PROFESSIONAL RESPONSIBILITY

WHEN FREE SPEECH AND ETHICAL STANDARDS COLLIDE

Professor Steve Lubet, *Northwestern University Law School*
Professor David McGowan, *University of Minnesota Law School*
Hon. A. Raymond Randolph, *U.S. Court of Appeals, D.C. Circuit*
Hon. Harold See, *Supreme Court of Alabama*
Professor Richard Painter, *University of Illinois Law School (moderator)*

PROFESSOR PAINTER: This is the Professional Responsibility Practice Group panel. My name is Richard Painter. I am a professor at the University of Illinois College of Law.

We are going to be talking today about, when free speech and ethical standards collide, with a focus on the judiciary. A great part, although not all, of our discussion today is going to focus on elections of state judges. But we will also have some discussion of the confirmation procedures for federal nominees and other issues relevant to the judiciary.

One of the areas I teach besides legal ethics is securities regulation. One of the topics I discuss with my securities class is the sharp difference between the standards that apply in the election of a board of directors of a corporation, which is an election with proxy solicitations and so forth, and, a political election. The election of a board of directors of a corporation is very strictly regulated with respect to what you can say and what you cannot say, and a federal agency, the Securities Exchange Commission, is looking over your shoulder. If you say something about the opposing candidate who is running for the board of directors of a corporation and it turns out not to be true, you can be liable under Section 14(a) of the 1934 Act.

Compare this with the free rein that is given to participants in the electoral process when candidates are running for office. Occasionally there are cases like the *Long Island Lighting* case, where constitutional issues arise out of a political election going on side by side with a proxy fight — in that case over the Long Island Lighting Company's involvement in nuclear power – but this does not happen very often.

Which rules should govern the restrictions on free speech in the corporate proxy context, or the primacy of First Amendment free speech rights that we see in the political arena? The election of judges at the state court level is in some ways in a position between the election of political officials and these other elections, where we see some restrictions on the First Amendment. Another such area is labor union elections.

One of the issues we are going to be exploring here, particularly in Justice See's discussion, is whether the election of judges should be bound by the same First
Amendment free speech rights that we see in the political arena. Or are judges like corporate directors or labor union officials, somehow special, such that maybe we should rein in the First Amendment rights that people are normally entitled to in a political election.

We will explore that topic and several others. I want to allow plenty of time for audience discussion after our discussion, so we are going to limit each speaker to, approximately ten minutes, maybe a little more — 12.

We are going to lead off with Judge Raymond Randolph of the United States Court of Appeals, District of Columbia Circuit, and then jump to Justice Harold See from the Alabama Supreme Court, and then move in with our two law professors, Professor David McGowan from the University of Minnesota and Professor Steven Lubet from Northwestern.

And so, with that, I will begin with Judge Randolph.

JUDGE RANDOLPH: I will not talk about elections of judges; I am not familiar with that. But I will talk about federal judges.

I have always been a great believer in robust, uninhibited, unfettered freedom of speech for most everyone except judges. I think it would be a disaster — in fact, I'll go further; I think it would be the end of the republic as we know it if federal judges had the same freedom of speech that all of you do.

Consider what things would be like if judges regularly gave public addresses on any matters that might suit their fancy at the particular moment, or appeared frequently as critics or guests on radio and television programs, or contributed regular op-ed pieces or wrote in magazines. Now, I'm aware of at least one federal judge, a judge on the Ninth Circuit, (where else?) who thinks that that would be just dandy.

He believes — let me quote so I don't get it out of context — "Judges should engage in vigorous and unfettered judicial speech because judicial silence denies the public an opportunity to hear from an entire branch of government." Ignore the hubris, if you can.

The remark is altogether silly anyway. Federal judges are not silent; far from it. Each day, the federal judiciary pours out an avalanche of judicial opinions and orders and memoranda and so on and so forth. It took 70 years for

Fed 2.d to reach a thousand volumes. In Fed 3.d we are going to break that milestone in record time.

Of course, the public, the great mass of people, doesn't bother to read very much of the judiciary's product. To paraphrase Winston Churchill, never in history have so many judges been saying so much to so few.

