking about is what does an election mean, and can a state define it its way? Those interests are going to correlate.

The speech clause may say, if you have an election, here is your form set of federal rules that go along with an election. That is at heart, I think, what is going on. If the interest in judicial independence is not compelling but merely interesting, then I really don't think that you can even ban pledges. I don't see why because this is a democracy. "Democracy" means rule by the people. There cannot be a more significant interest.

I disagree to some degree with the notion that it's just an enactment by the judges. If all of this is true, then the judges are just representatives and this enactment stands on no different footing than any act by a representative wielding delegated power. So, the canons are very much as representative of the will of the people of Minnesota as the statute, or as any other act.

AUDIENCE PARTICIPANT: The question is this. I think the U.S. Chamber has made a great contribution in a survey which is missing from the briefs. They had the Harris Poll do telephone interviews with 840-odd general counsels and other top litigators about how they rank the states. Minnesota came out tenth for impartiality and fifth in the competence of their judges.

My question is simple, don't you think that's entitled to respect?

MR. BARAN: Well, first of all, the study was not complete by the time we had to file the brief. But if you get a reply, Roy, you're welcome to submit it to the court.

The other findings in the study, as I recall, were that the top five worst states were all states that had elections, Mississippi, West Virginia, Louisiana, Texas and one other. And actually the five best states were states that had no elections.

What you have is a tension between an effort to try and put a finger into the dyke here by stopping the inherent, fundamental, underlying problem with electing judges with devices such as these types of announce clauses, which ultimately I don't think are related to the quality of the elections, nor will they necessarily work.

I don't think the reason Minnesota has a perceived good, dependable judiciary has anything to do with the Announce Clause. I think it is the culture in that state, and perhaps a fact that unlike some of these other states, they have not become a depository for a lot of controversial type litigation, whether it's tort reform, or whether they have state courts that basically are seen as unfair.

I don't think that is the situation in Minnesota. It certainly is in these other states that also have elections, have variations in an announce clause and simply have produced state judiciaries that have stimulated these types of controversies and reactions in the course of their own elections.

PROFESSOR McGOWAN: In Minnesota we ran into the phenomenon known as the state attorneys general litigation against the tobacco companies, out of St. Paul. There was a judge in St. Paul creating a document database that ran the entire country on local discovery rules, so we have had some wacky stuff. It seems not to have affected the overall culture, and I find that somewhat surprising.

MR. BARAN: Well, that's not the type of litigation that creates what we are witnessing in the states. If you had what is seen as a run-amok tort system, if you had a judiciary that was making other controversial conclusions, as did the Ohio judiciary with respect to school funding and things of that nature, I don't think that the tobacco litigation has prompted any sort of reaction anywhere in the country.

PROFESSOR McGOWAN: That's the problem.

AUDIENCE PARTICIPANT: Professor BeVier mentioned the difficulty of bringing traditional First Amendment analytical approaches to this issue. I just wanted to mention a couple other approaches, one that I came across in a circuit court of appeals case just the other day involving an analogous set of facts. It involved the constitutionality of a restriction on incumbent members of a state legislature from receiving campaign contributions while the legislature was in session.

The court, I think, said that was not an unconstitutional restriction. But the thought to uphold the restriction based

on the venerable legal maxim that "the fleas come with the dog", the dog in that case being, if you want to be in the state legislature, you have to accept the fleas of restriction. It seems to me that could be applied here. If you want to run for judge, you have to accept the restrictions the state has put on you. I'm not sure that was persuasive, though.

But let me suggest a different approach that I do want to ask the panelists about. That is, the First Amendment rights of the voters, the right to hear information; the right to obtain information. I think the Supreme Court has at least alluded to that right.

If my memory serves correctly, I think it was the *First National Bank of Boston v. Bellotti*, a well-known finance case in which the court said that the voters have a right to obtain information, too. I wonder if maybe that isn't the answer here. Don't approach it from the standpoint of what is the First Amendment right of a candidate for judge. Don't the lawyers have a right to ask these questions and to get an answer if they want to ask the question?

PROFESSOR BeVIER: What I would say from the doctrinal point of view (this answer doesn't really satisfy me, either) is that the notion of people having a right to the information is something that has mostly rhetorical force. If you have a right, then somebody else has a duty, and I just don't think there's a corollary duty.

AUDIENCE PARTICIPANT: I don't think they have a duty to speak; they don't have to answer the question. I think it's really the right to ask the question. But that right shouldn't be inhibited by prohibition the Announce Clause.

PROFESSOR BeVIER: Yes. Well, I take your point and I understand what you are suggesting but I don't think it is analytically pure to say that the public has a right to know in this context.

Basically, what you're saying is that this is an election; you're supposed to vote and you're supposed to actually care about what you're voting. And you're supposed to vote with some sort of knowledge about the candidates, and thus there is this aspect of keeping the voters in ignorance that is hard in my argument and I understand that.

I think this is a really hard.

AUDIENCE PARTICIPANT: Let me play devil's advocate with you, Erik, because I tend to be on your side on this very difficult issue. Is anything open? Is everything open in this? I'm thinking of the analogy to the federal context because right now we're seeing elections before the Senate Judiciary Committee, and they are not going well for the Bush Administration. We are seeing the imposition of an ideological litmus test.

Should candidates be asked in either state or federal to declare, "Are you a union member? Where do you stand on Big Tobacco?" And so on. It seems to me that the point where the kind of Burkian judgment that Professor McGowan spoke of maybe had to be exercised by the candidate themselves. And yet, will this kind of process, whereby we elect judges either at the Senate Judiciary level or the state level, just invite the kind of abuse of rule of law principles that Professor BeVier has so rightly pointed to?

I wonder what your thoughts are, not only on that, not only on the state but in the federal context as well.

MR. JAFFE: Sure. My answer to what the limits are, are implicit in my definition what the job for judges is, which is to hear, to consider and to decide. So, if you make a pledge or a promise not to do any of those things, you have effectively, anticipatorily violated your oath. I think we can stop people from saying, I will do something that's ultimately illegal or improper under your oath, just the same way I would stop someone from making a campaign promise that if elected as state senator, I'll take a bribe, I'd stop that, too. So, I think that's the limit. That's where I place the limit that answers Professor McGowan's question about how commitments are different. Some are; some aren't.

If I promise to be a strict constructionist, I'm not sure I'd have a problem with that, though it might violate my 'consider' criteria. And so, maybe I would say, "I am a strict constructionist. I'll certainly listen to someone arguing otherwise, but let me tell you I've thought about it for a long time. I'm a strict constructionist; I'll listen but I'm not promising you I'm going to agree with you." That works for me.

So, the question, then, is how do we compare this to the federal context and the litmus test? My answer is, I have no problem with litmus tests at the federal level. Zero. I think those questions are fine. I think the Congress can make the decision on anything it bloody well chooses. I think as for advice and consent, it's pretty much completely open-ended discretion for the Senate to take them or not take them, in the same way that the President, when choosing who to nominate, can put a litmus test and can ask those questions to the candidate privately.

What I think would be improper is if the candidate turned around and said, I promise to vote against Microsoft if you appoint me tomorrow. That would violate — once again, my notion of hear, consider, decide, it would violate my notion of a pledge. It would be a promise to violate your judicial oath. They can't do that.

SPEAKER: But suppose that I say, "Unless you say that, you're not going to get my vote on this committee?"

MR. JAFFE: Then I don't get your vote. I don't see why that's a problem.

SPEAKER: But there's a problem right now given —

MR. JAFFE: No. It's a political problem. It is not a constitutional problem, and it's not even an ethical problem. It is strictly a political problem because that is what Congress has the right to do — grant or withhold consent. And there is zero check on what they choose to exercise that right on. That is the nature of a political body.

So, if they want to know, will you overturn *Roe v. Wade* and you refuse to answer that, and so Biden says, well, then I won't vote for you if you don't answer me, the answer is, thank you very much, Senator. Vote your heart; I don't give a hoot. But that's my answer.

So, I think you're right. A conscientious judge, having their own sense of decorum, might well refuse to answer those questions. But I've never known decorum to be a constitutional requirement. I've never known it to be much of a concern of Congress.

If you want to be noble and ethical, stand up and tell Biden to stand up and shove his head somewhere. But, when he votes against you, you don't have any grounds to complain because it's a political process and he has every right to vote against you for telling him to shut up.

I don't have a problem with that. I may not like the result politically and personally but I have no legal problem with that.

AUDIENCE PARTICIPANT: One of the arguments that you have made today is that the integrity of the judicial process requires this kind of speech code. But can the argument also be made completely on the other side? An example from a real case in Georgia is an individual, a lawyer, who wanted to run against an incumbent Supreme Court justice. He wanted to make as part of his campaign the fact that this justice, because of her own personal biases, refused to uphold the death penalty, no longer recognized homosexual marriages, and basically wanted to make her own philosophy the law of the land, instead of upholding what the legislature had put in as laws. But he was not able to do that.

Doesn't that hurt the integrity of the process more than not being able to inform the public about this?

PROFESSOR BeVIER: I don't understand why he was not able to do that, in the sense that surely what the judge had done was a matter of public record. Isn't that right, or am I just being naive?

PROFESSOR McGOWAN: His hypothetical plainly violates the announce clause as read. If you read the announce clause, the disputed issue — it plainly violates it. Whether or not it's true.
The hypothetical works just find.

PROFESSOR BeVIER: But that's the flip side of the *Buffet* case in the 7th Circuit. There was a court of appeals judge who ran on the campaign ad or brochure that said, in all my years on the court of appeals in Illinois, I never reversed a rape conviction — which was factually accurate. But it was in violation of the announce clause under the ruling of the Illinois Disciplinary Committee. For that reason, it held unconstitutional because it was a factually accurate statement and, yes, rape is likely to be an issue that might come before the court of appeals again.

But there are other ways of handling that, and there was a question of whether, in fact, he was actually making a promise or a pledge, saying I'm never going to reverse a rape conviction ever again if I'm on the bench. Those are the type of practical, real issues that do come up and that are subject to this announce clause debate.

PROFESSOR McGOWAN: I think I just want to reinforce one thing. It would be a mistake to pretend that there is a sharp distinction between an announcement and a commitment. The one problem I have with this sort of verbal formulation — this is a very hard problem; I don't mean to imply that it's not — is that whatever verbal formulation you draw will invite deceptive masking or innuendo or this standard sort of "you know what I really mean."

Campaigning is not exactly a tribute to candor. You know, we're going to be candid. We're going to give the people the information they want. If you reserve any prohibited scope at all, including overt promises, then what you're really say is, we'll signal; we'll drop hints; we'll drop innuendos; and in the real world, that's how this is going to work.

It's what we do in the Senate Judiciary Committee: You are quite right about that. In the Souter confirmation, we actually had a debate over pledges because there was an explicit ethical debate. I do think it is an ethical question for judges, by the way. But this is not a fine distinction, and that's a lot of the problem.

AUDIENCE PARTICIPANT: My question is about the actual case. I'll give you my two assumptions.

Whatever they do with this case, it can be easily confined to a very specific factual scenario involving judges, and they can write it in a way that there would be very little collateral damage to any other First Amendment doctrine, which

Engage

means they get to do whatever they want.

At least one justice has been quite clear that he thinks electing state court judges is an abomination, and it would not shock me if his colleagues believe that same thing, as some of you expressed. Assuming a majority of the court feels that it's an abomination, how do you decide this case?

MR. JAFFE: If it's an abomination, what you do is say, "You've got to live with the consequences of that abomination, and you can't escape the consequences of that abomination by sacrificing the First Amendment." And then you wait for the due process case to arise. You wait for the proof of all the harms that make people want to pass clauses like the announce clause, that skew decisionmaking, that prejudice litigants. And then you strike down the elections.

But you don't distort First Amendment jurisprudence because you feel compelled to accept the initial abomination as if it weren't.

PROFESSOR McGOWAN: You mean, if they don't take the "don't just do something, stand there" approach?

I think what you're likely to see is an opinion that says pledges can be prohibited but beyond that the standards are too vague. And I really find it difficult to see how the 8th Circuit's narrowing construction can be distinguished from the existing American Bar Association prohibition on comments that appear to commit. If you really seriously apply speech clause doctrine, that's not going to go very far.

I am happy with that outcome. It doesn't solve in a logical, Euclidian fashion the competing interests. It is a resolution. It is a solution. That's, I think, what you're likely to see, and I'm comfortable with that, because this is very hard.

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Religious Liberties

School Vouchers: Past Lessons and Future Prospects
The Implications of Government "Strings" on Vouchers

Professor Michael Paulsen, *University of Minnesota Law School*
Professor Charles Rice, *Notre Dame Law School*
David P. Scott, *Beacon Education Management*
Rebecca K. Smith, now Rebecca K. Wood, *Sidley Austin Brown & Wood LLP, and Co-Chairman, Religious Liberties Practice Group Subcommittee on School Choice and Education Reform, moderator*

MS. SMITH: It certainly has been an interesting week for religion in the news. We heard from the 9th Circuit, at least a panel of it, that public school kids can't say the words "under God."[1] And now we've heard from the Supreme Court that at least certain kinds of school vouchers like the ones in Cleveland are constitutional in that they don't violate the Establishment Clause.[2]

Now comes the next round of debate and the next round of litigation. If vouchers are okay in private schools, what kind of strings can come with them? What must be done by religious schools that accept voucher money? I thought it was very interesting, even in the *Zelman* decision, that they noted that the Cleveland program places certain restrictions on private schools that accept that money.

Although this was not a topic of that decision, I think it will be an interesting part of the next round of debate. What they say is that private schools must agree not to discriminate based on race, religion or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group based on race, ethnicity, national origin or religion. It sounds pretty nice on its face, but as we get deeply into it, will this raise issues of unconstitutional conditions? For instance, can private schools that accept voucher money ask for the baptism records of kids? Can they ask for the religious denomination of the kids' parents? Can Catholic schools prevent Protestant kids from taking communion? Are all of those things hatred, or are they some sort of improper discrimination based on religion? That'll be the next round of constitutional questions, or some of them at least, that are likely to follow and be raised as vouchers are increasingly accepted by religious schools.

There is also the question of whether schools want to live by ordinary kinds of regulations the government can put on any kind of entity that accepts public money. If it is true that he who pays the piper can call the tune, what are the implications for religious schools? To help us unpack some of these questions and offer some insights into the next round of the debate, we have three speakers who have spent a lot of time thinking about these kinds of issues.

Our first speaker is Michael Stokes Paulsen, who is the Briggs and Morgan Professor of Law at the University of Minnesota Law School, where he has taught since 1991. He's a graduate of John Marshall Elementary School, Northwestern University, Yale Law School and Yale Divinity School. Professor Paulsen is a former federal prosecutor, former senior staff attorney for the Center of Law and Religious Freedom at the Christian Legal Society, and former Attorney Advisor in the Office of Legal Counsel of the United States Department of Justice. He has been involved as counsel or *amici* in dozens of free speech and religious freedom cases, including, most recently, *Peter* v. *Wedl*, a school choice case involving the right of children with disabilities to attend private religious schools without forfeiting special education benefits. He has also testified before numerous House and Senate committees on a variety of constitutional issues and has authored three dozen articles on various topics of constitutional law, especially issues of freedom of speech and religious liberty.

He will be speaking first and will help put some of the "strings" issues in the context of *Zelman* and of constitutional law more generally.

Our second speaker will be Professor Charles E. Rice, a Professor Emeritus of Law at the University of Notre Dame Law School, and also a visiting professor of law at Ave Maria Law School. His areas of specialization are constitutional law, jurisprudence and torts.

He is a graduate of the Holy Cross College, Boston Law School, and also has an LL.M. and J.S.D. from NYU. He was a lieutenant colonel in the U.S. Marine Corps Reserves. He has practiced in New York City and taught at other schools as well. For eight years, he served as Vice Chairman of the New York State Conservative Party. From 1981 to 1993, Professor Rice was a member of the Education Appeal Board of the U.S. Department of Education. He served as a consultant to the U.S. Commission of Civil Rights and to various congressional committees on constitutional issues, and is an editor of the *American Journal of Jurisprudence*. He has also authored numerous articles and books on constitutional issues.

Finally, to help us put all these issues in perspective is David P. Scott, who is Vice President of Development for Chancellor Beacon Academies, Incorporated, a nationally recognized education and management organization. He is also the founder and webmaster of www.charterschoollaw.com, a website dedicated to offering a collection of charter school

resources to the members of the charter school community. Mr. Scott has been involved with charter schools since 1996. He has assisted in the lobbying for the passage of charter school legislation and the organization of charter school resource centers and charter school operator associations.

He has actively participated in the preparation of charter school legislation and in drafting revisions of charter school laws. He is the founder and Chairman of the Board of St. Louis Charter School, the first charter school in St. Louis, Missouri, and has been instrumental in navigating the political obstacles facing the charter school movement in Missouri.

Prior to joining Chancellor Beacon Academies, Mr. Scott was a lawyer with several prominent firms, including Bryan Cave. His legal practice has focused on working with charter schools and education organizations. He is also the author of numerous publications and has spoken frequently on the topic.

Without further ado, I turn it over to Professor Paulsen.

PROFESSOR PAULSEN: Thank you very much. I passed out an outline. Like all good law professors, you have to pass out lecture notes so the students don't fall asleep during the middle and so they can follow along at home.

I've entitled this presentation "No Strings Attached," but probably a better title is "No Unconstitutional Strings Attached."

The way I'd like to start is with a map of the universe of school choice voucher constitutional issues. I think there are four major constitutional questions about vouchers and school choice proposals generally. They are, in the order in which they are likely to arise and receive their final judicial resolution, and in ascending order of difficulty and importance, as follows. The first question is, may religious schools and their students constitutionally be included in school choice programs? I call that the Establishment Clause question. That's the question that the Supreme Court decided yesterday by a vote of five to four; that's the *Zelman* question, and I'll leave most of that to the second panel, which is going to do an in-depth analysis of *Zelman*.

The long and short of it is that the Supreme Court has held that the Establishment Clause of the Constitution does not authorize or require discriminatory exclusion of religious schools from school choice programs. It does not violate the Establishment Clause to include religious schools as destinations for which people may use their vouchers.

The second big question is, may religious schools and their students constitutionally be excluded from voucher programs?

Now, some of you who are familiar with the various incarnations of the Wisconsin School Choice litigation might recall that originally the Wisconsin School Choice proposal did not include religious schools, and a challenge was brought on free speech and free exercise grounds to the exclusion of religious schools on the theory that this was discrimination against religion. That case was pending in the 7th Circuit when the Wisconsin legislature mooted the whole problem by extending the program to include religious schools.

I think the next issue on the horizon is, are religious schools constitutionally entitled to be included in voucher programs? Is it permissible for a city to devise a program that excludes private religious schools but includes other types of private schools? I think this question is also fairly easy and is the next one over the horizon. Cited there in my little outline is the case of *Rosenberger* v. *Rector and Visitors of the University of Virginia*, which is a 1995 case involving the funding of campus religious organizations at the University of Virginia.[3] Virginia funded student organizations to compete for money, and a student organization wished to publish a religious newspaper. The University of Virginia said no, you can't do that. The Supreme Court held that where government has made a fund or program available, it may not discriminate or exclude based on the religious nature of the ideas conveyed.