If federal judges, at least, were free to write or speak on anything that sparked their interest, if we're suddenly permitted to express our views anywhere, any time on any subject, I have no doubt that some judges would grab their robes and run to the broadcast studios.

So, try to imagine, if you can, a weekly television show, or even a weekly radio show, with a lot of federal judges sitting around talking about the controversies of the day, from a judicial perspective, of course. Do you have trouble imagining that? I do. And the reason I have trouble is because that is totally out of the tradition of the judiciary, at least in this country. And there's a good reason for that.

A visibly impartial and independent judiciary is essential to a free society. Yet such a judiciary requires an element of remoteness in the judges and in their work. If judges were free to chatter publicly about any subject that struck their fancy, and to reveal that we, in fact, have views, then I think respect for the law would collapse.

These reasons and others are why the federal judiciary has rules against judges speaking at certain times, in certain settings and about certain subjects, with the notable exception of the honorarium ban, which I'll get to in a moment.

These are really not rules at all, by the way. They're ethical prescriptions. And ethics has to do with what you should do and what you should not do. The model rules on professional responsibility that all practicing lawyers are subject to are not ethical rules at all. They are now framed as what you must do and what you must not do.

An ethical rule is one that talks in terms of "oughts" and "ought nots. " I had no idea before I was appointed how many "ought nots" there are in the code of conduct for federal judges. Federal judges should not make speeches for political candidates or support publicly or oppose candidates. No bumper stickers on your car; no posters in your front yard. We shouldn't contribute to political campaigns, although that's a form of speech under *Buckley v. Valeo*.

We should not speak about the merits of pending or impending cases. An impending case is one that we're fairly certain is going to arise, so I won't talk about the constitutionality of the military tribunals that try the terrorists because we are pretty sure that is going to happen; at least, we hope so.

And there are other things. I won't go into all the details, but there are other things that we can and cannot do. Now, I do not begrudge these ethical restrictions on my speaking. It's the price that judges pay for the privilege of wearing a black gown with floppy sleeves, and I pay it gladly. I am happy about these restrictions because I think they keep the federal judiciary where it should be.

But there's one particular restriction that I do resent. And it's a restriction placed on us by Congress — not an ethical rule about what you should or should not do, but an absolute flat prohibition enforced by the Attorney General of the United States. I refer to the Honorarium Ban enacted in 1989 as part of the Ethics in Government Act. Let me give you some background.

1989 just happened to be the year that Jim Wright, the Speaker of the House, resigned. Speaker Wright and other congressmen were very creative in inventing ways to get money from lobbyists. So creative, in fact, that the body over which Speaker Wright presided became known as the "house that honoraria built. "

When this was exposed, Congress knew it had to something. But Congress didn't want to pass a rule barring only its members from accepting honoraria — heaven forbid. So they swept in the executive branch and the judicial branch.

The 1989 law prohibited anyone in the three branches from receiving payment for any speech or any article or any appearance. Book royalties, by the way, were excluded in deference to Judge Posner.

And you could get paid for teaching. I can give a speech at a law school and I can get paid. The ban on honoraria for other payments for speaking and writing amounted to a ban on speech itself. Why, you may ask.

Well, Dr. Samuel Johnson famously said, "No man but a blockhead ever wrote, except for money."

And a former President of ours has amended that to say, "No man but a blockhead gave a public speech, except for money."

I won't go so far because — and I'd better not because I'm not getting paid for this address.

Anyway, a year ago the Senate voted to repeal the honorarium ban for federal judges. Rumor had it that the Chief Justice of the United States had engineered the repeal as a way to get some more money for us poor federal judges. He's a good man, the Chief.

But then somebody tipped the press, and the hue and cry went out. The nightly talk shows or, as my wife likes to call them, the shouting shows, had a field day. Geraldo was firmly against repealing the ban. So was Alan Dershowitz and most everybody else who appeared. Editorials in the *Washington Post* and the *New York Times* huffed and puffed. This was "a scheme to weaken judicial ethics radically," according to the *Times*.

"The provision, if enacted, could only erode public confidence in the integrity of the courts," said the *Post*. In the end, the House refused to follow the Senate's lead, and repeal of the ban died in conference. The Republic was saved.