This is a fabulously important case for school choice in that it establishes the principle, to my mind at least, that not only does the Establishment Clause not require the exclusion of religious groups, the Free Exercise and Free Speech clauses will not permit government to discriminate or exclude religious options within the context of genuinely neutral school choice programs.

The third situation or genre of constitutional issues on the horizon is whether school voucher programs may be loaded up with regulatory strings attached that expand government's control over private school curriculum and personnel decisions. I call this the poison pill or unconstitutional condition list issue. That is the issue that is framed for this panel, and I think this is an issue that is right around the corner. It is one on which I have written in the past; I actually brought along a couple of my old law review articles, left them over there so that somebody besides my mother reads these things — well, I actually doubt whether my mother gets through these things. I will talk about that more in a second.

PROFESSOR RICE: I read them.

PROFESSOR PAULSEN: Professor Rice says he reads them. He is a generous liar here. But I think that is the issue of the next 10 and 15 years.

Finally, the fourth big constitutional question about vouchers that I pose here is, are vouchers mandatory? Are private school voucher programs at some minimal level of funding constitutionally required? Now, this is a whopper of a

constitutional question, and it's not even over the horizon yet. This is a good 10 to 20 years away. If the courts were to address this issue now — is systematically funding public alternatives over private alternatives unconstitutional? — there is no way the Supreme Court would say that's a problem at all. But I think that there is a powerful intellectual case to be made down the road that a government program that discriminates against parents' choices of the religious or other private content of the education they wish imposes an unconstitutional condition on a very important government benefit program.

I have laid this argument out in speeches that I have given in other places — highly controversial positions. We are not there yet. Where we are is back on question number three, and that is what I want to talk about in the next ten minutes or so. That is, what strings may be attached once you have constitutionally permissible voucher programs? The answer here is a little less obvious, in my mind at least, than the answer to the first two questions. But in principle, it should be reasonably clear once it's been given a little bit of careful thought.

Here is my position. The acceptance by private schools of students taking advantage of a voucher or tax benefit program gives government no greater power to regulate private school, curricula or personnel choices, or any other aspect of private education than government would have had in any event. The acceptance of students carrying a voucher gives the government no more power than it otherwise would have had. The idea of consent really adds nothing to the analysis.

The scope of government's regulatory authority over private schools and private religious schools I think presents very interesting, important, and difficult questions of the freedom of speech and free exercise rights of religious and other private organizations, but I do not think that those questions are really at all affected — at least, not legitimately — by receiving a voucher. If government could not constitutionally impose a particular requirement on a school directly, it may not do so by the means of attaching a condition on receipt of a voucher. I think that's the correct constitutional analysis.

Let me briefly run you through why I think that is so. I think it's important to step back and look at what the government could do now without receipt of a voucher. What is the power of government to regulate religious or other private schools now? This is a function, I believe, of the freedom of speech and freedom of expressive association rights of private schools.

The core principle of the Free Speech Clause that I alluded to in talking about *Rosenberger* is that government may not discriminate based on the content of the ideas being expressed or the viewpoint of the ideas being expressed. Relatedly, a line of Supreme Court cases has established a freedom of expressive association; organizations get to band together in order to further their common messages.

The cases that I cite there are the *Hurley* case from 1995 and the *Boy Scouts* case, the famous case from just a couple of years ago.[4] *Hurley* held that the State of Massachusetts could not require private organizers of a parade to include a competing message that they didn't want. Specifically, the St. Patrick's Day parade in Boston did not wish to include a group of gay, lesbian and bisexual Irish that wanted to march under that banner. The holding of the Supreme Court unanimously was that government grants the parade permit, but that does not give it the authority to regulate the content of the expressive message being conveyed by the private group that takes advantage of the neutral government forum. Think about that. It doesn't give government the power to regulate the message. It's the Irish group's parade, not the government's parade, and they get to control the content of their own messages — nine-zip, 1995.

It became a little more controversial, two years ago, when in the context of the *Boy Scouts* case, the question is can the Boy Scouts exclude from their membership or leadership openly gay assistant scout masters. The Supreme Court again upholds the freedom of expressive association, but much more narrowly — five to four; in fact, the same five-four lineup that we had yesterday in *Zelman*, the conservatives, roughly speaking, against the liberals. What *Boy Scouts* stands for, again, is a reaffirmation of the principle that a private group gets to control the content of its messages, including those who speak on its behalf. What I infer from this is that as a matter of constitutional law, a religious or other private school must have the right to control the content, within very broad boundaries, and the viewpoint, very nearly absolutely, of its own educational program. Also, I infer that there is a constitutional right, a First Amendment right of private schools, to control the content of their curriculum. Private religious schools get to be religious. Now, this is all in the absence of a voucher.

In addition, once you add to that the freedom of expressive association, you also have the right of a private association — a private school, a private organization — to decide who constitutes that expressive community. I think this extends legitimately to matters of employment, the teachers they hire, and even to matters of admissions.

Now, there are some limits on this and the Supreme Court has not gone as far as my theory. These propositions that I am giving you about the First Amendment rights of the religious organizations, private schools, are contested. But the big point I want to make for you now is that they are contested whether or not a voucher program is in place. There is a dispute about how far government can intrude into private religious schools or private schools, but government is already trying to do that.

The big question is, does the receipt of a voucher affect those legal issues in any way? I argue that it does not. My second point is the legal irrelevance of acceptance of a voucher to government's authority to regulate. It is my position that there's no greater authority of government to regulate private schools by virtue of the indirect receipt of a voucher than it would have had in any event. There are several reasons for this.

First, acceptance of a voucher does not transform the private school into an arm of the state. It does not turn a

private school into a public school. Think about it. If accepting a voucher turned you into a public school such that government could regulate you in exactly the same way as it regulated its own schools, then the *Zelman* decision would have to be wrong. If acceptance indirectly of government money really does make you the equivalent of a government school, then inclusion of religious schools would be unconstitutional under the Establishment Clause.

A central premise of the *Zelman* decision and about a dozen others that preceded it is that in genuine private individual choice programs, the fact of a transmission of money to the private religious organization does not mean that the government is sponsoring what's going on. I think that has important implications for government's authority to regulate. The mere fact that government provides a voucher that someone then takes to a private school does not mean that the government owns the private school. It is not the case of the government directly funding a religious or other private organization.

My second constitutional issue is that if it is illegitimate to exclude religious schools from participation in a voucher plan on the ground that they are religious, then it is equally illegitimate to say that inclusion of those schools in a program may be conditioned on the schools' forfeiture of their right to maintain their distinctive religious identities in the program. That is the *Rosenberger* case; that's the *Mitchell v. Helms* case, talking about pervasive sectarianism.[5] If it is unconstitutional for the government to exclude you because you are religious, then when it includes you, you still get to be religious. It just follows logically.

A constitutional lawyer would dress this up with a whole bunch of gobbledygook in terms of the unconstitutional conditions doctrine, which is, simplified drastically, that if you would otherwise have the right to a benefit, government may not condition that benefit on your relinquishment of a constitutional right you otherwise would have. That, I think, is the important rationale of challenging the restrictions that government may attempt to impose with voucher requirements.

Now, I will say a few words about David Souter's dissent in the *Zelman* case. Souter gives absolutely the wrong answer to absolutely the right question. At one point, Souter portrays himself as a champion of religious liberty because we must protect religious schools from themselves because if they start accepting this government money, there'll be all sorts of strings attach; look at the strings that are already being attached. Therefore, the program is unconstitutional under the Establishment Clause.

But the conclusion doesn't follow. The wrong answer is that this makes government voucher programs unconstitutional. The right answer is that when government has a voucher program, if a condition that comes attached is unconstitutional, it is open to the recipient to challenge the unconstitutionality of that condition — or not. First Amendment rights can be waived, and I think it's an important part of private schools to decide that, yes, we do not wish to discriminate. Yes, we wish to take all comers. And no, we do not have a problem with not advocating hate speech.

I think that, in principle, many of these restrictions would be unconstitutional. But the appropriate way for them to be challenged is in this next wave of litigation challenging the unconstitutionality of specific conditions as they arise.

I will stop there and give the others a chance. We will take questions a little later. Thank you.

PROFESSOR RICE: Thank you. I appreciate that. I really am one of the few people who read Mike Paulsen's articles, though. Mike and I and Mr. Scott have divided up the time. Mike has taken his 15 minutes and I will now take my hour and 45 minutes to explain these things in more detail.

Actually, I agree with a lot of what Mike said. The states have the authority to regulate private schools, even if they don't subsidize them, to some extent. Fire, safety, health regulations, Civil Rights Act on race, for example, which is a Commerce Clause-based thing.

But, I don not agree with Mike's analysis in terms of the subsidy because there really is a difference in the capacity of a state or federal government, as the case may be, to regulate when there is a subsidy involved. In *Wickard v. Filburn*, back in 1942, a man was prosecuted because he grew excess wheat on his farm and consumed it on his own farm. The Court said it is not lack of due process for the government to regulate that which it subsidizes. That is just common sense. There is no such thing as a free lunch. That is a basic natural law of possession.

By analogy — this is not in the same context at all — we have a principle in the Commerce Clause that when the state becomes a market participant rather than a market regulator, it is exempt from all of the restrictions of the Commerce Clause. So, when North Dakota goes into the cement business, it can refuse to sell its cement to citizens of other states. Why? Because it is in the business and it is putting state money into that business. When it puts state money into that business, it can act like any other entrepreneur.

When you get into the voucher routine, it does not matter whether you are talking about vouchers or tax credits. In the *Regan* case and earlier, in the *Bob Jones* case, the Court held that a tax advantage is a subsidy, just like a grant.[6] So, when we look at this thing, we are talking about something that has a very human dimension.

If you take the money through the voucher, you are going to rely on it. And the result of this is that you are going to have three kinds of schools. First, you are going to have public schools — state schools — and the state school system is a failed system. Second, you are going to have authentic private schools — evangelical schools; Jewish schools; Catholic schools. And third, you are going to have state regulated private schools. Now, when you're a private school and you take

the voucher, don't kid yourself; you're going to rely on it. You're going to increase wages. You're going to incur debt. You're going to put a new program in. And you're going to be very reluctant to give that up. The uncompromising school down the street resists. The Lutheran schools in Milwaukee resisted the vouchers because of this. The uncompromising schools down the street will be put at a disadvantage just because they do not have the extra infusion of funds. Do not kid yourself.

This is a situation where you have a public school system that is sinking beneath the waves. The public schools have always been religious schools. In the mid 19th century, they had as a common denominator Protestantism. Starting in the 1960s with the school prayer decisions, the public schools have developed a secular religion, but they have always been religious schools.

The second point to keep in mind about public schools is that they do not do their job very well. They spend a lot of money but they do not do the job, particularly with the kids who need it most. So, you have that situation.

What would you think of the judgment of a passenger on the Titanic, as the Titanic is starting to go down by the bow and he's off in a lifeboat and he suddenly climbs back onboard. You would say, wait a minute; that is not very good judgment. He says, I want to stick with the ship. Why? I don't know. You wouldn't really respect his judgment very well. The Titanic here is the failed system of state schools, just at the point where we have a remarkable development in the growth of these authentic little schools — Evangelical schools; Catholic schools, Jewish day schools. And we have the home school movement, which has about 2 million kids in it.

Twenty-seven percent of the kids in the national spelling bee and geography bee were home-schooled kids. They are going to be the leaders of the future. Do you know why? Because they can read and write. And just at the point you have this great development, which is an application of subsidiarity, and if the Federalist Society ought to be in favor of anything, it ought to be in favor of Federalism and subsidiarity, things being done by families and by smaller groups.

Just at the point where we have these things taking off and you have a guy like James Dobson saying things like take your kids out of the public schools — just at this point, we're going to translate a good 1st Amendment constitutional decision in *Zelman* into the really mistaken prudential judgment that we ought to get vouchers. There are two questions. Are vouchers constitutional? Second, should we have them? It is really a very misconceived approach. Don't get the idea that somehow, you can resist, you can avoid these kinds of things.

There is a natural law operating here. There's a guy named Chuck Chvala, who is the Majority Leader of the Wisconsin State Senate. A couple of weeks ago, there was a story in the paper that he is supporting a measure to reduce the voucher from $5,300 or whatever it is to $2,000. Why? Because he says it is a Rolls Royce program — and he is a politician. What he is saying is that these schools are not accountable. They do not have accreditation. Their teachers do not have to be certified. They do not have to report in the same way as public school and so on and so forth. Do you see the picture? Don't kid yourself that you are going to get this kind of public money without some kind of public control.

And if you say, well, that's all right; listen, what we will do is have the school that will do the public school thing until two o'clock or three o'clock, and then we will switch and do the Evangelical or Catholic thing. No. In a private religious school — I don't care what the denomination — religion is supposed to permeate everything.

If you take the position, as for example in New York where they have public school textbooks, which is a great constitutional victory — the textbooks that are usable in the Catholic schools in New York have to be the public school textbooks. And the tendency there is for the Catholic education to be basically a public school education with holy water sprinkled on it, with a class in religion here and there. So this is not something that is an esoteric imagining on my part, I don't think. This is just a natural law.

There's a kid, Mark Hull, up in a Toronto suburb. Just a couple of months ago, this happened. He is a student at a Catholic school in a Toronto suburb. He went in to buy a prom ticket and they said, "Oh, who's your date?" "Jean Paul." And the school said, "Nothing doing. We're not going to allow a boy to bring a date who is a boy to the prom." The court said, yes you will, because they were taking government money. That's no surprise. Don't kid yourself. There is no such thing as a free lunch.

And when Charles Glenn was in the Bush Education Department, he did a survey of the educational systems in other countries. He did six countries — England, France, Holland, etc. I could read it to you. But basically, he said what happens is that the religious character of those schools is watered down. Estelle James, who was a World Bank economist and a professor at the State University of New York, did a study of 35 developing and developed countries and came to the same conclusion. This is simply a natural law. That's the way it works.

So please do not translate the constitutional victory — and it is that in *Zelman* — into a prudential decision that, therefore, vouchers are good. There are alternatives. You see, we have this private school and home school movement developing. Instead of climbing back onboard the Titanic and instead of trying to hook these private schools up to the public trough (incidentally, if you did that, vouchers would discourage home schools, which really is the wave of the future) instead of doing that, think about this: In 1948, the Internal Revenue Code enacted the personal tax exemption of $600. That meant that for each individual, the first $600 of your income was not taxed. That didn't mean you saved $600; it was taken off your income. Now, if that had kept pace with inflation and tax rates, instead of it being — what is it now? About $2,750 or

something like that — it would be significantly over $10,000. If you did that, that would mean a family consisting of a husband, wife and three children would have $50,00-plus of their income off the tax rolls.

That is a limited-government, Federalist, free solution. That's not a solution of trying to hook us up to the public trough. No, that's not the answer. The answer is to continue with these great developments that are happening. You have, for example, the growth of private scholarships, which are simply 501(c)(3) entities that give scholarship money to other 501(c)(3) entities. And they don't involve the state education department in that sense.

We have all kinds of creative things that we can do. But the most significant thing is the restoration of family control over education; families taking control of education through home schools and through the small religious and other schools. I think we ought to seize that moment and say, "Okay, how do we increase the ability of those schools to provide that education to the people who are really short-changed by this Titanic that is sinking beneath the waves?"

There are ways to do it. It's totally negative; it's unimaginative. On the other hand, it's very imaginative in thinking that you're going to take the money and not get the regulations. That's Disney Land. That's contrary to human nature and the record of every system that's done it. The constructive thing to do would be to continue with these authentic family-oriented private developments. Thank God for that Supreme Court decision, yes, but realize that the answer to this is not to hamstring the private school movement and the home school movement by trying to hook them up to the failed public system.

The last thing I want to say is this. There was a guy writing in the *Freeman* magazine back in July, 1986. His name is Dwight Lee. It was a very prophetic statement. He wrote an article on vouchers, and he said, if the voucher movement ever begins to take off, we will find that it is growing and it is being utilized by the public school bureaucracy. That was a prophetic statement.

He said, the voucher movement is going to be the last defense of the public school bureaucracy because that's the movement by which they are going to keep themselves in business by reaching out and taking control of these aided schools. It was a very prophetic statement, and it's true. So please don't translate the approval, which we ought to have, of the Supreme Court decision into the prudential decision, which in my opinion would be certifiably nuts, that we ought to hook our schools up to the public system, the state system.

Thank you.

MS. SMITH: David Scott.

MR. SCOTT: These guys are going to be a tough act to follow, but we'll see how we can go from here. I'm going to talk about two things. First, I think, from my introduction, I can tell you I'm not a voucher person. That's not where the depth of my experience lies. I'm a charter school person. I was asked to come here today to talk about educational reform in general, and then look at charter schools and the strings that are attached to them to see what lessons we can learn, evidence there is for what kinds of strings might be appropriate or inappropriate in a voucher setting.

I'm a big fan of school reform and school choice. You've heard the example of the public school as a Titanic that's sinking. Unfortunately, I think that's probably more accurate than any of us would like it to be. There are many people out there who see the existing system as being a failed system or a failing system or an inadequate system. And at the same time, many of those people want that system to work. I'm a big fan of public education. I think public education is a great strength for this country.

So, you've got the Titanic and it's sinking. Well, maybe we ought to be looking at how can we fix the Titanic. Can we pull the Titanic back up above the waves? Can we repair the hole created by the iceberg? Is it possible? I see some people shaking their heads; maybe some people nodding. I think you can fix the existing system by doing things to try to reform it. And how can you possibly do that?

Charter schools are one public example of how you can have a new kind of school. You take some kids away from the existing system, take five percent of their students, put them in a different system. Vouchers can be a way of creating competition. Take some of the kids away and put them in another system so that the system has to realize that it's sinking. People are jumping off of our ship. People are getting on these lifeboats that are floating around out there. They're going to charter schools. They're going to parochial schools. The people who can afford to do so send them to the best private schools out there, the best parochial schools. But we need to have a reform mechanism that can reform the system. I think that's kind of a patchwork quilt.

I have seen several scholars remark that charter schools are the most important educational reform initiative in the country today. I had the pleasure of speaking with Professor Green, who is on the next panel, out in Oregon earlier this year, and he made the remark that no educational reform initiative can succeed unless it is capable of reforming the entire system. So, when I look at education reform, I look at a large patchwork quilt of how can we impact the system. How can we make the folks who are driving that Titanic realize that they need to start steering before they hit the iceberg? Well, too late. How can we make them realize they have hit the iceberg? What can we do to try to help patch that hole?

With charter schools, you get the competition. With vouchers, you create some competition. When I started the

first charter school in St. Louis, I wanted to compete with the existing system; I wanted to beat the existing school district at their own game, take their kids away and make them realize that they were failing these kids. And who are the kids who were failing? The affluent families can send their kids to private schools. Middle-income families can send them to the parochial school at the corner that's a little bit less expensive.

Who can't make a choice right now in a system that doesn't have a voucher or doesn't have charter schools? The people who cannot make the choices are the kids who, quite frankly, need it the most. It is those inner-city urban families and kids, lower-income families that can't afford to make a choice. I look at vouchers and charter schools as ways of getting those people involved in this process of agitating to change the system. So I'm a fan of vouchers to the extent that they do that, but in the context of using them as a tool to try to fix the existing system. Take Washington, D.C., as an example, which has a horrible school system. Twenty percent or so of their students have left to go into charter schools, and that has had the impact of making the District try to do things to start competing with these new schools — magnet programs and starting to offer different services to families so that they can feel like they are getting a good value for their educational dollar.