Well, I watched all this with some amusement. I found it an amazing controversy but I judiciously kept

quiet, until now. I think the time has come to let you all in on a little secret. I found the controversy amazing because, in fact, there is no statutory ban on honoraria for federal judges, and there hasn't been one for five years. Let me explain.

In 1995, the Supreme Court struck down the ban as applied to all executive branch employees under the grade of GS-16. The Justice Department, which enforces the law, wondered whether it should enforce the ban with respect to everybody above GS-15. What about judges? What about the legislative branch?

A 1996 opinion of the Office of Legal Counsel, the OLC, binding in the Justice Department, determined that the law was not severable. And so, according to the Office of Legal Counsel and hence the Justice Department , the honorarium ban was kaput. It fell entirely with the Supreme Court's NTEU[1] opinion. This development in 1996 escaped the attention of nearly everyone, including the press. But it did not escape the attention of the Clinton Administration.

Two days after the OLC opinion issued, the Administration, through the Office of Government Ethics, advised members of the executive branch that they could now accept honoraria. This was in 1996. Hooray for the First Amendment. Later in 1996, the Administration completely eliminated from its government ethics regulations any reference to honoraria.

Given the OLC opinion, there will never be a case pending or impending about the legality of the honorarium ban. And in my remaining few minutes, I am, therefore, free to give you my opinion about it without violating ethics. And here it is.

As applied to federal judges, the honorarium ban was flat-out unconstitutional.

In the NTEU case, the Supreme Court struck the ban down because Congress had no evidence of misconduct relating to honoraria by any of the vast number of federal employees below the grade of GS-16. Congress had no such evidence with respect to federal judges either, and for good reason. Congressmen accepted honoraria from lobbyists or from foundations or from corporations, and then went back to the Hill and voted for legislation that affected them. A federal judge couldn't do that. We have rules against that, and we have a law against it.

If I gave a speech to the Ford Foundation and accepted $1,000 for it, I couldn't turn around and sit on a case involving the Ford Foundation, according to our rules. Federal judges are honest, and very few of us are stupid. Compliance with the ethical rules is taken very, very seriously.

The way the ban worked was ridiculous anyway. If I were giving this talk at a law school, I could get paid for it. But if I give the same talk before a group of lawyers, I can't get paid for it. The ban contained an exception. If I gave a series of lectures, I could get paid; if I wrote a series of articles, I could get paid. But if I write one article, no pay. This seems to me totally counterproductive because the ban encouraged moonlighting, which is what it was supposed to prevent.

Please understand, it's not that I want to line my pocket with speaking fees or that I even could. But writing an article takes time. And so does preparing a speech. I am fond of Mark Twain statement that "an impromptu speech is not worth the paper it's written on."

This is extra work, above and beyond my judicial duties. For two centuries, we had no ban on judges accepting honoraria. There was absolutely no evidence of abuse whatsoever.

I will end on this note. With respect to the federal judiciary, the story of the honorarium ban, from its enactment to its very quiet demise, shows the wisdom, I think, of Eric Sevareid's insight. "In government," he said, "the main cause of problems is solutions."

PROFESSOR PAINTER: Thank you very much, Judge. And now we will turn to Justice See.

JUSTICE SEE: Thank you. It is good to be here with you again. I love to come to these Federalist Society meetings. I enjoy the open and vigorous debate that we have, and the insights.

I thought for a minute that I was going to get out of this bind I always find myself in when I speak about judicial speech. I find it peculiar that the burden seems to fall on one who defends the First Amendment, freedom of speech, when it seems to me that the burden ought to be the other way.

I thought for a moment that Judge Randolph was going to put me in a position where I could, in fact, respond. But I think, bottom line, he and I are pretty much in agreement. We believe in ethical standards. We believe judges ought to follow those ethical standards. But the question is, should there be some regulatory body that tells Judge Randolph or any other judge what part of his speech is permissible and what part is not; what he may speak about and what me may not?

How do we address these questions of application of the First Amendment in a judicial context? I am going to speak about it in the context of the election of judges, although it seems to me that, with a little adjustment, the same principles apply when we are talking about an appointed judiciary where judges are asked questions and they respond or do not respond to those questions.