How can vouchers do this? What we have heard today is that you are going to get money, give it to parents with some parameters on how that money can be spent; it is theirs to choose; it is a private choice, which is now constitutional, which is good news for saving public education in America. But what kind of strings come with that money and with charter schools? I will talk about charter schools first.

When you open a charter school, it's a public school, whatever that means. I think it means that it's a creature of statute. There is a law that allows charter schools to be created. And I also think that they are public because they get public dollars. And I also think they're public because they have to be open to every student who resides in the state of Indiana. They are public; they cannot discriminate; they are subject to all of the same kinds of rules that are set forth from an admissions standpoint on the traditional public schools. They are very public schools, and they are subject to certain rules and regulations.

But, charter schools are exempt from many of the strings that are imposed on the existing district. The charter school receives some freedom from many of the rules and regulations — like collective bargaining agreements and having to teach a fixed curriculum — so they have some freedom to teach in a different way, teach a different curriculum, and take a different approach to energizing their students to learn. In exchange, they are held accountable for the results that they produce with the taxpayer money that they get.

So, you have the charter schools trying to create reform and provide choice. And they are public in the way that I just described. With public funds and being a public school, they do have strings. They have to comply. The previous speaker mentioned the things that the state can do to regulate schools. You have to comply with health and safety laws; you have to comply with local zoning ordinances; you have to comply with the Americans with Disabilities Act; and you have to provide special education services to the students. So, even though there are freedoms in charter schools, there are still many requirements that the government imposes as part of the agreement that you make to get this license to run a school — a bargain for freedom in exchange for funds. But you're held accountable, and there are some strings that you have to comply with.

When you start to look at vouchers, and you can look at the Cleveland example, there are strings that are attached, even in the case in the statute that was found constitutional, about not teaching hatred toward certain groups or doing certain other things. I think we are going to see certain levels of strings that are attached to these dollars out there. The basis of the Court's opinion was to look at the purpose and effects test and go from there.

One of the strings that will have to be attached is to make sure that the purpose of the voucher program is a constitutional one and is not a discriminatory purpose. There are going to be strings that weren't really even addressed in the *Zelman* opinion that you're going to have to look at. Can you have a voucher program that gives lots of money to rich people to subsidize them to send their kids to schools that they're already attending? If you had a program that did something like that or was that wide open, I think there might have been a little bit more scrutiny on examining whether the purpose of the statute was a constitutional one.

When you look at the purpose side of the purpose and effects test, you are going to see some strings that are going to be attached in that area like they were in the Cleveland case about what kind of program we can have. What kind of voucher program even had the right kind of purpose, and how can we frame that to make sure you're providing a constitutional program?

There was a conversation earlier about the money going directly to the private hands, and whether you can put some strings on that money once the parents choose where that money is going to go. I have to think that you can. Whether we're going to be able to have certain strings or other strings is something that we don't know today, but I think you're definitely going to be able to see the schools that receive these monies being required to comply with health and safety kinds of law, education-related laws. Some of these schools, I believe, might be subject to making sure that the kids are passing certain state tests that they may or may not be taking, before they get these voucher programs.

I think there are going to be some areas, especially in the academics and state testing and things like that, where you're going to see these schools be subject to some form of regulation going forward. And the depth and breadth of those

is something that I think we'll see going forward.

With that, I will turn it back over to our moderator. Thank you.

MS. SMITH: We got started a little bit late, so I want to leave plenty of time for audience questions.

The first question I want to ask: is there a real danger that private religious schools who accept voucher money will lose their uniquely religious nature? Is there any way that they can keep their souls and still accept government money, or is it just inevitable that they'll have to lose some of that unique character?

PROFESSOR RICE: Yeah, let me take about 30 minutes to discuss that. The answer is yes. Yes, definitely. You know what's going to happen? It's going to happen not so much by formal litigation and law suits; it's going to happen by the human tendency to want to avoid problems. I mean, in Milwaukee after the second voucher system was put into effect, they put the opt-out provision in. The head of the Catholic schools in Milwaukee said, we do opt-out anyway. We don't proselytize in Catholic schools.

You know, the Second Vatican Council said the Catholic school is supposed to permeate the entire school day with the Gospel truth — the whole thing is permeated. And you cannot say, hey, we will be a state school for six periods, and then we're going to have a period of religion. No. That is hostile to the mission because that implies that you can separate history, science, whatever, from the ultimate principles and the ultimate questions.

There is no doubt about it; this is something where the tendency is going to be that you say, look, Justice Stevens went on at great length in the Supreme Court in one of the abortion cases, saying that the Catholic position that life begins at conception is a merely theological position. That's what he said. So, if you're going to talk about abortion, the school will say, go easy because we don't want to be in a position of discriminating religiously. Under Catholic teaching, the Eucharist can be given only to Catholics. Those who are not Catholics are welcome to participate in the Mass and so on, but the Eucharist is a sign of doctrinal unity. What is going to happen here, if you have Mass at Catholic schools receiving vouchers? What do you say to the kids who are not Catholic. There are all kinds of problems that come up.

Look, folks, there's no such thing as a free lunch. I don't think there's any question that that's the way it's going to operate. You're going to have three levels of schools; public, private and state-regulated private schools. Just at the time when we're on the threshold of breaking free with the authentic private school movement and the home school movement, we're going to climb back onboard the Titanic.

MS. SMITH: Professor Paulsen, you have some comments?

PROFESSOR PAULSEN: Sure. I actually agree with a lot of what Professor Rice said. I think that it is the case that religious schools will be tempted by Screwtape to compromise. The question is, what follows from that? Does that mean that voucher programs should be unconstitutional? No. We agree on that. Does that mean that voucher programs should not be implemented? Professor Rice says yes, we should not do these things. I think what follows from it is that voucher programs should be implemented and government should be stopped from playing Screwtape. That is the best way for private schools to maintain their autonomy.

Now, can I just take two minutes to respond to a couple things Charlie said?

MS. SMITH: One minute.

PROFESSOR PAULSEN: He says there's a difference between government's authority to regulate generally, and to regulate what it subsidizes. I think there is a mistaken premise, and thus it's very important for those who are aggressively in the vanguard of the school choice movement to seize on it. The premise of the *Zelman* decision is that receipt of a voucher is not government subsidization. If it were, there would be an Establishment Clause problem. It is a neutral program. For the same reasons that neutrality does not equal establishment, neutrality does not mean that you are now subject to government regulation that you otherwise wouldn't have been. That is my first point, that that is contrary to *Zelman*.

Second, government can regulate now, as Professor Rice agrees. So, we are not in any different situation in terms of the things that government tries to regulate. They can, right now, under the guise of civil rights law, attempt to impose on private schools a requirement of gay prom dates or using state-mandated textbooks. The question is, can they constitutionally do so or does the religious or other private school have the constitutional right to control its own curriculum decisions, personnel decisions, and school discipline policies? I think that question is not affected by the receipt of a voucher, once you accept *Zelman*'s premise that receipt of a voucher is not itself government sponsorship or subsidization.

The third point is that there are these horror stories, and actually, Charlie, I want you to give them to me because I want to represent some Catholic schools challenging the New York requirement that the Catholic schools use the state-mandated textbooks. I can win this case. I really can. Once you have *Rosenberger* saying you cannot discriminate against religion, *Mitchell*, where the plurality says that a religious school gets to be religious and there's no pervasively sectarian

disqualification, *Zelman* and the *Boy Scouts* case, I think that equals the right of the religious school to control the content of its curriculum and its own decisions. I can win the gay prom dates case, too.

For every one of these private schools, government-attempt-to-regulate horror stories, I can give you ten public school horror stories because that's what I used to do for a living, is represent school kids who were being forbidden. I have cases of the kid who cannot pray at lunch; forbidden to pray silently and hauled to the principle's office. I represented a girl who was given a zero because the term paper topic she chose was the life of Jesus Christ. And she was given a zero. The Supreme Court denied cert because, of course, public schools get to control the content of their curriculum. I've had cases where sex education curriculum brought eighth graders up on stage in front of an assembly to simulate masturbation. The list goes on and on.

The difference between a public school system and a voucher-enabled, bigger private school system is that in the public school system, these kids can't get out. They don't have a voucher, they can't get out, and then they're subject to whatever government curriculum control or regulation it wishes to impose on its own schools. That is a lot greater restriction. Once they're in a private school context, we have other weapons that we can use to defend their autonomy rights.

MS. SMITH: Great. Let's take questions.

AUDIENCE PARTICIPANT: This is a terrific panel. Let's spend the rest of the day just discussing what they have brought up. I'm going to start by challenging Professor Rice. You said that the state schools are a failure, and you are right. But 50 years ago, we moved into a public school system in order to get to Shortridge High School, a very fine college preparatory school in that day. They all got a fine education and they all went on to fine colleges. Today, we have two grandchildren in Washington, D.C., and they can't find a decent education without going to a Catholic school, which we're in favor of, of course.

Professor, those were state schools then and they still are today, but something has happened. Why don't we identify what has happened and attack those problems so that we do not leave out those who do not have vouchers and who cannot choose where they want to go.

PROFESSOR RICE: Go back to John Dewey. What happened was the introduction into the public school system of a different concept of education. And it relates to the epistemology of the Enlightenment. We are at the tail end of the Enlightenment, which is the effort of philosophers and politicians over the last three centuries to build a society without objective moral norms, as if God doesn't exist. So, the epistemological basis of that, is a relativism, and that's what happening.

John Dewey in the 1920s was the architect of this sort of thing, so that the educational system is designed to promote not knowledge, not virtue, but adjustment. There are no absolutes. There are no rights and wrongs. The Supreme Court, in the *School Prayer* cases in *Torcaso v. Watkins* in the early '60s essentially declared the neutrality of all governments in this country on the basic question of whether God exists. So the government now is required to be neutral as between theism on the one hand and non-theism on the other hand.

So the kid asks the teacher, is the Declaration of Independence true where it says there's a God and if the teacher says yes, that's unconstitutional; it's a preference of theism. If the teacher says God died last week, it's unconstitutional because it's a preference of atheism. The only answer is "I, as the state, do not know." That's why, in the public schools, you have all these programs where you cannot introduce moral elements.

You cannot even talk about there really being moral norms. That is a large part of it. In addition, the reading business — the whole look-say method of reading — the whole thing is the Titanic and it's gone down the tubes. So that's why I think this is the last time for us to hook ourselves up to that sinking vessel.

AUDIENCE PARTICIPANT: I understand your point and I agree with you. But, sir, let me challenge you. You're part of the establishment of the school systems in a broad sense. Why aren't we fighting things like that? Political things? Philosophical things? Why aren't we simultaneously fighting them as well as finding answers for our kids?

PROFESSOR RICE: You know, the best way to fight this is family by family, individual by individual. Go and build your own schools and do your own thing and do it right. That's what's so encouraging about the situation today with the private schools and the home schools. And the last thing we ought to do is hook it up to the Titanic.

PROFESSOR PAULSEN: Let me make one follow-up comment on that. I think we are trying to fix those problems. All of these things that we're talking about — charter schools and vouchers — are ways to try to fix the system that is broken.

You asked the question, how did the system get broken? I think it's been breaking for a long time. What has happened is that the school district wasn't doing something that met a couple of families' expectations. Where the family had a higher expectation than the district would provide, they chose and left. They went to the suburbs. They went and left the

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urban, inner-city schools. Then, the district got a little bit worse because there was a little bit less tax revenue and there was a larger percentage of slightly less gifted students, and then that crossed another threshold and even more people moved out to the suburbs.

Over time, what you are left with in the inner city, in a lot of situations, is the families who realize that the system is not good and cannot afford to leave it, or the families who just do not care. I think that the way to fix education in America — family by family is right at a certain level, and getting people to understand that educating their kids is probably the most important thing that we do; education is the most important thing to the future of this country. We've got to make education the number one priority at every level. Towns like Indianapolis trying to be a high-tech corporate or biotech gateway have to have the workforce. You've got to educate the kids. We do that by making that the number one priority.

MS. SMITH: We'll take the next question.

AUDIENCE PARTICIPANT: Yes, I have three questions that are essentially related. First of all, I think it was Professor Paulsen who said, isn't the whole point of *Zelman* that once the voucher creates a neutral mechanism for choice, the choice of that school is no longer state action?

Second, if government creates a food-stamp program, does it follow that it may constitutionally regulate the business conduct of a kosher deli?

Third, on the prudential basis, would you advise the literally thousands of independent, private, post-secondary colleges and universities in this country — and I sit on the board of one — to cease using Pell Grants, the G.I. Bill, and a litany of other similar aid programs, frankly on which the existence of most of these colleges now depend.

MS. SMITH: Can you answer this quickly?

PROFESSOR PAULSEN: Well, I'm in agreement with all of those questions, so I'll pass it off to Professor Rice.

PROFESSOR RICE: How did you state the first one again?

AUDIENCE PARTICIPANT: Isn't the whole premise of *Zelman* and the Wisconsin Voucher case that once the money is transmitted through a voucher, that cuts off the state action?

PROFESSOR RICE: No, state action is not really what's involved. The issue of state action comes up in terms of the 14th Amendment. It's clear from Supreme Court decisions such as *Rendell-Baker* v. Cohn*, that merely taking a state subsidy does not convert the private entity into state action. So, its action is not the action of the state for purposes of the 14th Amendment.

Remember that in the Grove City case, the Court held that if a college takes one kid with a Pell Grant, it is subject to all those regulations of the federal government on recipients of federal financial assistance. So the question then is not whether it's state action under the 14th Amendment but whether the federal administrators can impose regulations and restrictions on that entity, on the use on that money.

You mentioned the food stamps. Try using food stamps to buy beer or cigarettes. You can't do it. When we were talking about the Civil Rights Restoration Act, and I was involved in that, testifying on that in response to the *Grove City* case, the question came up, well, what about welfare checks that are endorsed to McDonald's? Suppose McDonald's took a welfare check? The opinion of both sides was, yes, that would subject them to these regulations.

This is not the state action thing. It's the question of whether having given the money, the state, the federal government, has the constitutional authority to supervise the way it's expended. That's a no-brainer. There's no question about that.

MR. SCOTT: But I thought that the question he was asking was whether that necessarily spells doom in the context, say, of Notre Dame, which obviously should have, or I assume, has kids who are on federal student loans, or maybe even have kids who are subsidized by state programs as well. The student loan program is huge but it hasn't crashed higher private education like Notre Dame, or even public institutions?

PROFESSOR RICE: It has crashed Notre Dame, hasn't it?

AUDIENCE PARTICIPANT: You think it has? Maybe it has crashed Notre Dame, but —

PROFESSOR PAULSEN: But not like the University of Minnesota's crash.

AUDIENCE PARTICIPANT: But the other question is that there is a very vibrant state-supported system of higher public education, right? So, public education can work at some levels. Why could it not work at all levels?

PROFESSOR RICE: We're talking here, first of all, about Notre Dame. Let me mention one thing that might be helpful on that business of Pell Grants and tuition and colleges. The college tuitions have gone up multiples of the inflation rate. It's out of sight. I've got kids coming out of law school now with debt of $150,000. It's unbelievable. Two law students who got married now have $250,000 in debt. Now, how did that happen? You know how it happened? Congress gave a subsidy.

Congress gave the subsidy, and then in the 1980s, they took the income limits off the subsidies so that you didn't have to be poor to get the federal guaranteed loans. And do you know what happened? The colleges raised the tuition and the limits went up, and they raised the tuition and the limits went up again. The colleges responded to this federal subsidy by relying on it. And they built these Taj Mahals on the backs of the students who borrowed the money to pay for it. The reason it's all messed up is because the government got involved. The government went in and started to subsidize it.

AUDIENCE PARTICIPANT: I agree that the government has messed up the lives of some of these students who are saddled with this huge debt. The legal profession having a situation where, in order to pay off their debts, some of the really good graduates can't afford to clerk because they have to make the money — often three times what their judge is getting. They have to go straight into private practice to get the $150,000, $180,000 to pay off their debt.

But have the schools been compromised? The students have been suckered into a situation which is sort of a Faustian bargain, but have the schools? Has Notre Dame been compromised? Has the University of Virginia been compromised? Has Harvard been compromised? I mean, there are a lot of problems with Harvard, but I don't think they're caused by student loans.

PROFESSOR RICE: It depends on how you look at it. Now, let me level with you in terms of Notre Dame. What Notre Dame is now is not what it was 30 years ago. What Notre Dame is now is a research university. They promote themselves —

AUDIENCE PARTICIPANT: That's because they are taking all this money from the federal government directly, but not through —

PROFESSOR RICE: — that's right. And it's part of the same business in terms of the gigantism that results from this money that becomes available through the subsidies. But you've got plenty of state institutions that are splendid colleges and universities. There's no question about it.

When you look at the voucher, we're talking about elementary and secondary. There you're talking about education, which is different in a formative sense. And I think there are different issues that arise there.

AUDIENCE PARTICIPANT: One of things that some people do not realistically see in their everyday lives but something that needs to be addressed — this gentleman talked about what has happened over the years that has made things different. Professor Rice, you talked about relativism, and actually out in what I call the world, we have a godless society. You have a lot of situations now — and it doesn't seem to matter what socioeconomic you are in. There are no families. So, we need to look at the situation where we have people who are involved in education, who are intact families, who are home-schooling or whatever they're wanting to do, and we do have to help them.

I believe decreasing taxes would be the best way because, again, they would have more money in their pockets. But when you look at the higher proportion of people, these kids do not come from families. These kids do not come from families. There are no interested parents. And it is not just your inner city; it's everywhere. So if we are going to fix public schools, I think you need to look at the fact that, in concert with that, you need to fix the American family and buoy that because without parental participation, children do not value education.

PANELIST: I couldn't agree with that statement more.

PROFESSOR RICE: I agree with that. And the thing about the whole family business is that that's a product of the cultural development — the secularism, the relativism, the autonomous individualism. The ultimate answer to these problems is, in the broad sense — I'm not talking about the sectarian sense, but rather the conversion of the American people back to the realization that there is a God and He is in charge, and there are rights and wrongs.

PROFESSOR PAULSEN: I agree with that. I'm just a humble constitutional lawyer, so let me try to bring this families observation back to the voucher thing. Here is where I am headed on this. The point of our education reform policies and the point of vouchers is to empower families to make education choices. It's very important to see the right of education and communications of messages to the next generation as a right that inheres in parents and in families; that the parents own the

school system, not the school system owning the children.

I think, however, that in a system of predominantly government-run schools, you're going to have exactly that upside-down situation where the government runs the schools, the government runs the kids, and the parents are not the consumers. That's why I think we have to move toward a decentralized, more privatized system of education in which the parents are the sovereigns, so that in terms of the legal directions in which we should go, we should build on *Zelman*'s language of true private choice. To the extent there are these problems of government regulating, let's fight the regulations, not accede to government domination of the education marketplace.

MS. SMITH: We have time for one more question.