Can a rational public choose to elect its judges? I think a rational public can choose to elect its judges, that is, if the public is capable of selecting people who are qualified to be judges. Are citizens capable of making a decision that one person or another is better able to serve as a judge? If citizens are not capable of making such a decision, then I do not

know how a democratic republic is going to select its judges; if citizens are not capable of evaluating the judicial choices made by others on their behalf, then there is no representative means by which a judicial selection can be made.

I believe citizens are capable of determining who is not performing the judicial function in the way they believe the judicial function should be performed. And, in fact, I think we frequently see that. Judges are usually simply re-elected, but, if there is a problem, then the public has the power, through either contested election or retention election, to say, "No, we don't think you're doing the job right, and so we're going to remove you." If we believe that a rational public could believe that it is capable of making such an evaluation, then it seems to me we have to concede that a rational public could choose to have an elective system. And, if there is such an elective system, we then must address how the First Amendment ought to apply to that method of selection.

Now, let me make another quick point. There are three branches of government, and one of those three is the judicial branch. Since the judicial branch is a branch of the government, speech about the selection of someone in the judicial branch or the retention of someone in the judicial branch is core political speech.

I don't know how we can say that the legislature is political because it's part of the government and the executive is political because it's part of the government, but the judiciary is not political. No, it is part of our constitutional system of government, and speech about the selection of the members of that branch of our government, it seems to me, is core political speech. If that is the case, then there must be some compelling state interest to restrict the campaign speech of judges.

At this point in my presentation, I ought to be able to sit down and wait for someone to show me the compelling state interest that justifies restrictions on judges' campaign speech. What we are really talking about here is a regulatory agency, some sort of state or federal agency, some regulatory body that will say this speech is permissible or this speech is not permissible.

The argument I hear — generally, it's no more than this — is, well, judges are different. Yes, judges are different from public service commissioners. And public service commissioners are different from state legislators. State legislators in their turn are different from governors, and governors from Presidents. Yes, judges are different, but, in what way are judges different that justify regulating their political speech?

Here are the three arguments I hear most frequently. The first argument is that we need public confidence in the judiciary, because without it the system will fail. I think that is true, but I think it is also true of the executive branch and the legislative branch. It is true of democratic governments. It is probably true of all governments, but it is particularly true of democratic governments that if we do not have faith — public confidence — in the executive branch, the system is going to fail. If we do not have public confidence in the legislative branch, the system is going to fail. But, I don't hear a lot of arguments that we, therefore, ought to regulate the campaign speech of legislators or of governors or of Presidents. We may not like some of the speech, but we say that it is core political speech and that the answer to the speech we do not like is more speech, not less speech. So, simply to say that we need public confidence in the judiciary does not justify the restriction of campaign speech.

I have two other observations about the argument that political speech destroys necessary public confidence in the judiciary. My first observation is that the argument, once you cut away its fancy garb, is that we can have public confidence in our judiciary only if people don't know what judges are doing. That is, we cannot have the public informed; we cannot have vigorous debate. We cannot have someone pointing out problems, because people will lose confidence in our judiciary.

I have a problem with the idea that public ignorance is the foundation upon which the strength of our government rests. It seems to me that it is better to solve the problems, to address the accusations, and to base public confidence on what is really there. The argument that the public must not be exposed to political speech is a Whited Sepulcher argument, that with a coat of whitewash on the sepulcher no one will see the bones. But, the bones are there, either way.

My second observation on the public-confidence argument is that, if we are to improve the system, we must be able to talk about it. The people who can talk about it are the people who are involved in it. If we restrict speech so that no one can say anything that might cause someone to question whether the judicial branch is perfect, then we will not make it better. In fact, we will be giving it the opportunity to become worse.

That is the first argument, that to preserve public confidence in the judiciary we can't have people talking in their campaigns about such things as the courts and the law, or their records or those of their opponents. It is the argument against political speech.

The second argument is that the public does not know enough about the candidates. We must restrict campaign speech because, in the presence of public ignorance about the candidates, one candidate could say something that would be misleading. Candidates must not be allowed to say those things.