AUDIENCE PARTICIPANT: This has been a fascinating discussion. I'm going back to the metaphor of the Titanic. I wonder, is the Titanic the fact that it's government or is it the fact that it's monopoly? Now, it happens that the monopoly is even worse because it's a government monopoly. And it's even worse because there's a lot of extra weight on deck, such as the relativism of society. But I think the premise of *Zelman* and the premise of those of us who have supported vouchers and charter schools and other forms of reform is that the monopoly is the worst thing about it, and anything that breaks up the monopoly is the most important solution. Fixing the government will help, too, but getting rid of the monopoly is most important.

MR. SCOTT: I think that's part of the patchwork quilt concept that I talked about. I mean, you are trying to break up that monopoly by creating competition and empowering people to make choices, and there are many different ways to accomplish that. Charter schools are one; voucher programs are another; religious schools; private non-religious schools — magnet programs within the existing public system is another way to do it also. So there are ways outside the system and inside the system to try to do those things. But I think that breaking up the monopoly and giving choices and empowering people to make those choices is what is going to reform the system.

PROFESSOR RICE: You put your finger on a big point. The public school system, the state school system, was founded on compulsory attendance and compulsory taxation, so everybody has to support it and kids have to go to it. What we are talking about in terms of the voucher is how do we liberate parents and students from this system? I don't think it is a real liberation to say, well, instead of a 10-foot leash, we are going to give you a 25-foot leash, because you are still on a leash. That is not the answer. The answer is to continue with these great developments that have sprung up by themselves in terms of private schools and home schooling, rather than to climb back on board the Titanic.

PROFESSOR PAULSEN: I agree that monopoly is part of the problem, but I'm actually quite a radical on this. As long as government retains any control over the content of education and exit options are costly and burdensome, it is an interference with the 1st Amendment rights of families and parents to direct and control the upbringing of their children.

I favor private alternatives to government, but eventually, in the end, I'm deeply suspicious of the idea that government retains the ultimate or primary control over the content of the education of the next generation. I wouldn't accept a government-dominated marketplace in newspapers, and I wouldn't accept it in education, either.

[1] *Newton v. United States Congress*, 292 F.3d. 597 (9th Cir. 2002).
[2] *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).
[3] 515 U.S. 819 (1995)
[4] *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000).
[5] *Mitchell v. Helms*, 530 U.S. 793 (2002).
[6] *Committee for Public Ed. And religious Liberty* v. *Regan*, 444 U.S. 646 (1980); *Bob Jones University* v. *United States*, 461 U.s. 574 (1983).

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RELIGIOUS LIBERTIES

SCHOOL VOUCHERS: PAST LESSONS AND FUTURE PROSPECTS
A CASE STUDY ON CONSTITUTIONALITY: *ZELMAN V. SIMMONS-HARRIS*

Mr. Richard Komer, *Institute for Justice*
Professor Steven Green, *Willamette University*
Mr. Marc Stern, *American Jewish Congress*
Professor Michael Paulsen, *University of Minnesota Law School*
Mr. James Ammeen, Jr., *Lewis & Kappes, moderator*

MR. AMMEEN: The fortunate timing of this conference is not a coincidence. Knowing that the Supreme Court would hand down its decision this week, we have assembled a panel of distinguished scholars and experts on religious liberties and constitutional law with respect to school choice. We will hear opening statements from each of the panelists and then the panelists will take questions from the audience.

Professor Steve Green is a Professor of Law at Willamette College of Law. Professor Green served for nine years as General Counsel and Director of Public Policy for Americans United for Separation of Church and State. He has extensive litigation and appellate experience in First Amendment law and has participated in several cases at the U.S. Supreme Court. Professor Green holds a J.D. from the University of Texas, and a M.A. and Ph.D in American Constitutional and Religious History from the University of North Carolina, Chapel Hill.

Richard Komer is senior litigation attorney for the Institute for Justice. Prior to his work at the Institute, Mr. Komer worked as a civil rights lawyer for the federal government, working at the Departments of Education and Justice, as well as at the Equal Employment Opportunity Commission as a Special Assistant to the Chairman, Clarence Thomas. His most recent government employment was as Deputy Assistant Secretary for Civil Rights at the Department of Education. Mr. Komer received his law degree from the University of Virginia in 1978, and his B.A. from Harvard College in 1974.

Marc Stern is co-director of the Commission on Law and Social Action of the American Jewish Congress. Mr. Stern is one of the country's foremost experts on the law of church and state. A graduate of Yeshiva University and the Columbia University School of Law, he has been attorney with the Congress since 1977, conducting litigation, preparing amicus curiae briefs, drafting legislation, and giving public testimony on the full range of church-state issues.

Michael Paulsen is the Briggs & Morgan Professor of Law at the University of Minnesota Law School, where he has taught since 1991. He is a graduate of, inter alia, John Marshall Elementary School (in Wausau, WI), Northwestern University, Yale Law School, and Yale Divinity School. Professor Paulsen is a former federal prosecutor, former senior staff attorney for the Center for Law & Religious Freedom of the Christian Legal Society, and a former Attorney-Advisor in the Office of Legal Counsel of the US Dept. of Justice (Bush I). He has been involved as counsel or amici in dozens of free speech and religious freedom cases, including, most recently, *Peter v. Wedl*.

I will now turn the time over to our panelists, Professor Green.

PROFESSOR GREEN: Some of us have been litigating these cases for quite a while. So some extent, this decision is surreal. I first became involved in voucher cases back in 1992, in a case out of New Hampshire. And I've been involved in most of the later cases. All along we realized that this issue would eventually go to the Supreme Court, so it's a strange experience after such a long time to finally have a decision — not that the outcome was that unexpected. We'd all been saying it would be a five-four decision, and it was a five-four decision. So, it's nice to know that we were right about some things.

Let me give you a brief overview of the case and the holding, and then I can get my five-minute observation.

The Cleveland voucher plan was enacted in 1995 and became effective in 1996. It provides a voucher of up to $2,250 for children to attend private schools in the Cleveland area. The amount of money depends on one's income level. I believe that 200 percent of poverty line is the priority cap for the $2,250 figure. If you make a little more income, then the amount of the voucher goes down to about $1,800. So, it's not a whole lot of money.

Low-income families are given a priority for their children to receive the voucher, although that has not always been the case. (Pardon me if I editorialize as I go along, but I can't resist. That has not always been the case because recently, only about 40 percent of the children who've received the vouchers have come from lower-income families. But that was the intent of the state legislature; at least it seemed to be.

By 2001, 56 private schools participated in the program, 46 of which are religious, which means that 82 percent of the schools are religious. However, that figure belies the actual number of the available seats in the various schools, because religious schools are far larger and have a greater number of seats — 96.6 percent, as the Court noted in its figures. Actually, this last year religious schools accounted for 99.4 percent of the available seats. So, if you were a parent and you received a voucher, then 99 percent of the available seats would be in religious schools.

You can thus see the constitutional issue: whether the voucher program, of providing funds that inevitably, eventually flow to private religious schools violates the Establishment Clause of the Constitution, the prohibition against funding religion, religious activities, worship and religious instruction.

As was mentioned in the previous panel and recognized in several cases, many religious schools — not all of them, but at least the traditional parochial schools — integrate religious values, traditions and teachings throughout their curriculum. They don't segregate them from the regular curriculum. The Court had traditionally held, since 1947 or 1948 until more recently, that it was unconstitutional to fund religious schools, at least through an unrestricted funding mechanism, because the money could be spent on religious education. In essence, there was no way to ensure that public funds were not paying for religious instruction and religious education.

As we will discuss, the Court has been slowly changing its case law over the years; however, as recently as two years ago in the case of *Mitchell v. Helms*, the Court reaffirmed that public funding of religious indoctrination and worship is unconstitutional, even if it takes place under a neutral program. What we mean by that is a program that is made equally available to recipients who participate in a private, religious private, non-religious or even public context. In essence, the court held that even though a program may be generally available, if government is funding religious instruction and religious worship, it would still violate the Establishment Clause.

And so, what Zelman came to then is what is the effect of private choice? What is accomplished by not providing the voucher directly to the school? If you give the money to parents and the parents turn around and give the money to the religious schools, does that a constitutional make difference? Does that action "break the circuit," as Justice Souter said in one of his decisions several years ago? Does it break the chain of responsibility such that it is now the private citizen's choice about how the money is being spent and where the money is being spent?

One of the arguments that we made in this case, is that for there to be truly effective private choice — and the Court has said that "genuine independent, true choice must exist," — is that there must be a true universe of options for parents. In essence, parents must be able to choose among a wide array of potential institutions to place their voucher monies.

Our argument was that when a parent qualifies for a voucher, and then, looks in the phone book and asks, where can I send my child, "that 99 percent of the available options are going to be religious schools. This situation does not provide a wide array of options. Rather, the limited options create incentives toward religious education that violate the Establishment Clause.

Well, let me provide some background to this case. As I mentioned, Zelman was filed in 1996. It was first filed in state court alleging violations of several provisions of the Ohio State Constitution — the comparable 1st Amendment provisions plus some specific funding prohibitions within the Ohio Constitution about public funds being used only for public purposes — those types of provisions that you offer find at the state level. What ended up being the kicker was what is called a single-subject rule in Ohio: that when you pass a piece of legislation. It has to appear in a free-standing bill as opposed to being thrown into an omnibus bill.

We filed a law suit in 1996 in state court..

We lost at the trial level in Ohio. We took it to the Ohio Court of Appeals, and won — I believe it was three-zip, was it?

PANELIST: Two-zip.

PROFESSOR GREEN: Two-one. Anyway, we won at the Ohio Court of Appeals. The state appealed to the Ohio Supreme Court, and the Court struck down the voucher program based on the single subject rule issue. However, a majority of the justices opined that the program would likely be constitutional under the Establishment Clause.

We then refiled the case in federal court offer the Ohio legislature reenacted the same law the appropriate way. We obtained an injunction from a district court judge to halt the program. That was stayed by the Supreme Court a month or two later to allow the program to continue in operation.

We ended up prevailing at the district court, which held the program unconstitutional. The state appealed to the 6th Circuit Court of Appeals. The 6th Circuit affirmed in a two-one decision. So when we went to the Supreme Court we had a good idea that the Court would take the case, primarily beacuse they had already expressed an interest before. The Wisconsin voucher case had gone up to the Court two or three years earlier, in 1998, after the Wisconsin Supreme Court upheld the Milwaukee voucher plan. The Court denied cert in that case, so everyone thought there was a good chance that the Court would take the Cleveland case when it got to the Supreme Court.

As mentioned, the Supreme Court upheld the Cleveland voucher program five-four reversing the 6th Circuit Court of Appeals, the majority opinion being written by Chief Justice Rehnquist.

The Court held that this case, or at least this situation, falls within what the it has been saying for about 20 years. It referred to three cases primarily — a case called *Mueller*, a case called *Witters*, and a case called *Zobrest*. These three cases, the first one coming in 1983, is where the Court started to write about neutral programs and private choice, at least in a consistent manner. The Zelman Court held that the Cleveland program meets these criteria of neutrality and choice. The legal

issue was whether there is genuine independent choice or whether the program does not offer true choice but creates incentives for religious education.

The Court held — let me read a short excerpt — "*Mueller*, *Witters* and *Zobrest* make it clear that where a government aid program is neutral with respect to religion," in essence, it doesn't identify religion in the language of the law, "and provides assistance directly to a broad class of citizens who in turn direct government aid to religious schools wholly as a result of their genuine and independent private choice, then the program is not readily subject to challenge under the Establishment Clause."

So, focus of the arguments last February was to what extent should courts look outside the voucher program to consider whether there are available alternatives for parents. Justice O'Connor particularly, in her questioning during oral argument, wanted to know to what extent could, courts consider other types of alternative programs besides the voucher program and whether this sufficiently broadened the universe of options for parents.

The questions focused on the charter schools, the Cleveland community schools, the magnet schools, and a tutorial program. In essence, how much should these programs figure into the mix? The more that you pile on or broaden the universe of options, then fewer of those options are religious. This in turn will enhance the constitutionality. This is exactly what the court did — at least what the majority found — in its decision.

The majority said that one must view programs as a part of a whole. Courts must view them broadly, to see how a particular program fits within broadened educational alternatives. The Court said that it was appropriate to consider tutorial, magnet, charter and community schools, and consider all of them in this broad universe of options for parents. Once it did so, the court noted that the percentage of religious seats or religious participants drops from 96 percent down to 20 percent.

Chief Justice Rehnquist also said it could not look at a snapshot of any particular year — that participation is a dynamic process. The number and character of schools may change over time and may fluctuate. The Court also distinguished a case from 1974 called *Nyquist*, which was the primary impediment, for the voucher proponents to prevail in this case. There, the Court had struck down a very similar program, a tuition reimbursement program that gave tuition reimbursements for parents to send their children to private schools. The difference was that that program was limited to private schools, and in that case the Court did not consider the greater universe of educational options that were available to parents.

Justice O'Connor, who had been key in a couple of earlier school aid cases in the last five years, filed a concurring opinion. But unlike her vote in *Mitchell v. Helms*, Two years earlier, where she wrote separate concurring opinion without agreeing with the plurality, here she agreed with the reasoning of Chief Justice Rehnquist. However, she wanted to emphasize that "We must consider all the educational alternatives. Beneficiaries, however, must have a genuine choice in the matter." Interestingly enough, both Justice O'Connor and Chief Justice Rehnquist said that they did not see *Zelman* as being a significant departure from prior Establishment Clause jurisprudence.

Significantly, Justice O'Connor also emphasized that the case involved indirect aid, the implication being that a direct aid program, even under a neutral plan, still would raise constitutional problems.

In my remaining time, let me make a few comments about the decision. I believe Justice O'Connor is correct on one level. If you accept Chief Justice Rehnquist's decision and her concurring opinion at face value, it does not appear to be a major change in the law. As I mentioned, the Court has been speaking about neutral generally available programs that are not designed, at least in their language, to benefit religion or favor religion in any way. — They've been talking about neutral aid programs of general applicability with independent choice this for at least 20 years, since the Court upheld the Minnesota tax deduction case, the *Mueller* case.

Zelman is a rather cautious decision. The Court puts its analysis squarely within what it already said in the *Agostini* and *Mitchell* cases. In some ways, those were more path-breaking, especially Justice Thomas' plurality opinion in the *Mitchell* case.

I would almost argue that you could view the majority opinion, Chief Justice Rehnquist's opinion, in this case, as a step back from the *Mitchell* case, with, Justice O'Connor agreeing, because the majority seems to suggest that genuine independent choice is the key. Even though the program must be neutral and generally available, there must also be a wide array of programs that are available in order for independent free choice to work. In essence, neutrality of the program alone would be insufficient.

If you go back, though, and read Justice Thomas' plurality opinion in the *Mitchell* case from two years ago, you see the opposite emphasis. Justice Thomas emphasizes neutrality, and he sees choice as being a secondary, supportive mechanism that is not always necessary. Neutrality was determinative, at least, for the plurality in the *Mitchell* case. Private choice was helpful but it does not seem to be necessary. But here, in order to ensure the vote of Justice O'Connor, the Court had to emphasize the wide array of choices.

Therefore, I would argue — and you might say I'm putting the best face on this, and I guess I have been — that a program that does not provide a wide array of choices would not satisfy this decision. It would fail. You could argue, in fact, as a result of this decision that secular options must clearly predominate. The Court did not provide a litmus test, did not tell us exactly where that line is going to be, but both Chief Justice Rehnquist and Justice O'Connor emphasized that when you

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consider all of the comparable programs, that only 20 percent were religious. That would seem to suggest that if you had a voucher program that was primarily religious and there weren't a sufficient number of alternative secular programs, that would be problematic.

O'Connor also emphasized the seamless web that existed between the charter schools, community schools and voucher schools, that these were all of the same kind, even though they didn't appear in the same statute or were not established at the same time. She emphasized that these were very similar programs. In fact, two of the largest private schools in the Cleveland area changed into charter schools because they were non-religious. This shift from private into charter, in Justice O'Connor's mind, made it very hard to distinguish between private schools and charter schools.

Of course, we argued that the Court was comparing apples and oranges. Even if you consider charter schools and community schools in the mix, they are still state controlled, state run schools, so that there are different types of accountability, financial performance, testing standards, things like that. There are different eligibility requirements sometimes, especially for magnet schools. They may make a preference for certain types of students. So to say that all voucher parents have the option of putting their children in a magnet school is not necessarily true.

And on the flip side, under the voucher program, there's a preference for siblings of children who already attend the private school. If you look at the law, low-income children are the third in line when it comes to priority.

Also, between charter, magnet schools and private voucher schools, there are differences in student and parental rights issues: access to information, the right to a due process hearing, the type of punishment system, certain definitions of public control, and certainly being exempt from anti-discrimination laws that may apply. So we argued that there are significant differences between private schools and magnet and charter schools, which are still part of the public system — that the Court was comparing apples and oranges.

Well, is this a significant decision? As I said, it may not be in the law, but from a practical standpoint, it is a significant decision. Certainly, it opens the door to an extensive transfer of public funds to private institutions. Granted, some of that's been going on for a while. But this case is different in two important respects.

First, the total amount of funds transferred may represent a significant shift in the money that will go to private schools. The Court mentioned that within Cleveland, the average religious school receives close to $600 per-capita in various forms of public aid separate from the voucher program. Such aid, according to the earlier Supreme Court decisions, is restricted to discrete types of secular services, which traditionally have been hot lunches, text books, transportation — you know, the litany of things the Court has upheld as able to go to religious schools. Here, however, we're not talking about $400 or $500 per student; we're talking about, as in Milwaukee, $6,000 or $7,000 per student. In essence, the voucher pays for the entire educational experience.

In essence, the decision may lead to significant transfers of money, which leads to the second point, that for the first time, putting aside the *Witters* case, which was a college case, public funds will pay for the entire educational experience. Once again, vouchers are not a discrete program. It pays for the full panoply of what is being offered. Religious instruction and worship is integrated into the curriculum. The prior barrier had prevented payment for religious activity, being limited, as under the *Agostini* case, under Title 1 services, and in *Mitchell*, under Title 6 services, to secular services and activities.

In *Zelman*, both the majority and Justice O'Connor reject the substantiality argument, that it makes no difference whether substantial amounts of money flow to religious schools. This aspect makes this case significant. Justice Souter is correct in his dissenting opinion that this does represent a change. The Court has in the past been concerned about divertability and substantiality, and here the Court seems to reject both concerns.

It is also unclear what to include in the universe of options. If you read the opinion the majority looked to magnet schools, to charter schools, tutorial programs. At one point, Chief Justice Rehnquist makes a passing reference to public schools, but you don't see him relying on public as part of the universe. Justice Souter, however, is correct, that the principle has no end, and it logically flows to considering public schools as one of the options we. And if you throw all potential options into the mix, all public schools, then you can easily justify a religion-only voucher program because if you look at everything, then it will not matter that some of the programs may be entirely religious.

Well, what's the practical fallout of this decision? I think it will reinvigorate a voucher movement that has stalled over the last several years — at least renew the interest in vouchers. I question whether it's going to affect significant legislative change, though, because the emphasis has been toward charter schools.

As some of the questions in the earlier panel intimated, there will be increased concern by public officials, about control, and accountability. There will be greater control with magnet and charter schools than within voucher programs. And with today's economy — I live in Oregon and our legislature is in the third special session trying to come up with $860 million to correct a budgetary shortfall, and is slashing public school spending left and right. I don't believe there's going to be a great groundswell (among people) to provide money to voucher schools, especially when you see, as in Cleveland, that the $15 million that funded the voucher school came out of disadvantaged student funding. Thank you.

MR. KOMER: Hi. I'm Dick Komer, and you've been subjected to the usual Institute for Justice bait-and-switch. You came expecting to see Clint Bolick, who is Litigation Director and Vice President at the Institute for Justice, and instead, you get me.

Engage

This happens to me all the time.

Clint makes commitments and I fulfill them.

It is, however, unusual for us. The Institute for Justice was founded roughly 11 years ago. One of the things we've been litigating ever since is school choice cases against these fellows on my left — and it's been a traveling road show all over the United States. Yesterday was the culmination of a war for us that was longer than the Trojan War for the Greeks, and it's not over. There is ongoing litigation involving one of the six voucher programs that currently exist in the United States in the state of Florida, which I'll talk about briefly at some point.

What I'd like to focus on today is the "what next", from our perspective. We support school choice in its myriad forms — charter schools, tax credits and voucher programs. The litigation has largely involved vouchers and tax credits because the legal issues involving charter schools are substantially different and don't really require our specialized skills. But what we have today, I think, is a fairly incremental decision, as Steve pointed out. On the other hand, it was an essential step for voucher programs to continue because they have always suffered under a constitutional cloud. I agree with Steve that this decision in some ways is less far-reaching than *Mitchell* was, but for a different reason, I believe.

The Supreme Court has always distinguished between institutional aid programs, like *Mitchell*, where the aid is to a school, and individual aid, student assistance type programs. And the voucher programs, we believe, are in fact individual assistance type programs. For us, the relevant analogous programs tend to be in higher education, or even pre-education.

We don't see voucher programs as different in structure or principle than Pell Grants or guaranteed student loans or the sorts of vouchers that people received under the Community Development Bloc Grant that can be used for pre-school activities, which can be used at religious schools. Everyone understands and has no real difficulties with the idea that Pell Grants and GSLs can be used at religious schools to pursue religious studies. It was only at the elementary and secondary level that doubts remained. And because this program was in fact a student assistance type program, they didn't have to go as far as they did in *Mitchell*, in allowing institutional aid to go to religious institutions, because it fit within their prior decisions in *Mueller*, *Witters* and *Zobrest* much more closely.

This was our fifth cert petition, and the fifth time we tried to get the Supreme Court to take up one of these cases. I think one fact that Steve did not mention that may have swayed the Court in granting cert this time, besides the increase in conflict among lower courts, was the fact that this was the first time that, if they did nothing, the lower court decision that they would be leaving in place would have changed the status quo.

For the past six years, the program has been providing an escape hatch to school children in Cleveland. We represent actual school children in Cleveland in this litigation, as opposed to the State of Ohio, and it mattered very much to us that they take the case because otherwise 4,300 kids were going to return to really bad public schools.

I think that they may have taken it because there was something very real at stake. In the previous decisions, including Milwaukee, which is very similar, we had prevailed below and denial of the cert petition did not affect the kids in the program.

The importance of the distinction between institutional and student aid will be critical to future legal issues involving school cases, both in the Florida case and in any further efforts at the state level, for the complicated reason that a number of the state constitutions, including Florida, have their own religious clauses, their own religious language.

There are about 38 states — people argue over two or three of them — that have language which is called Blaine Amendments, and which, roughly paraphrased, say that the legislature shall not appropriate any public funds to any sectarian institution or school. Sometimes they say both institution and school; sometimes one or the other. But the thrust is there.

Now, that language is language that clearly is aimed at any form of institutional aid. It in fact derives from the efforts of the Catholic schools to receive the same sorts of direct aid that the then-Protestant, public schools received. Most of us — especially those less than 50 years old, which does not include me — don't know much about the history of American public education. But the Catholic schools were originally established in contrast to the public schools, which were deliberately created as Protestant institutions. They were deliberately created to civilize the heathen, which at that point included Catholics.

So you had the Catholic schools created to provide their kids with the same sort of religious education the Protestant denominations were providing their kids in the non-denominational, non-sectarian public schools. They were called non-sectarian to distinguish the fact that all different sects of Protestants were supposed to be comfortable in the public schools; not to distinguish themselves as non-religious schools from religious schools.

As a result, there was a movement in the second half of the 19th century to get equal rights, basically, on an institutional basis for Catholic schools. The Blaine Amendments were a reaction to that, to reserve all public funding for the Protestant public schools rather than give equal money for the Catholic schools. That's why their language is the way it is. Well, this very distinction between student aid or student assistance and institutional assistance is the one that the Supreme Court has been developing in its establishment clause jurisprudence all along.

The majority of states that have Blaine Amendments as well as others also have religious language that can be called "compelled support language," which says no person shall be compelled to support a ministry without his consent.

Engage

This is older language and it's found in some of the older state constitutions. Since 29 states have "compelled support" language, and 38 states have Blaine Amendments, you can see a number of states have both. There are only three that don't have either, as far as I can tell. That's Maine, North Carolina and Louisiana, for whatever peculiarities of those states.

The compelled support language is generally less problematic. But what we have is a long history now of the U.S. Supreme Court accepting certain forms of assistance. The state legislatures are then passing those forms for their state, and then a challenge is being brought by entities similar to those represented on my left here, and sometimes succeeding.

For example, in 1947, when the Supreme Court upheld transportation subsidies for all students, including those attending religious schools, a number of states passed similar legislation. But under their state constitution that legislation was sometimes struck down. For example, Alaska, Georgia, Hawaii, Idaho, Kentucky and Washington State all struck down those under their state constitutions. Similarly, in 1968 in the *Allen* decision, when secular textbook loans to all students were approved by the Supreme Court, a number of states implemented the same sort of program — it was a New York program — but it was struck down by state supreme courts in California, Kentucky, Massachusetts, Missouri and Nebraska.

Then the Supreme Court in *Witters* upheld the use of vocational rehabilitation funds to become a pastor at a religious college, and a number of states had parallel state Pell grant-type programs that they then found could not fund students at religious schools; for example, Alaska, Virginia and Washington. Once again, Washington.

Washington is a particularly good example of how the Blaine Amendments operate in a non-parallel fashion sometimes. The *Witters* case came from Washington. Mr. Witters received a unanimous decision from the U.S. Supreme Court that it was okay for him to use his money to pursue a religious vocation at a religious school, but they remanded it to the Washington Supreme Court for a determination under their Blaine Amendment. Washington then determined that it was not okay under the state constitution in a four-three decision.

So, what does this portend for us? Florida has a Blaine Amendment. These folks are involved in litigation against one of the two voucher programs in Florida and they are now left solely with a state constitutional issue. They will argue that the aid to the individual families that are using it at religious schools is in fact a violation of the state Blaine Amendment, which we will in turn argue is aimed at aid to schools, not aid to parents.

We also expect that we will need to affirmatively begin attacking those interpretations of state Blaine Amendments that we believe exceed the federal Constitution's Establishment Clause interpretation. We will use against those other Supreme Court decisions that have been developing in the same modern period, such as the *Widmar v. Missouri* decision and the *Rosenberger* decision. In *Widmar*, you may recall, the University of Missouri refused to let student religious organizations use their facilities on an equal basis with non-religious organizations. The Supreme Court struck that down on the basis that it discriminated against religion, and refused to accept the argument of Missouri that their state constitution required it because it was more restrictive.

Similarly, in *Rosenberger*, the University of Virginia, my alma mater, refused to fund student religious publications when it was funding all other student publications. And that was struck down despite the fact that the Virginia Constitution has Blaine Amendment language, as well as compelled support language. We will need to bring law suits like that in some of these other states that I've mentioned in order to bring the two constitutions into alignment.

We believe that drawing religious lines violates the Federal Constitution's Free Exercise Clause, the Free Speech and the Equal Protection Clause. It's a privilege for me to be here today with Michael Paulsen, who's on the panel, because he's actually succeeded in some cases like that in the federal courts, particularly the *Peter v. Wedl** decision. So, I'll shut up at this point so that other people can talk, and I'd be happy to take your questions later.

MR. STERN: Let me just pick up where Richard ended because state constitutions will clearly be an important area of litigation. The state constitutional provisions which restrict in fairly explicit terms state aid to religion will clearly be a crux of future fights over vouchers. Notwithstanding that broader language, some state courts have tended to bring their constitutions in line with the federal constitution. That clearly happened in Ohio and Wisconsin, notwithstanding fairly clear evidence, historically, that a more restrictive intention was embodied in those provisions. We may escape this problem with constitutional misinterpretation by state courts.

One of the provisions in the original Ohio voucher plan by the Ohio Supreme Court in the course of opining that plan did not violate the Establishment Clause violation, is a provision that permitted religious discrimination by participating schools. The Ohio Supreme Court volunteered that that would be unconstitutional and ordered it struck, if the legislature reenacted legislation, leading to the anti-discrimination provision they talked about in the earlier session.

Notwithstanding the confident predictions we heard earlier this morning that the states will not be able to enforce and will not willingly enforce the religious non-discrimination provisions on the schools, even a court prepared to uphold a voucher program is apparently not prepared to sanction religious discrimination. In any event, it's going to be very difficult for legislators to do that directly.

I have many scars on my body from the fights over Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, in which we tried to preserve civil rights claims under those statutes. That is, a religious citizen could challenge application of civil rights statutes under those religious freedom statutes. We failed miserably. We

could not find a single senator, Republican or Democratic, prepared to resist an amendment to the bill that would exclude the civil rights laws from coverage. As many of you know, the most politically potent argument against charitable choice has been the argument that it will permit religious discrimination.

I represent an organization that's opposed to charitable choice. We also happen to believe that religious organizations ought to be able to engage in religious discrimination. Those two positions have found absolutely no treadway together. Our position has been politically untenable.

If Professor Paulsen is confident that he can prevent religious schools from being regulated, it will be in the courts. It is very unlikely that it will be in state legislatures. It's very difficult for legislators to get up and vote in favor of religious discrimination. If you're advising a client, you've got to tell him that for a couple of years you're probably going to have to put up with the rules or take the chance that nobody will notice.

I turn to yesterday's opinion and apply it to charitable choice, which I think is probably going to be the most immediate impact. Justice Rehnquist engaged in a highly formalistic, other-worldly analysis of the Constitution. One of the most astounding things he's ever written is that facts don't matter in constitutional law. That applies in any case in which he wants to uphold the statute. In case civil liberties plaintiffs are bringing facial challenges to the statute, Justice Rehnquist is quick to remind us that we need facts to decide cases. That's somewhat editorial, but still accurate.

There is a tension between *Zelman* and cases like *Salerno*, which says we can't throw anything out on its face unless we've got a lot of facts, and most circumstances will lead to an unconstitutional application of the act and *Zelman's* willingness to litigate constitutional issues in the abstract. In decisions like *Mueller* and *Zelman*, the Court refuses to be bothered by the actual operation of the program.

That's important for a couple of reasons. One is how real the choices have to be. I am now litigating a charitable choice case in Texas, involving direct funding of a program to offer transitional welfare-to-work programs. The nearest secular alternative is 50 miles away. That's a choice; it's theoretically available. It's not really available to people who are on welfare and can't own a car that will go 100 miles a day and can't afford the gas. But it's a theoretical choice. Now, which counts under *Zelman* and Justice Rehnquist's rather theoretical approach? That's an unanswered question.

Remember, of course, you need Justice O'Connor to get five. Everybody needs Justice O'Connor to get five. I was asked after oral argument what the result was going to be. The reporter wanted to know if the result would be dictated by Justice O'Connor? I said indeed. And so will lunch in the Justices' dining room today be dictated by Justice O'Connor.

For charitable choice, it's going to be a particular problem, not for legal reasons but for practical ones. When you're dealing with dysfunctional populations, which is most of the social welfare services, you're not necessarily dealing with people you can hand the voucher and expect them to find a useful program. If you're thinking of running a program like that, and you have to invest substantial money up front to hire teachers and get a building and equipment, then you're relying on, say, reformed drug addicts to know that you've got a better program than the fly-by-night guy down the street. You may not think that's a worthwhile investment of your money.

While it's a theoretically fairly easy way to voucherize charitable choice, there are a lot of practical problems between here and there.

In much of rural America, distances are large, public transportation doesn't exist, and there aren't going to be a whole lot of people to serve. So, there may not be enough to justify competition, particularly when you've got to make the investment on the chance that somebody will come. It's not clear that the voucher alternative will offer very much. That will not be as true in urban areas, where there's mass transportation and enough people around that you may be able to have several alternatives.

Steve Green also referred to the fact that this is a very modest opinion, and I think that's right. I detect almost an apologetic note in Justice O'Connor's opinion, trying to justify how she could be here when much of what she's written would seem to point her in another direction. Let me point to some issues that I think are open. I think the question of the viability of the pervasively sectarian doctrine is left open. Four justices in *Mitchell* say that the pervasively sectarian doctrine is gone. It clearly is not, because Justice O'Connor clearly does not endorse that rejection. She has not either rejected or endorsed its continued existence. Three justices clearly believe the doctrine is still valid.

In the charitable choice area, *Bowen* says clearly that funding of pervasively sectarian institutions is unconstitutional. Some circuits have treated the pervasively sectarian doctrine as still binding on the lowers courts. The Fourth Circuit regards it as an abrogate doctrine.

As Steve mentioned, direct funding of religious education through per capita grants is very much open. That clearly divides the *Mitchell* plurality from Justice O'Connor and the dissenters. Justice Thomas says in *Mitchell* that a per capita grant directly to the school is the same as private choice. Justice O'Connor begs to disagree. Whether she's changed her mind on that or not, whether that will have continued legs, we just don't know.

One of the things that I think is illustrative of the difficulty in reading these opinions is that you can read them three different ways. You can read them line by line, as lawyers tend to do when they're writing a brief or law professors when they're writing a law review article, you can read them by comparing to what went before, and you can read them the way public officials read them.

Public officials read Supreme Court decisions the way baseball standings are read. There's a new column. It's not so new but it's new because it didn't exist when I was really following baseball. The new column in major league standings is win-loss streak. My view is that most public officials read the "streak" column only when it comes to Supreme Court decisions - which side won the last decision or the last couple of decisions. They never read the whole decision, given the length of the decisions, I think it's excusable.

Public officials will say, hey, the Supreme Court said anything goes. If you read it line by line, it says what it says, and I think Steve has covered it well. If you read it comparatively, life becomes more difficult. Just two examples: In *Mueller**, there is a series of distinctions between the tax decision at issue in *Mueller* and the tax credit invalided in *Nyquist*. The Court refers to the special deference owed to state officials when it comes to taxation. It's indirect; there's no money that is actually transferred. The Court placed a fair amount of weight on that in M*ueller**.

All of those distinctions disappear in this opinion. *Mueller* stands now simply for the proposition that if there's choice and it's real and the statute is neutral on its face, that's enough. Now, does that mean that those distinctions in *Mueller* are gone forever, or is it just enough to get rid of this case that you don't have to talk about them, and those are still issues in the law.

In *Rosenberger*, the Court was at pains, both in the opinion of Justice Kennedy and in the opinion of O'Connor, to point out that that was, at issue was not a tax; it was a student activity fee. The Court is careful to say, this opinion should not be read to control the case of a program based on real tax laws.

There was however, a grant, vacate and remand order last year in Albuquerque that involved access to a part of tax funds run as a limited public forum. We don't know if the Rosenberger tax funds caveat has disappeared forever or not. It's not mentioned here. Is that gone? Was it just a convenient, for-the-moment distinction? Is that still an issue that's in the law?

Finally, I want to point to what I think is not going to be a secret for very long. Justice Rehnquist relies on a very formal, as I said, other-worldly form of neutrality. In fact, you have to be deliberately blind to reality to think that this program is neutral. There are in fact journalistic accounts that became available after we tried the case. This program was carefully negotiated between the Catholic bishops in Ohio and the Governor. This happened to have been reprinted in the *American United* magazine, but the articles were done independently by journalists in Ohio. For example, the value of the tuition is within a couple hundred dollars of the average Catholic school tuition in the United States. It's probably a little bit higher in the Northeast, so it's probably pretty close to the average tuition in Ohio. It's less than a third of the tuition in the average Protestant school, and less than a third in the Jewish schools.

The Court nevertheless says this program is religiously neutral. That is so if you ignore the real world. The prohibition on religious discrimination makes perfect sense for schools who have as one of their missions taking the Gospel to all of mankind. For schools that have as a mission serving believers, creating a community of believers, that provision is distinctly non-neutral. There's not a single Jewish school in Cleveland — even if they were in the city of Cleveland itself, but they're not; they're in the suburbs — that they could take advantage of the voucher program with any credibility and integrity. They all, to one degree or another, exclude non-Jews.

One of the internal debates we had in deciding how to argue the case was that I thought that absence of real neutrality should have been given a higher priority in our argument. I don't know whether that would have persuaded Justice Rehnquist, who tends to view the Constitutional law in very abstract terms. I don't know whether that argument would have appealed to a Justice O'Connor. How that will play out remains to be seen. But that, I think, is another uncertainty that we face.

PROFESSOR PAULSEN: Hello again. I am Michael Paulsen. I am not Gregory Katsas. This is a real bait-and-switch. He's the Deputy Assistant Attorney General for the United States. He couldn't make it, so I would like to offer the official views of the United States Department of Justice.

That's what I would like to do. I'm not authorized to do it, so I'm just pinch-hitting. I scribbled out some notes between the two talks and during this morning's panel. Here are my short insights on this element, for what they might be worth. I think this was a very easy case, and nothing that Steve Green or Marc Stern has said is inconsistent with this. When the decision came out and I read it, I thought there was really very little new here. It's a kind of pedestrian, workman-like, classic Rehnquist majority opinion. When he has to hold five votes together, he writes fairly narrowly and in a straightforward manner and puts in his little subtleties and distinguishes the cases that aren't helpful, and drops little notes that will help him in the future and some of his agenda.

And it really felt like *deja vu*. I was still a law student 19 years ago reading *Mueller v. Allen*. It was quite a piece of work to distinguish *Nyquist* and get that five-four decision that held on to Lewis Powell and to Sandra Day O'Connor, distinguishing carefully the contrary cases and establishing for future use this principle of neutrality. This case reads exactly the same. It read like reading *Mueller v. Allen* all over again, with a few wrinkles and about 19 years of consistent precedent reinforcing all along the way. It made me wonder, why was anybody worried that this case would turn out this way? It was sort of like watching Tiger Woods sink a four-foot putt. You know, it's theoretically possible that he'll miss it, but you don't

have to watch very closely; you know that it's going to go in. That's the way that this opinion reads, as a very easy case following from the principles of neutrality that existed before.

There are only a couple of points or nuances that I think are interesting and to some limited extent new. One is the emphasis on true private choice and the implications it has for other issues. We discussed that in the first panel. Another had been this distinction between tax credits and tax deductions and is a voucher more like a deduction or a credit, or are the vouchers different? Most of that does seem to be gone. The one line of distinction they say may still exist is direct grants. They don't say it definitely does exist. They say that's a different issue; that might be a harder issue. But this issue, the issue of indirect funding through private voluntary choices is an easy Establishment Clause issue. That's five-four.