As with the first argument, I have a little trouble seeing the difference between judicial races and those for legislative or executive offices. Tell me who your state treasurer is. Name your public service commissioners. Do you know who is on your school board? Few citizens know these officials, yet for some reason we think it is acceptable to elect them.

Why is it, then, that because we aren't intimately familiar with all of the candidates in a judicial election, we should prohibit those candidates from talking about themselves or talking about their opponents? Isn't the answer to this absence of information, more speech, not less? And, certainly, the answer is not to have some government entity, however selected, determine which speech the public should hear and which speech it should not.

The final argument is that the public doesn't understand the judicial function. Citizens know enough about what legislators do to make intelligent decisions about who should be a legislator. They know enough about what governors do to make decisions about that, or attorney general, or public service commissioner, but citizens don't understand what judges do. Therefore, we cannot let candidates say things that might be misleading to the public, that might sound good but don't really have to do with the judicial office.

First, speaking as someone who's run for office three times, I don't think the argument is true. Maybe Alabamians are smarter than folks around the rest of the country, but I find that voters understand the judicial function better than they understand the legislative function or the executive function. So, I reject the argument. But even if it is true that voters don't understand what judges are supposed to do, what is the answer? Cut off speech? Not let a candidate talk about what judges are supposed to do and what they aren't supposed to do, what judges are doing and aren't doing? Isn't the argument, instead, for more speech? Shouldn't there be more speech in order to counter that ignorance? These are the arguments I hear. They do not make a lot of sense to me. It seems to me that we are talking about core political speech, and that more information is preferable to less.

In my opinion, there are some things that judges should or should not do in order to do their jobs right. There are a lot of ethical restrictions that we ought to abide by. I don't believe judges should announce in advance positions on cases that are pending before them.

But, the question is what to do if a judge does speak on some topic, like Judge Randolph's topic of whether a ban on honoraria for judges is appropriate? Should there be a governmental body that will decide whether the judge's speech undermines public confidence in the judiciary and, therefore, should be punished? Or, should the answer depend on the problem that has been created and the solution to that problem? If a judge comments on a case in a way that indicates bias, then shouldn't that judge be precluded from ruling on that case? Well, that is the law on recusal. Doesn't that solve that problem?

It is true that a judge could comment on everything and not have to do any work, but if a judge is not doing his job, in an elected judiciary the people can get rid of him.

The question, it seems to me, ought to be approached by asking, what is the problem we are trying to solve? And, is there a way to solve that problem without having some regulatory body determine which speech is appropriate and which speech is not?

PROFESSOR PAINTER: Thank you, Justice See. We will now turn it over to Professor David McGowan.

PROFESSOR McGOWAN: Thank you, Richard.

I think the problem that we are addressing is fundamentally a problem of reconciling two values that, in the context of selecting judges, come in conflict with each other. Those values are accountability, on the one hand, and independence, on the other. Those two do conflict. You are independent from things; you are accountable to things. And what we are thinking about is the manner of choosing the best way of navigating and negotiating that tension.

I think I come down closer to Judge Randolph's view of the republic falling than perhaps Justice See's. But let me pose, initially, the criteria that have to govern the choices that are made and why I think this an ethical issue at all, which is somewhat against the current stream. I am going to talk, by the way, about federal nominations rather than state elections.

Justice See was asking, if the courts are a political branch, how is it that they are different from other political branches? That calls to my mind an article by Professor Lon Fuller of the Harvard Law School — the late Professor Fuller — who asked, how is it that adjudication is different from other forms of social ordering? How is it different from elections? How is it different from negotiation? What is it that makes litigation unique? Why don't we just have elections over guilt?

The answer Professor Fuller suggested was that in adjudication the parties have a unique interest. They participate directly in the process through the presentation of evidence and reasoned elaboration of evidence to an argument in their favor. We do not do that in the executive branch; we do not do that in the legislative branch.

It follows that, as Professor Fuller stated, the criterion for evaluating any rule, not just rules pertaining to nominations, whatever heightens the significance of this participation lifts adjudication towards its optimum expression. Whatever destroys the meaning of that participation, the participation of the parties, destroys the integrity of adjudication itself.