The other points that are interesting are what I call the baseline question, the baseline for how you judge neutrality. One point that Rehnquist makes, and this goes back to *Mueller v. Allen*, is as long as the program is neutral in terms of its operational requirements, the breakdown of usage does not affect neutrality or else you would make constitutionality dependent upon the way schools and parents make their choices in particular years. That should not be the governing criteria.

Now, Marc Stern sees that as abstract and unrealistic, but I think it's just a realistic, good approach to constitutional law of not making the operation of a constitutional principle vary year to year with actual usage. I think that's sound and an important principle.

In addition, in terms of the baseline against which neutrality is judged, they are careful to look at the full universe of options. This was important to Justice O'Connor. And it does seem to me, as Steve Green and Marc Stern said, that it does seem to have the implication that when you're judging the validity of a private school choice program, the fact that public education receives substantial overwhelming assistance is relevant to your inquiry as to whether or not this is neutral in terms of the choices it provides. That, I think, is a great step forward for the school choice movement.

The other thing that is interesting is Rehnquist, bless his heart. He sneaks in reference to the coercion standard. Now, most of it is cast in terms of the Lemon/Agostini test of purpose and "effects." But when he gets to effect, he recasts what counts as an effect in terms of whether or not any individual is coerced into attending religious schools. Now, as a law professor, this is very interesting doctrinally, and I think it should be for litigators, too. The coercion test is the least law-invalidating test that the Supreme Court uses, sometimes, for evaluating constitutional challenges.

Here's Rehnquist's language. I don't have correct pagination. I just pulled this off of Westlaw. "The Establishment —

PANELIST: That's page 14.

PROFESSOR PAULSEN: — page 14 of the slip op., okay. "The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools,"coercing", and that question must be answered by evaluating all options Ohio provides Cleveland's school children." I think that's very significant language. And if Rehnquist sticks around for a while, you'll see him pick that up and say, "We have evaluated school choice and voucher programs in terms of coercion of parents. As long as parents are not coerced into sending their children into religious schools, it is a voluntary neutral program." You can hear it. It might be eight years from now; it might be four years from now; it might be 12 years from now. But Rehnquist has dropped one of his nuggets that he always picks up a few years later.

The other thing that's significant is that *Nyquist* is dead. Dead. Dead as a doornail. They don't overrule *Nyquist*, but *Nyquist* is limited not only to its facts but to the Supreme Court's 1973 mischaracterization of its facts. And you know, they said this case means virtually nothing in terms of future principles for neutral private choice programs. As long as you draft it right — and here's the roadmap — these will be upheld.

Other things that are interesting — Justice Thomas has an interesting concurrence. I don't know quite what to make of it yet. One thing that I do appreciate that's very central to the Cleveland facts of the case is that this was a tremendous opportunity for poor inner-city minorities. This was important. He begins his concurrence by quoting Frederick Douglass, "Education means emancipation." I think that's an important principle the school choice movement will pick up on. It's similar to a recent book by — I'm blanking on is first name — Viteritti —

PANELIST: Joseph.

PROFESSOR PAULSEN: — Joseph Viteritti.

PANELIST: It starts with the word of equality.

PROFESSOR PAULSEN: The whole idea is that the school choice movement is in part about equality and fulfilling the promise of equal opportunity in education, especially for the poor and minorities.

Thomas also would grant states broader latitude than the federal government in terms of the application of consti-

tutional requirements. It's interesting; it's doctrinally peculiar. He's all alone. It might not have much consequence.

There's one aspect of the opinion that's disturbing to me, and that's footnote five. Now, the way my Westlaw printout is that I get the footnotes at the ends of these things and go, oh my gosh, what is this? I read Thomas as referring to his opinion in *Troxel*, the "grandparents" case. Does he make it "but of" or a "but see?"

PANELIST: But see.

PROFESSOR PAULSEN: — implying that the principle of *Pierce v. Society of Sisters*, of recognizing parental rights to direct or control the children's education is something that, if push came to shove, he would not agree with as a constitutional issue. It's a very cryptic footnote and I hope I'm over-reading it. But I find this interesting.

The last thing I find interesting, and disturbing, though not at all surprising, is the four dissents. There are four votes in dissent. This is a five-four decision. The position of the four dissenters essentially says that the Establishment Clause requires what amounts to discriminatory exclusion of private schools from a generally applicable, facially neutral benefit program.

It continues to strike me as extraordinary that anybody would embrace that principle as actually being what the Establishment Clause requires. It strikes me as particularly extraordinary that justices who ostensibly, in other contexts, are committed to principles of *stare decisis*, like Justice Souter purports to be, would take a position that is contrary to *Widmar v. Vincent*, 1981; *Mueller v. Allen*, 1983; *Witters v. Washington*, 1986; *Mergens*, 1990; *Lamb's Chapel*, 1993; *Rosenberger* and *Pinette, 1995; Agostini*, 1997; *Mitchell v. Helms*, *Good News v. Milford*. There has been a succession of now 11 cases where I count. I mean, talk about a streak. They only go up to 10 in my baseball standings. There have been now 11 cases in a row.

There have now been 11 cases in a row where the Supreme Court has rejected the proposition that the Establishment Clause authorizes discrimination against religion. Now, hopefully that now seals the deal. But what is disturbing is that there are still four votes that are intransigent on this point, and also how easily a single change in membership could reverse that or a single change in Justice O'Connor's clerks could change that result.

MR. AMMEEN: At this point, we've got about 15 minutes for questions. To get it started, I'll throw out the first one. I think the observation of three of the panelists that *Zelman* is a modest decision, that there was not something earth-shaking or ground-breaking here, is pretty interesting. I've got a question about three passages Chief Justice Rehnquist put into the decision, at pages 7, 11 and 21, where he refers to a consistent and unbroken chain of jurisprudence. He states, essentially, that the Court has *never* found a program of true private choice to offend the Establishment Clause. In the opinion's next-to-last sentence, on page 21, Chief Justice Rehnquist writes, "In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause." I'm curious if this is one of those "nuggets" that is designed to foreclose for all time issues concerning the "true, private choice" type of voucher program here.

PROFESSOR PAULSEN: Can I jump in? It may be. I don't think Justice Rehnquist thinks that the dissenters will now come along simply because there have been 11 decisions in a row. I think that sort of language is classic Rehnquist craftsmanship to make sure to hold shaky votes. Justice O'Connor is sometimes very *stare decisis* focused, and this opinion — you know, the Chief held it for himself. Those of us who do nose counting thought that this had to have been assigned to Scalia or Kennedy in terms of the number of opinions they'd written on February-heard cases. But wisely, Rehnquist keeps it for himself. He's very good at holding votes on board, and I think this is Justice O'Connor language.

MR. SCOTT: Mike is right. There's also, though, of course, more than one tradition out there. And I think that's the thing; there are parallel traditions. So you read this opinion and think, oh, my God, as Mike said, how could they have come to any other decision? How could this be a five-four decision? Well, there also are some other traditions out there in our establishment clause jurisprudence besides this one, and we're seeing, of course, the neutrality theory rise to the top here.

MR. STERN: I'm going to say one last thing about this, that sitting under a picture of Madison, I don't find it hard at all to understand how that can be discrimination against religion. I think that Jefferson (who wrote the constitution in Virginia that *Rosenberger* challenged) and Madison in fact intended that sort of discrimination. They also intended to provide preferred treatment of religion under the free exercise clause. One of the prices that we have paid for the emphasis on equality and neutrality under the Establishment Clause is essentially gutting the Free Exercise Clause.

Scalia's theory in *Employment Division v. Smith*, that neutral laws don't require special justification even when they impinge on religious practice, is the mirror image of his Establishment Clause theory. Indeed, it would be difficult to maintain neutrality under the Establishment Clause and non-neutrality under the Free Exercise Clause. I think it's a bad bargain for religion in the long-run.

You're much better off with the ability to repel legislation that stops you from doing what you're doing privately and

give up the government subsidy. I don't think it's possible to separate the one from the other, nor as Steve has said, is the notion of discrimination against religion, which is what it is, alien to our constitutional tradition. That's what Jefferson and Madison fought about in the post-Revolutionary era.

AUDIENCE PARTICIPANT: I'm a philosopher of law, and I was surprised at what strikes me as the Court being so caught up in so many irrelevancies in trying to decide a legal decision like this. But we have protagonists on both sides of the decision because of its political consequences.

I admit that Professor Rice switched this morning from the legalities to the political ramifications of the case. I rejoiced, even though I sort of expected the decision. My wife considers it a disaster. She teaches in the inner-city school system and thinks the private schools won't take any disabled kids for which the public school has to spend a lot of extra money.

But we have a Muslim private school in Columbus, Ohio. Judging the way the judges themselves get involved in irrelevancies, the political community will be even more involved in those. I can foresee very easily if Ohio tried to expand this to the inner-city of Columbus, not only the legislature but the entire community would have some very serious questions about whether this Muslim school has teachers like the 700 Imans educated in Saudi Arabia.

If the schools are teaching that the Nation of Israel is illegitimate according to international law, or that males and females should be mutilated sexually, there will be real questions about the content of what private schools are teaching. And the legislature would be very much concerned with that. And I think the entire community would be, too.

So, his warning — I've read things critical of you going this way. Professor Rice's warnings were frightening to me, and I had to sort of agree that going this way is going to be very dangerous, at least in our temporary situation.

PROFESSOR GREEN: You know, I don't hold much out for Professor Paulsen's future litigation insofar as forcing public school districts to allow for funding for private schools if they don't want to. But I do think this is one area where he is going to be successful because you can't start making distinctions between religious groups, and the Supreme Court doesn't know what to do with free speech. It's going to be almost impossible to figure out where you draw these lines, which is exactly right. There will be, of course, Islamic academies. There is in Cleveland — and Milwaukee?

PANELIST: They were in Cleveland.

PROFESSOR GREEN: — in Cleveland there's one, yes. Of course, there's going to be. And how you're going to go about trying to exclude those religiously affiliated institutions with which some people may have some concerns about what's being taught, I don't know, but that will be a case that certainly will be litigated.

MR. STERN: I don't know if we have to respond. His wife has already overruled him.

AUDIENCE PARTICIPANT: I wanted to direct this question to Steve and Mark. I was intrigued by Marc, or one of you, who criticized Justice Rehnquist a little bit for ignoring the facts. I'd been listening to your presentations and reading the arguments that were made in the briefing and so on, up through the various courts, and it struck me that you all along had ignored reality.

Obviously in Marc's case, and apparently in Steve's, you have some deeply held religious or theistic beliefs of your own. But as a practical matter, public education has become exactly what theologian Alexander Hodge predicted or prophesied a century ago — the most massive engine for the propagation of atheism that the world has ever seen. It creates a clearly atheistic world view in which students are taught.

It is easy to pick out a specific program like the one in question, identify a few overtly theistic schools and say that clearly government is acting selectively in relation to religion. But this whole focus is not merely ignoring the forest for the trees; it's picking out a single tree and scraping it for fungus.

The idea that we are somehow perpetuating this wonderful state neutrality towards the religious beliefs of individual school children is just sheer nonsense.

Secondly, moving away from a religious perspective and on to the economic perspective, again, if you pick out a single discrete program like this and identify only those specific schools and children involved in that discrete program, you can say yes, in that small universe there is a net transfer of dollars from someone else to individuals who are practicing their religion. But if you simply step back and analyze it the way that probably a more Libertarian entity would — IFJ or the Freedman Foundation — and say, look, what is the net effect of all state action in regard to education?

As Justice Rehnquist says, put all the activities and all the options on the board. Look at the taxation that government does from private individuals, to transfer that wealth to other private individuals to carry out the benefits or the viewpoints that they espouse. You have in government action in the various states a massive transfer of wealth from individuals who wish to practice theistic religions to those who are perfectly satisfied with an atheistic viewpoint perpetu-

ated by public education.

The thing that frustrates me to no end is what I view as the intellectual dishonesty of this entire area of litigation. I do not for a moment question your own personal integrity involved in this. But the way that this litigation is conducted in general, the real questions never arise. And this almost frenetic focus on these miniscule issues and little programs seems to me to be lancing a boil on an elephant; you're worried about spreading germs in your house when the elephant's stomping the place into oblivion. So, I think you've got my point. I'll let you respond.

MR. STERN: To take the smaller point first, if you look at the brief that I helped write, we do not make the argument that you look at the voucher program in isolation from the other choices. Our submission was, it didn't matter what the other choices were. One thing the Constitution says the government can't spend its money on is religious education. We did not think that the court of appeals effort to distinguish between statutes and section numbers had any appeal. It had none to us and we didn't make that argument.

Second, this is not a decision about the ability of the government to use taxing power to transfer wealth from one group to the other. The Establishment Clause is not about libertarianism or non-libertarianism. I have thought for a long time that the voucher argument is really not about the Establishment Clause; it's about two different conceptions of the role of government. Anybody who's listening to today's argument has heard very eloquent defenses from a libertarian position of that point of view. It's not a point of view I share at all.

The blaming of all that ails the public schools on their non-theistic — not atheist but non-theistic nature — wholly ignores other factors like racism, which clearly infected the Cleveland schools; they have been under desegregation order for a decade or more. Wealth disparities too play in role. The reason why the suburbs didn't take any kids from Cleveland has nothing to do with monetary amounts. It has to do with the fact it's the most segregated urban area in the United States. It was entirely foreseeable that the suburban schools are not going to take poor children from Cleveland.

The Cleveland schools have won a lawsuit against the State of Ohio for systematically underfunding this. To say that John Dewey is responsible for all that ails the Cleveland public schools or any other urban public school system seems to me to be just so unrealistic.

Let me move to the last argument, which is the crux, I take it, of the speaker's position that the public schools are a sort of engine aimed at the destruction of religion in the United States and they represent the non-theist, John Dewey — all that stuff. I have no doubt that there are public school teachers who have that view, maybe public school superintendents who have that view, though most public school superintendents that I've met are not at that level of theory.

They get to be where they are because they offend nobody.

There is no such plot out there. It defies reality to say that there is.

There is a serious question of constitutional theory here, between a bipolar and a trivalent view of religion and society. The questioner's assumption is you're either with us or against us and you have to fit everything you do into you're with us or you're an enemy.

The Constitution doesn't make any sense that way. The only possible model that makes sense is three positions — the government as an agent or propagandist for religion; the government as an agent or propagandist against religion; and government is disinterested, neutral, toward religion.

What the courts have meant by neutrals is that third position.

There are people who have religious views that are incompatible with that trivalent position. They cannot for legitimate and sincere religious reasons, accept the possibility that there is some sphere where religion doesn't control or their religious beliefs don't have to control. That's fine. But if you don't agree with that, then we have a very fundamental disagreement about the constitutional order. That's just one of those fundamental debates that we will have to debate.

MR. AMMEEN: I'm going to break in for a second here. We've got three people in line; we're starting to run over a little bit but we want to get through the questions of the folks who've been standing at the mic. So I just ask that the questions be kept short, and then after we finish the discussion we'll move down to the State Room, where lunch and a third panel will begin.

AUDIENCE PARTICIPANT: Thank you. I'd like to offer one brief comment and then a question. This is based on scanning the case during the panel here. Stephen Breyer, in the first paragraph of his dissent, says that he wants to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. And all the dissenters seemed to pick up on this. I think that's misplaced significantly. I mean, it's the plurality of choice that dissipates strife in our society. There's nothing more likely to create dissention as when you put everybody of different beliefs in one pot, in one public school, and expect them to get along. For example, are you more likely to have Jewish kids and Muslim kids in this country fighting today in a public school in light of what's going on in the Middle East, or would it be better if their parents had them attend their own schools and then mix with the rest of society to the extent they want to? I mean, to me it's the latter option that's much more clear.

The question I'd like to ask was something that Clarence Thomas, who I think obviously is the most emotionally charged judge in this case, got into, and that is whether the incorporation doctrine, the application of the 14th Amendment through the 1st Amendment or vice versa to the states really applies in this case to the extent of the Establishment Clause or not. He seems to be the only judge who got into that, and I don't know — for those of you who have a better background in this area, is that a doctrine that has any legs with any of the other justices, or is he the only one who sees a distinction between the Free Exercise Clause and the Establishment Clause?

MR. KOMER: This has no legs.

PROFESSOR PAULSEN: No legs.

MR. STERN: Zip.

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Religious Liberties

School Vouchers: Past Lessons and Future Prospects
The Successes of Voucher Programs Thus Far

Mr. Danny LaBry, *Washington Scholarship Fund*
Brother Bob Smith, *Messmer Catholic Schools*
Mr. Robert Enlow, *Vice President, Programs and Public Affairs, Milton and Rose D. Friedman Foundation, Discussion Leader*

MR. ENLOW: We are talking about the real world, and it is important to note that some of the previous panelists who were critical of school choice and school vouchers are no longer here to actually defend the comments that they made. For example, one panelist said, this is about the real world; the Justice's opinion is abstract and other-worldly and that any reasonable person would consider this decision (*Zelman v. Simmons*-Harris) unconstitutional. Well, in my world, which I consider a slightly more real world, a par is a par: a four is a four; a three is a three; a five is a five; and a 5-4 is a 5-4. That is the end of the story.

We need to make sure we're clear about that. We can whine about different dissents; we can complain about different things. And there are legal, reasonable debates to be had. But the fact is that it was a five-person majority who ruled very strongly, as far as we can tell, in favor of giving parents the choice of schools. And the critical difference between one of the panelists on the legal side and my personal opinion was the misunderstanding of direct aid versus indirect aid. Vouchers in Cleveland are more different than food stamps in many ways — direct aid to a parent who can choose to use them wherever they want, which is in fact, the genesis of Dr. Friedman's argument.

I was originally supposed to only be the moderator of this panel. We were going to be joined by Pat Rooney, who unfortunately is ill and cannot join us. I have also been asked to do a little speaking, and in the true nature of Milton Friedman and free markets I am being a little flexible, we are responding to the marketplace. What I am going to do very quickly is introduce our two esteemed panelists and let you know what we are each going to talk about.

First, is Mr. Danny LaBry, who is the President and Executive Director of the Washington Scholarship Fund. The Washington Scholarship Fund is a non-profit organization giving out private scholarship vouchers to low-income children in Washington, much like our Choice Charitable Trust here in Indianapolis. It serves a number of kids. It started in 1993 with 56 children and now has over 1,300 students that are receiving privately funded vouchers to over 130 different private schools.

Prior to being the executive director — I just found this phenomenal — Danny worked as a fundraiser for many years in non-profit education settings, but he also worked for NASA, which is great. He was the senior vice president of program innovations at the Challenger Center for Space Science Education. He also directed development of educational programs at the Space Center in Houston.

I was saying to Danny at lunch I cannot think of a better example of how indirect aid works than NASA. When President Kennedy got up and said, you know what? We are going to land a man on the moon in ten years, well clearly, they didn't build a government rocket ship. They actually built it with private enterprise and private companies being paid for by the government. So, I was really excited. Danny is going to talk about the Washington Scholarship Fund and the recipients of the Washington Scholarship Fund — the real stories.

The next panelist is Brother Bob Smith. I have had the distinct honor and pleasure to get to know Brother Bob over the last few years out of Milwaukee — in fact, one of the original pioneers in Milwaukee of the school voucher program and one of its longest defenders. He is a member of the Order of Friars of the Minor Capuchin since 1979. Brother Bob's experience is incredibly varied. He has a B.S. in Criminal Justice and a B.S. in Sociology and a M.S. in Administrative Leadership and Supervision. He has a teacher's certificate and a principal's license. This man knows what is going on, not only in the City of Milwaukee, but also in cities and urban areas around the country.

Prior to being named the principal of Messmer High School in 1987, he was with the Michigan Department of Corrections. And here is something really interesting about the evolution of the voucher program and the private market in Milwaukee, just looking at Brother Bob's experience, from Messmer. He was elected first as principal of Messmer High School. He then became president of Messmer High School. You can see the change in title to a different understanding. Then, from there he became president of Messmer Catholic Schools. Hence, they have created a new school and they have a growing and budding business for children in Milwaukee.

Brother Bob is obviously a frequent keynote speaker, a man who has many awards, who is on many boards, including the Bradley Foundation, the University School of Milwaukee, and many others. There were three awards that he received that I think are outstanding: The Archbishop's Vatican II Award for Education; the Governors Commendation for

Education; and of course, there is a Brother Bob Smith Day in the City of Milwaukee by Proctor Casey.

So, Brother Bob will be our panelist, and I am glad to have him here in our great city of Indianapolis. I know he has been here before, and it is nice to have a friend here as well.

My goal is to give the really boring details really quickly before you get to the real world of school vouchers and their success so far, but I am not going to be talking about parents and the impact and the community involvement that people have. I am going to talk about what are the inputs in terms of voucher programs and school choice programs around the country. We know our educational establishment loves to talk about inputs. What are the outputs about educational choice programs? What are the numbers in terms of inputs? What are the numbers of children in the programs? What are the number of schools accepting vouchers and tax credits? What are the amounts of vouchers and tax credits? Let us just look at the hard, cold numbers because, of course, to the education establishment they mean something.

More money means better education — we all could debate that until we're blue in the face. There are five voucher programs currently in America, and there are five tax credit programs. It is nice to know that when the Friedman Foundation started, there was one in Milwaukee and two voucher programs in Maine and Vermont. Since we have started, since early 1995, there are now ten school choice programs around the country.

Let me focus on the voucher programs. Cleveland has a limited low-income voucher for the residents of Cleveland City. The number of children in the program is 4,457. The amount of the vouchers is up to $2,250. The number of schools participating — 56 privates schools, 46 religious, 10 non-sectarian. Now, there could be a billion more schools; maybe billion is a little large. The fact is, suburban schools in adjacent districts decided not to take vouchers. They could have taken vouchers for children in Cleveland, they decided not to, despite the fact they would have gotten three times the amount of $2,250. So clearly, we know where the educational establishment lies on this.

Florida has two voucher programs. One is called the McKay Scholarship Program, which I think is an amazing program. It is a limited voucher program for children with special needs. Any child in Florida that is given an IEP, an individualized education plan, is eligible to receive a voucher. That is a universe of 340,000 kids who are eligible. Currently we're looking at about 4,997 in the program, and that is in less than two years, if I remember correctly.

The amount of the voucher for Florida's McKay Scholarship is the lesser of the cost of the student's public school or the actual private school tuition, plus categorical funding from the federal government, and top-ups. Parents are allowed to top up the voucher. The average range is $3,000 to $5,500. There are 357 private and public schools enrolling to McKay Scholarship children.

Florida's A-Plus Scholarship Opportunity Program — this is not a limited voucher program in terms of means tested. It is limited based on failing schools. The State of Florida decided that we are going to give grades to schools, A through F. If you fail as a school based on state assessments and a variety of other criteria, twice in any four-year period on a rolling basis — you could fail the first and the fourth years or the third and the fifth year — every child in that school would be eligible to receive a voucher.

When it started in 1999, there were two schools and that number has been maintained until just this year. There are currently 70 children in the program, 23 of whom can go to public schools that given a grade of C or above and 47 in private school. There are five private schools and other public schools are part of the program. The amount of the voucher is the local district's per-pupil cost or tuition, whichever is less — again, between $3,000 and $5,500.

It is important to note that this year, ten new schools have reached the failing list. That is ten new schools in Florida, and that reflects thousands of kids.

There is an old program in Maine, the Maine Program, that is known as a tuitioning voucher program. Here is the basic concept in a nutshell. Maine has places where they have decided, for whatever reason, not to build and operate public schools, whether they are elementary or high schools. They said, we are either too rural or do not want to; we are just not going to operate it. So instead, we are going to give that money to the parents and allow them to choose the school they send them to. They could choose public schools, private schools, in-state or out of state. There are examples in Maine and Vermont where children are using vouchers to go to out-of-state schools.

Religious schools were involved in Maine until 1981. There are 11,100 children currently in the Maine Program, 8,100 in 9 to 12. The amount of the voucher is $5,732 or the actual private school tuition. This is a very important distinction. In both Maine and Vermont, if you are a local district and say we have got a really elite private school over here and think our kids should go here because John's very bored in school, but that tuition is $9,000 and we only get $5,700. Well, they can have a meeting day – it is actually called an annual meeting day — and the local town can get together and vote. You know, we are going to vote to allow $10,000 to go to this school, and our kids are going to go there. And they do that. It is a very unique program in that fact. There are 150 schools that are accepting tuitioning students.

Milwaukee is the next voucher program. It is a limited voucher program; again that means it is tested for the City of Milwaukee. There are currently 10,882 students in the voucher program, which constitutes slightly above 10 percent of Milwaukee public schools' enrollment. The program is capped at 15 percent, which is about $15,000. The amount of the voucher is the lesser of $5,553 — and I leave it to Brother Bob to talk about the actual details of how that works — or the actual private school tuition, so it is the lesser of the two amounts. There are currently 106 private and religious schools in

Engage

the program.

One of my favorite sayings — I learned this from Brother Bob and Kevin, who took us up to Milwaukee on a number of occasions. Zakiya Courtney in Milwaukee likes to introduce Milwaukee as a city of options. That is what Milwaukee is right now. Thirty-seven of these schools, by the way, have started non-sectarian schools since 1995, so there is more evidence that the market will work.

Vermont is the last voucher program. It is another vouchering program, that is, where they do not have enough or decide not to build schools. There are 6,336 children in the program. The voucher amount is $7,347, or again, the actual amount of tuition. There are 148 schools that are receiving voucher students. Interestingly, in Vermont, in a study we did at the Friedman Foundation, 95 percent of the school districts in Vermont received voucher dollars — 39 percent of the district's voucher students. This is after 100 years of having programs in existence. So, this is the impact, long-term, of school vouchers and school choice.

What does this mean in terms of input? This is the longest section, so I will just get through it. It means that there are 37,000 children currently receiving publicly funded vouchers in this country. It means that the average voucher is around $4,480, so please do not let anyone say that there is not a large voucher out there. And there are more than 882 schools accepting voucher children; many of those have started recently.

In terms of tax credit programs, there are six tax credit programs in this country — Minnesota, Arizona, Iowa, Illinois, Pennsylvania and Florida. Most of those are in a situation — we do not know much about Pennsylvania, Florida or Illinois, because they are brand new. They are pretty new — 1999-, 2000-, 2001-enacted programs — so we know very little about them. We also do not know much about Iowa, except that Iowa's tax credit program is a very low-level program of a $100 tax deduction.

We do know a little something about Minnesota. Again, just like there are differences in types of voucher programs, there are different types of tax credit program. Minnesota is a direct tax credit program, where lower-income parents can get a tax credit, or a tax deduction if they are higher income. The tax credit could also be refundable. I cannot think of anything more like a voucher than a refundable tax credit. In 1999, in Minnesota, more than 57,000 families claimed an average tax credit of $369 per family for approved educational expenses. But half of those families claimed a credit had an income of less than $20,000. So, please do not tell me that people who are "dysfunctional" do not know how to operate and get their kids a good education. In 1999, 191,000 families claimed a tax deduction for approved expenses. The total deductions claimed were $206 million, for an average of $1,178 per family.

In Arizona, which is a scholarship tax credit — what Arizona is, is Danny's Washington Scholarship Fund, where donors who give to Danny's fund can get a tax credit from the state. That is all it is. They are called student tuitioning organizations in Arizona. They then can distribute vouchers out, scholarships, to children. In 1999 in Arizona, 31,875 taxpayers donated $13.7 million to 31 student tuitioning organizations. The average donation was $430. In 1999, the student tuitioning organizations awarded 3,800 scholarships to children from mostly low-income families, for an average scholarship of $637.

Those are the inputs. And if were in the education establishment, we would stop there and say we need more money.

Well, right now, let us talk about the outcomes because, frankly, this is what matters. This is what matters for kids. What are the outcomes of choice programs? Parental satisfaction — in Milwaukee, Cleveland, Florida, and for numerous other private voucher programs that have been studied by Harvard, Princeton, University of Wisconsin, Indiana, and Florida State University, all these programs.

What are their findings? Every evaluation shows increased or substantially improved parental satisfaction. I am sure Danny will tell you about his program. The key point — parents who use vouchers are more satisfied with their child's school – it is the same thing in tax credit program, whether it is public or private — and they get more involved in their child's education. Wow, you have a choice, you get more involved.

Outcome number two — academic gains in students. Let us get clear on this. Programs studied in terms of publicly funded voucher programs — Milwaukee, Cleveland, Florida, Maine and Vermont. Tax credit programs are much more difficult, by the way, to research on academic gains of children because the way they are set up, you cannot actually track the students easily. So, we have little knowledge of tax credit programs.

We do have a significant and growing amount, of knowledge on publicly funded voucher programs. Again, researchers at Harvard (two researchers at Harvard, one of whom is Carolyn Hoxby, who is an awesome researcher), Princeton, Indiana University, University of Wisconsin, Florida State, Houston Baptist.

What are the findings? In Milwaukee, which is old data, and I am sure that others in Milwaukee will say that we need a new study, third- and fourth-year students in Milwaukee gained 5 to 12 percentage points increase in math and reading. They score, according to Princeton, 1.5 to 2.3 percent higher per year on the Iowa Test of Basic Skills. According to the University of Wisconsin, voucher students and public school students were the same.

Now, that is a very interesting one because that last finding was John Witte from the University of Wisconsin Madison. He basically said, you know what, we have studied the voucher program and parental satisfaction is up, parental

involvement is up, but academic test scores are equal. Well, guess what. If that was the establishment, how much do you think they would be trumpeting the incredible gains in parental satisfaction and parental involvement.

Second, Cleveland — data shows small but statistically significant increases in student achievement in two out of five areas, language and science.

Florida — the performance of students on academic tests improves when public schools are faced with the prospect that their students will receive vouchers. When you are in a failing school once, what happens? You start getting better, quicker.

Maine and Vermont — this is a study that we think is actually important — schools that attract a greater percentage of voucher money typically outperform on standardized test schools that attract less money. That is regardless of other factors, such as demographics, school location and per-pupil cost.

What is the key point here? There is no credible study in the United States by a credible researcher that shows a negative correlation between vouchers in choice and test scores, that we understand.

Public school improvements — well, the public schools improve quickly. Programs studied by Milwaukee, Florida, Maine, and Vermont. Researchers — and this is likely the most important one — Caroline Hoxby, who I hope Brother Bob will talk more about — a paper by John Gardner, a Milwaukee School Board member, the Urban League of Greater Miami, Florida State, Milwaukee. Overall, an evaluation of Milwaukee, according to Caroline Hoxby, suggests that public schools have a strong positive response to competition from vouchers. Schools that face potentially the most competition from vouchers had the best productivity response. That is from Hoxby, which is one of the few peer-reviewed studies on school choice in America.

Also, during the time the school choice program — according to Milwaukee public school members, MPS students improved on 11 out of 15 tests. Full-day kindergarten was expanded. Seventy-five million dollars has been given in private investment to public schools, which has never happened before. Hiring and firing of teachers has moved more toward the school local level. So, we now have an incredible thing happening. Public schools are improving.

The same thing is happening in Florida. Guess what happened when vouchers became available in Florida. Well, let us see — those first two schools, guess what they did. They hired new teachers. They extended their school day. They required parent-teacher conferences. All this stuff, they had said they couldn't do without more money, but of course they did it very quickly. Public schools respond to competition.

In Arizona, we do know a little bit about the tax credit and the impact on public schools. As a result of the tax credit for public schools – that is dual tax credits, both for scholarships and for public schools — Arizona public schools in 1998 received $8.99 million in contributions from taxpayers. In 1999, $14.7 million. In 2000, $17.5 million. Public schools are not being harmed by school choice. It is that simple.

I will now quickly move to the last issue, the financial impact on public schools. There is a myth out there that I am sure you're going to hear, and which you heard today. Oh, Cleveland takes $15 million away from the public schools. It comes straight out of the budget. There is a myth that vouchers in school choice and tax credit drain money from public schools.

Again, these programs have been studied in terms of their financial impact — Milwaukee, Cleveland, Florida, Maine, Vermont, as well as Arizona. In Milwaukee, which Brother Bob will talk more about, in ten years of the choice program spending, actual spending in Milwaukee public schools has gone from $604 million to $968 million.

Quickly, let us think about Indianapolis, if you live here. When I came in 1995, I think the budget was $375 million. Does anyone know what it is now? It has easily doubled since that time. So, whether question of causation is there, the fact is that urban public school districts like Milwaukee are just simply doing what the rest of the nation is. They are getting a lot more money. There is no way you can make the argument that vouchers are taking money away when you are doubling your budget every year. Also, per-pupil spending is up from $6,064 to $9,400 in Milwaukee.

What are the most important things? If the program were eliminated and 10,000 students had to go back into the public schools in Milwaukee, the cost is estimated to be at $70 million of added operating expense every year and $70 million for new facilities. So, there is another burden. In fact, one could make the argument that vouchers are saving Milwaukee money.

In Cleveland, it is the same thing. Since the start of the program in 1996, general operating expenses for Cleveland public schools have risen from $559 million to $662 million. Per-pupil spending is up from $7,900 to about $8,800. It is the same thing in Florida. In Florida since the start of the program, schools identified its families received more than $331 million.

Now, quickly, to back up the saving money, I will go to the Maine and Vermont study that Houston Baptist did. We talked about how schools where the competition is greater have a test score increase. Well, let us just take for a second the assumption that money makes a difference. What would it cost in Maine and Vermont to actually buy that test score increase? What it would cost the states of Maine and Vermont to buy that increase in test results, which happens for free because of competition, is $909 per student per year, or $300 million extra per year. So, Maine and Vermont are saving a lot of money for their states.

So, I guess the question, before we quickly turn to Danny and Bob for their comments – I have been talking a lot

about the details, what are the current programs. They will tell you a lot more about the human stories and the actual details because I do not have as large a grasp as either of them.

What do we know? All of the opponents' misstatements so far have been answered and corrected. They have said parents do not make good decisions. Well, guess what. Parents in voucher programs make good decisions; they are happier and more involved. School choice does not work — guess what. Children are doing better. They are happier. Public schools don't improve; they are going to be harmed — public schools are getting better and responding to competition. But money is going to be drained; we are going to take money away — no, financially public schools have not been harmed by choice. In fact, in many states, including Arizona and Minnesota where there are tax credits, they have been substantially benefited by the introduction of choice. And now we know that school choice is legal. It is constitutional by what I consider a five-person majority.

The question is what is next. This is important because where do we go from here? The opponents of choice, in my opinion, are exposed. All of their misstatements have been answered, rebutted and corrected. They are going to keep coming up with them and we are going to keep rebutting them. But they have nowhere to run and nowhere to hide, as the old song goes.

Well, what is left? What is left is the one tool that they've been using that we have not yet challenged, and that is raw power. That is something they have been using over and over behind the scenes to defeat school choice initiatives all over the country. They will be exposed for what their self-interest is, and the power that lies behind that self-interest, the amount of money that lies behind that self-interest.

The other thing I need to say about what will happen next is that this fight will be in states, where that power will be exercised by opponents of school choice. I will also say that I believe that the closer and closer we get, the more we build on these issues like approving school choice work, the fighting is going to get dirtier and dirtier.

The only thing I can say to that in the end is that my task as a proponent of vouchers — I would not speak for Brother Bob — is to meet strength with strength. This is about raw power, who has it and who does not, and how we are going to ensure that those who do not exercise the same power that many of us take for granted in education are enabled to make that same choice, whether they do a good job or not.

So, those are my comments on the outcomes and inputs of voucher programs and where to go next. Danny, why don't you tell us about the Washington Scholarship Fund and the real side of this issue.

MR. LaBRY: You bet. Dick Komer made a very interesting comment earlier, and I have had the privilege of hearing this reinforced several times. But, in talking about one of the reasons that the Supreme Court took the case was that this time, it had some very real implications. There were 4,300 kids in an obviously failing school system that were going to be impacted by their decision. And that made a difference on the decision to go ahead and take the case and make a ruling on it. Oftentimes, we talk about the statistics and policy studies, and we have got all kinds of posturing and positioning that goes on. But one of the things that we need to remember is the families that are actually going through this, the families that are in need. They are often kind of taken out of the equation in some of these larger discussions.

Before I introduce you to those, there was also the comment made earlier that these families are — the mothers and grandmothers and aunts and uncles are "dysfunctional." One of our speakers earlier, Mr. Stern, made that comment. I want you to keep that in mind. His description is "dysfunctional." I have a problem with a lot of the labels that are applied to a lot of the children that are coming out of the public schools looking for our help, and I would like you to keep a couple other words in mind. I want you to keep the words "disciplined," "committed," and "dedicated," instead of dysfunctional.

There was also a comment made earlier — and I forget who made this one — but there was an insinuation that it is coincidental that the amount of the scholarships or vouchers in Cleveland were right about the same as the Catholic school tuition. I get hit with this a lot that you are working with the Archdiocese and all this is a big conspiracy and it is all about getting more kids in the Archdiocese.

Well, right after I came on board with the Washington Scholarship Fund, there was a pretty intense discussion going on about raising the amount of our scholarships again. And let me characterize our board for you. Number one, nobody on our board is wearing a collar. I have Jewish on my board; we have Protestants on our board; we have Catholics on our board; we have people who do not declare a denomination on our board.

The decision that was going around the table about how to set some of the amounts of these scholarships had a lot more to do with the needs of the families, the rates of tuition that were going up, and also how much we could actually fundraise from the private community that was within the area.

I have been there for a year and a half and I have never had a formal meeting with the Archdiocese or the Association of Christian Schools International or anybody else. We have set it based on the needs of the families and what the market is demanding out of the tuition being increased. It is what you would expect. So, no bishops, no cardinals, no ruler-toting nuns — just some committed community people.

Let me read for you a couple of letters, to really get to know the families that are in these programs, these are actual letters. These are not scripted letters. This is not a fundraising ploy, where we give somebody a letter and say can you

Engage

handwrite this for us. These are parents who are actually writing these letters.

This is from Carmen Ali. She has a son in our program. She says, "If it wasn't for the help you give, it would really be hard for me to keep [Jovan] in Holy Name. I applied for the scholarship because I was truly fed up with the public school system. Jovan has grown up socially and academically wise. He was having a very hard time with the work, but now that he is at Holy Name, the teachers spend more time helping and tutoring. He gets along better with the other children. He is a lot happier child. I am presently working two jobs to keep my son in the school, but it is worth every hour I put in." And again, that is Ms. Ali and her sons.

Patricia McCoy — "WSF has made the lives of my grandchildren meaningful. The financial support received has alleviated much stress in trying to provide a stable environment for three children. My grandchildren's parents are not in the home. Therefore, there are some emotional problems that exist. But with the caring extending family and Christian education these children receive, it has helped them grow academically and emotionally as well. I expect with the stable foundation that has been created through St. Anthony's School and your generosity, their future is very bright. This year, because of budget constraints, I have to pay their book fees in advance. This, of course, is a budget item that I had not anticipated. After reworking my personal budget several times, I found a way to take care of the financial obligation. I continue to pray for the sponsors who support the mission of WSF so that other parents can receive this gift as well."

And one of her grandchildren, Ashley J., also said, "My name is Ashley Jasmine Byrd, a fifth grade student at St. Anthony's School. I am doing well in math. Math is my most difficult subject. My math teacher has been providing tutoring, which has helped me become more proficient in my math skills. I'd like to thank WSF for their support in helping to provide a quality Christian education for my brothers and I." Again, that is another real family that is benefiting from this.

Another young lady, Lena — "Thank you for helping me get a better education. I love my school and all my teachers. Please continue to support the Washington Scholarship Fund because it helps kids like me get more out of life."

Her mother writes, "By being blessed to have this scholarship, it has made it possible to send my children to a smaller school that can provide better attention and a more positive environment. I applied for the scholarship because I was unable to pay the full tuition with my income. The Washington Scholarship Fund has helped me to feel at ease by sending my children to private school versus a large public school. Lena has begun to come out of her shy shell and be more open in classroom participation, and her school has a good computer lab and science lab."

You are starting to see some characteristics there that really have come out in some of the studies and stuff. We had one, the grandmother talking about the way she moved her personal budget around. This mother talking about wanting a small class instead of large classes — these kind of reflect a lot of the findings that have been there.

This one is from Estella Aralono, who is a single mother in our program. "Thank you for all your help. Without your support, my daughter would not be in the school that she is in right now. I am a single mother, and it is difficult, or rather impossible, for me alone to have my daughter in a private school. My daughter is a very talented girl and she likes school. From the bottom of my heart, I give you sincerest thanks, and may God bless you and all the people who have made a wonderful deed of helping low-income families."

Any time we talk about the program, we try to put our focus back on the customers, the families that we are actually there helping. It is a very mission-oriented approach, and that is what you see in a lot of the private scholarship programs that are around. And you find the same characteristics in the families that are using publicly funded funds. These are not families that are slamming the public school system. I think one of them referenced that it was a bad public school situation. Most of them just recognize that they do not have the types of opportunities that they would like for their children to have and they are looking for a better environment to place their children in. They are all motivated by different things.

There are a lot of others from which you will hear safety and a lot of the other issues. As a matter of fact, in the Harvard studies, and our particular one in Washington, D.C., and one that they did nationwide for Children's Scholarship Fund, when you look at the reasons that these families are choosing the schools they do, the top reasons had to do with academic quality, location, discipline and safety of the school. Religious reasons fell underneath all those other reasons.

I think between the national one and Washington, D.C., we had a few that switched position there. But the primary reason that they are choosing these environments, and oftentimes they are faith-based environments, is not particularly for the religious instruction. It has a lot more to do with the current situation they are in and then recognizing that they are not getting a solid education, and they are looking for a better environment for their children.

Of the 1,300 students that the Washington Scholarship Fund currently supports — and it was mentioned earlier, our children are spread out at about 130 different schools; it's actually 131 — 130 private schools and one public school. We actually have one family that wanted to go to a D.C. public school, a magnet school that has an out-of-boundary tuition option.

This family relocated so that they were outside of the District but still within one of those surrounding counties, and so they were able to use the out-of-boundary tuition option to put their children in – it is called the Duke Ellington School for the Performing Arts. And anybody familiar with D.C. knows that it is one of the top-rated schools and one of the sought-after schools in D.C. But for this family, the only way they could get in was by paying tuition to be there. And so, I always throw that little caveat in, that again it is about empowering the family to make a choice, not just trying to position the public schools

against the private schools.

Our average scholarship last year for K-12 was $1,545. The average tuition being paid between all the children in all those schools was $3,816. So, a lot of the opponents often say that the vouchers are too small to make any difference. You heard one lady I am going to go back to — I do not look at it as dysfunctional here; I look at it as disciplined and committed.

One lady was talking about the second job that she works in order to pay the rest of that tuition, to pay the book fees and the other expenses that go along. With that spread and what we provide as a scholarship and what is still there in tuition, which does not include book fees, uniforms and the other things — even our families — the average adjusted gross income is $22,326. These are the families that we are talking about.

They are still paying out of pocket between $2,000 and $3,000, even with the scholarship assistance, in order to be in the environments they are in. When you look at the discretionary income that these families, typically that is about all the discretionary income they have. They are so disciplined and committed to this that they are putting almost their entire discretionary income toward the future of their children.

If you look at the breakdown of our students, it is kind of what is expected and what you see across the country. Sixty-five percent of them end up in parochial schools. We have 17 percent in other Protestant faith-based schools. Seven percent are in independent schools. Eight percent are in other preparatory schools, like those types of schools. And three percent are in Islamic schools. Again, the families are empowered to choose. We get hit a lot because 65 percent of your kids are in Catholic schools. Let me give you another statistic to go with that. Of the 65 percent of our families that choose a parochial school environment, almost 70 percent of them are Baptists. They are going to the schools because the schools — again, go back to what the research has shown us — for academic quality, location, safety and discipline, all above religion. They are going to those schools because these are the schools that haven't abandoned their neighborhoods. They are there. It is the location factor.

We have had many people tell us that they feel welcome in these schools. They feel wanted. It is a self-esteem issue. In the public school system, they are labeled with words like dysfunctional or learning-disabled or all the other words that are out there. When they come into the private schools, they are expected to succeed. We hear this over and over — somebody finally believed in my daughter in my son and their grades start to come up. That is the warm and fuzzy side of it. And I know that these are not the formal, scholarly research sides of it and we love to tell those stories first. But when you look at the research that Robert was talking about earlier, the scholarly side supports exactly what we are seeing from the informal interactions and the informal information that we gather from our families.

When you look at the reading and math scores in the study. We brought some copies. This is the second-year study that covers Dayton, New York and Washington, D.C." The third-year results that were just released were released in a book. It is a little bit more expensive to distribute so we were not able to bring enough of those for everybody.

When you look at the results that they are finding, our students in Washington, D.C. were scoring above their peers by six percentile points the first year. The second year, they were up to nine percentile points. Our third-year results, again, were full disclosure, especially since I'm in a room full of lawyers — the third-year results for D.C. were inconclusive. One of the reasons that they were inconclusive, which the researchers point to, is D.C., unlike Dayton in New York, we have a blossoming charter school movement that is going on in D.C.

When the studies started, there were only three or four charter schools. Now, 16 percent — and next year they say it will be close to 20 percent of the D.C. population — goes to charter schools. Of our control group in our study, of the students that received scholarships and began going to private schools, 17 percent of them have now been enrolled in charter schools. Of the public school control group — these were students that did not receive a scholarship and remained in the public schools — 24 percent of them are now in a charter school. So, from a research control environment, there were too many of the sample that the researchers lost in order to make those results.

But when you take Washington and Dayton and New York together, again with students of all the same types of background, the same controlled environments, the math and reading scores showed a gain of six national percentile points. For those of you who are not in the education world, and I always ask for this too, it is like what does "six national percentile points" mean? It is about a 20-percent gain in academic achievement over the students that are in public school. These are students, too; not just general students in public school. Each of these studies was done so that these were students in public school that applied for a private school scholarship. They had the same motivations and interests that the scholarship students did. They just weren't selected in the random lottery. So, you have a very equal group of students that are being compared here.

When you look at the academic quality, 56 percent of the private school parents are very satisfied with the academic quality of their schools, compared to 17 percent of the public school parents saying that they were very satisfied. In addition to the testing that went on with the students, there were focus groups and surveys that went on with the parents, so these were all actual surveys from the parents.

Parent involvement — 88 percent of scholarship parents reported discussing experiences at school with their children, while only 64 percent of the public school parents reported doing the same. Fifty-eight percent of scholarship parents reported helping on math and reading not related to homework, compared to only 37 percent of the public schools.

Sixty-five percent of the scholarship parents regularly worked on homework with their children, compared to 52 percent of the public school parents. So the statement of the vouchers and the scholarships are also getting the parents more involved — again, when you listen, it is not dysfunctional. The other adjectives that I shared with you are reflected in this.

The environment — students who attended private schools experienced significantly fewer problems, such as fighting, cheating, property destruction, racial conflict and truancy. Only 32 percent of private school parents reported fighting as a serious problem in their school; 32 percent of private school compared to 63 percent of public school students. Twenty-two percent of private school parents claim that the destruction of school property was a serious problem. Public school parents — 42 percent. Again, the environments that they are looking for, discipline and safety, are reflected in this.

Class sizes — class sizes were not significantly different. But according to the reports, of parents participating in all three of the cities, private schools had on average 172 students fewer, so the average class size in private schools was 20. The average in public schools was 23.

The interesting thing that the researchers did not ask that we kind of talked about was the teacher to student ratios, and not just teachers – it is not always the qualified teacher. A lot of the private schools have a teacher aide that is in the classroom, so you actually have two adults for 20 kids versus one adult for 23 or more kids. New York had some very interesting situations because some of their public schools actually had more than 40 children in a classroom.

Parent-school communication — private school parents were 20 percent more likely to receive a newsletter than public school, which rose only 14 percent.

And the last thing I will share with you, the big parent satisfaction issue, for the Washington program, 81 percent of the parents gave their private school a grade of A or B, compared to only 60 percent of the public school parents. None of the private school parents reported their schools having a D or F, whereas 11 percent of the public school parents did. Again, the parent satisfaction is a key trigger there because when it comes to being more involved in the child's education, the more communication with the school — all those are big factors in what is going on.

So, that gives you a nice snapshot of the families that we are talking about. These are the families that are basically told that you do not have the right to decide where your child is going to go. We are going to decide for you. But even with low-income parents with an average income around $22,000, they are disciplined and they are functional enough not only to make the decision but to make it work.

BROTHER SMITH: I know we are getting close to the end of the afternoon and the program, so I will be very brief in my remarks in order to leave you some time for questions.

If you were anything like me, as you listened to some of the speakers this morning, you had to beat back the urge to get up from your seat, jump on the stage and strangle some of them.

I just kept shaking my head saying, you guys ought to be ashamed of yourselves because either you are pushing and promoting a bunch of misinformation or you are flat-out lying. Whichever it is, they are both wrong because you ought to know better.

I think back to the early 1980s when our country and the rest of the world was being educated by Archbishop Desmond Tutu about the apartheid and the terrible things in South Africa, and how, after many of the people who wanted to keep the status quo could not win on the law, they started attacking him personally. I remember one time watching him on television and, with great emotion, saying, "what is this Tutu-bashing?" And as I sat there this morning, I said to myself – what is this religion bashing, and in particular, this Catholic bashing?

There is a certain Governor Hunt who has famously gone around the country saying that the people being helped in Milwaukee are not, in fact, poor inner-city kids but are these white suburban families. He is flat-out lying and he knows he is lying. He has been told that he is lying. First of all, you have to be a resident of the City of Milwaukee to get a voucher. Second, you have to be 125 percent of the federal poverty level. And third, if those white suburban kids are getting the vouchers, guess who certifies their eligibility? The State Department of Public Instruction.

So, who is telling the truth?

People have to remember that in 1998 when Milwaukee's program to allow religious schools to participate was told by the U.S. Supreme Court that it was constitutional, that our State Department of Public Instruction superintendent got on national news and first of all said "all of us in public education need to take a moment to mourn this tragic decision." And secondly, "watch now all of the David Koresh and Wiccan schools pop up." It is four years later; there are no Koresh schools, no Wiccan schools, no devil schools.

This man, by law, was supposed to administer the voucher program. So, any success in Milwaukee has been done against hostility, against great and powerful forces, and against a tremendous amount of money. The People for the American Way made no secret, and in fact made it very public, that they were setting up an office in Milwaukee with one goal: to dismantle the choice program. Before the last election year, the NEA at its national convention had our guy who used to run the White House and his second-in-command speak. And they taxed all of their membership $5 each for one purpose — to defeat vouchers.

So, against all of this, in Milwaukee we have fought day by day by day. But you look at the growth of our program

from 1990, of 1,500 kids to almost 11,000 today. There is every type of school participating, including, against what some of our earlier speakers said, the Yeshiva School, a Jewish school, the Clara Mohammed School, a Muslim school, and everybody else. The system works. Giving the parents the choice works.

The thing, though, that troubles me, and Cleveland is going to have to deal with it — these guys play for keeps. They are serious, they take no prisoners, and they are not above lying. They start lying on a local level — they do it nationally, and then the whole mob jumps on you. But they will also deal with you locally and one of the things we have fought in Milwaukee is the over-regulation. I heard some question about that being a fear. You know, you would be a fool not to fear people attempting to regulate you, but you would also be a fool to back off of it.

Now, I get amused by these guys. It was no accident when the headmaster earlier spoke up about the Title 1 program and he said we get to pick the teachers. The first thing the panelsit said was, we will sue you. I laughed and I thought, look around the room. You have got 90 percent of the people here who are attorneys; who do you think you are threatening?

But to the headmaster — and these guys know whenever they say lawsuit, people run. Now, there are many heroes to talk about, but Milwaukee succeeded because first of all, it was the business community that stood up and said we have had enough incompetence. One of the business leaders who said because over 50 percent of 100,000 MPS graduates are drop-outs and the less than 50 percent who graduate, graduate with an average grade of a D+, we are raising an army of illiterates. The business community said, that is it. We have helped public schools for years. We will now put our weight toward voucher schools.

The second thing was the Bradley Foundation. You know, this thing about the Catholics and one of the myths was that President Kennedy had a deal with Pope Paul VI to get vouchers through in this country, and they are still proliferating that myth.

The truth of the matter is that if the opponents want to blame anybody for the Catholics being involved, do you know who is responsible? He said his name; John Witte. Back in 1992, John Witte was hired by the Department of Public Instruction to evaluate the choice program in Milwaukee. He called a certain Catholic school in Milwaukee and said I would like to come and visit you.

The school said we are not in the choice program. He said I know but your kids demographically fit the profile. So, John spent two days there and at the end of his visit said, you know, you run a great program; you ought to apply for the choice program. And the school said, well, we are a Catholic school. And John said, but you are on the eligibility list. Now, either he was lying or they wanted a test case. The school applied. A week later, it was accepted, and that same day both major newspapers had headlines, "Messmer Accepted into Choice Program."

For two years, Messmer fought alone with no help from the Archdiocese. The only help came from the Bradley Foundation. And it was after a visit to the White House that Governor Thompson said I want to write you into my budget. Messmer said, no, do not write us in; write in all religious schools. The Archdiocese still did not become a player. It was the Baptists and the Lutherans, etc. So to say that the Catholics were behind it — no. The Catholics — like we do many times, we come in like the police after the crime is over.

That is what happened in Milwaukee. John Witte was the guy, and I was the person he spoke to. That is how it happened.

Now, I wish I could tell you that yesterday's ruling will mean that choice will be secure and without interference. It is not going to happen. These folks will not give up. This is too important. It really is not about kids, and that is the tragedy, if there is anything. The first time I wanted to strangle one of these guys this morning was when he implied that Catholics and others would be co-opted because of money, that you are going to go feeding at this public trough. First of all, the public trough does not belong to the man in the moon. That money was put there by all of the people, who have a right to it. But second, to imply that religious schools participate only to get money is highly insulting, but more it is wrong. If you use his own information about the level of the voucher, the voucher does not cover, in Cleveland, the cost of education. Somebody else is subsidizing those 70 or 80 percent non-Catholic kids or others. Those are the people, the alumni — the public. And this has never been about money.

The way we defeated the opponents is because they never talked about kids. They talked about benefits, they talked about separation of church and state, they talked about all kinds of other issues that have nothing to do with people.

The future is going to be a battle. Just five weeks ago, we had a case in Milwaukee where a junior kid, a choice student, honor roll student, had destroyed a textbook. And our policy is that if you destroy the property of our school, you pay for it. Her mother said, she is a choice kid and she does not have to pay for it. We said, oh, no, she has to pay for it. So, she refused; we refused to give her the child's report card. They called Madison and some young whipper-snapper jumped on our registrar threatening to sue him and left me a very cryptic message on my voicemail, that you had better give her that report card and on and on. I was out of town for about a week, but when I got back, I got the message and said a few things to myself in my office first — and called him and said, young man, number one, do not ever threaten me because if you do that you had better kill me. Number two, don't you dare try to tell us that if someone destroys our property, choice student or not, that they are not responsible for paying for it. And I said, you yourself in public schools withhold transcripts and diplomas

for a $5 gym fee, and you are telling me that we cannot require her to replace the book. He replied, well, let me check with my boss. An hour later — oh, we made a mistake; we settled that issue. Yeah, yeah — she's got to replace the book. But do not ever, ever back down from these folks.

The last thing that I'll say — I say it not simply because you are hosting this event — is that one of the true important moments in Milwaukee came when attorneys from the Federalist Society, pro bono, worked to defend individual schools and the schools collectively. For a long time, the opponents of vouchers felt that they could threaten us, that they could push us around, and that we really did not know what we were doing.

When Messmer applied for choice initially, they were right. We had no clue what we were dealing with. We did not know the power of the NEA or People for the American Way. We did not know their tactics. When the Federalist lawyers came in, the game changed. At every moment the opponents went after us, there was someone there to defend us, and that has changed the landscape in Milwaukee — so much so. I suspect the battle will move now to Cleveland. And while the Federalists did not get what I perceive to be the correct amount of due for this battle, know that it has not gone unseen by a number of us. The work of this organization here, Milwaukee, and other places around the country is very valuable. And the fact that now in some of the confirmation hearings, you have people asking. . . have you been. . . were you ever a member of — tells you that you made it.

Thank you very much, and that is the Milwaukee story.

MR. ENLOW: On behalf of Leonard, who had to catch his flight to Washington, I want to thank everybody for coming. If you have a few burning questions – it is about five minutes before three – I would like to give you the opportunity to ask questions of the panel but I know it is getting late and many folks have to travel. I want to thank everybody for coming to Indianapolis. The Federalist Society is very grateful. And I would like to thank our panelists.

If you have got some questions, we will take them very quickly or we will adjourn.

AUDIENCE PARTICIPANT: I am not a member of the Federalist Society, and you might want to strangle them, but I want to thank the Federalist Society for inviting the panelists they invited. It was extremely helpful to me to hear what they had to say. Without them there, I think this really would not have been as impressive a performance.

SPEAKER: Thank you. We are the Federalist Society for Law and Public Policy Studies. That is why we try to bring all the viewpoints here and get the issues out on the table, so we can have a really strong intellectual debate about it.

I thank all of you for coming, and hope to have you all back here in Indianapolis sometime again soon for one of our programs.

Thank you.

* This panel was part of a conference sponsored by the Federalist Society's Religious Liberties Practice Group and Indianapolis Lawyers Chapter. It was held on June 28, 2002 in Indianapolis, Indiana.