The difference between courts, on the one hand, and the executive and legislative branches, on the other, is the same reason we worry about this issue when we do not worry about senatorial confirmation of executive branch nominees in the same way, even though General Hamilton — as I like to remind people that he is — wrote in Federalist 78 that

he didn't need to worry about the appointment process when writing about judges because that was the same as for all other officers, and he'd already talked about that in 76 and 77. That's not right.

The President has people working for the President, responsible to the President, and for whose conduct the President will be held accountable to the electorate. We do not want any of that for judges. And even though the process is the same, the values are very different. Independence is a value and it needs to be attended to. So, what I want to talk about are the ethical considerations facing nominees to the federal bench in what has become a very contentious process, and there is no reason to think it's going to get any less contentious.

My favorite method, by the way, just to let you know where I would come out, was suggested by Dr. Franklin at the Constitutional Convention. There were various proposals, and he forwarded what he called the Scottish method, which makes me like it right off the bat, in which, as he put it, "The nomination proceeded from the lawyers who always selected the ablest of the profession, in order to get rid of him and share his practice among themselves."

Now, this solves the information problem.

Competitors know better than anyone else who really does a good job. It aligns self-interest and selection of the most stable. It is actually the perfect example. Alas, we can not do that.

Of late, many people have come, to think of federal nomination processes as sort of extra-legal. This is largely a legacy, at least in my generation, perhaps to the Carswell nomination, but most specifically, to Judge Bork's experience. Professor Monihan, shortly after that experience, wrote that the entire appointments process is best understood as largely beyond the operation of norms of legal right and wrong. It instead involves mainly questions of prudence, judgment and politics.

And I commend to the attention of anyone who is seriously interested in ethics and the pre-commitment problem the Souter Confirmation Hearings because it was mooted there. Senator Simpson raised in the testimony of Kate Michaelman and Fay Waddleton the ABA Canon of Judicial Ethics. I don't know why he didn't go for Conduct for United States Judges. He went for the ABA. The witnesses were saying they wanted an absolute commitment on abortion rights, and Senator Simpson raised the Canon near the end of the testimony.

There was an exchange where Senator Biden asked Ms. Waddleton, "Do you want a specific answer on *Roe*? Are you demanding that we reject unless we get pre-commitment on *Roe*?"

And she alluded to the Canons.

Senator Biden said, excuse me; let me interrupt you there.

Senator Simpson, God bless him, notwithstanding reading the Canons of Ethics. If he applied the Canons of Ethics to what was said here, clearly Judge Souter has breached them.

Brown v. Board? Oh, yes, non-controversial. Commerce clause? Oh, yes, non-controversial. That was 1990. *McCollough*? Oh yes, non-controversial. *Roe*? It might come before the court.

The interesting thing to me is not the substance of any of these issues. Opinions vary on that and I have no interest in getting into that. What interests me is the relative scorn the Canons received in the Hearing. They were treated as a rhetorical device. It was consistent with Professor Monihan's view that this was an extra-legal world.

Senator Biden said, "Please try not to be a lawyer's lawyer with me," which is exactly what I would like to see a little bit more of, is the lawyer's lawyer approach. Let me talk to you for just a brief period about how that would work. The first point is that there are both accountability considerations and independence considerations. The choice to place the nomination power in the President is an accountability choice. For most of the Constitutional Convention, the appointment power resided in the Senate. Late in the Convention, the Senate had come to be equalized. It, therefore, in Madison's view, represented states, not the people. And he argued for a shift of the appointment of a national officer to a national official. And that's consistent, but is an accountability function.

The Federalist 78, which the Federalist Society has as its motto, has the words of Alexander Hamilton beneath the portrait of James Madison. Sometimes I wonder.

It's all about the complete independence of the judiciary being necessary as a safeguard to liberty. Federalists 76 and 77 are about, in part at least, accountability, in which Hamilton says, "The possibility of rejection would be a strong motive of care in proposing. . . " Those two tensions are built into the structure.

So how do you navigate them? We value both; we have both. It is not irrational, as Justice See said, to expect accountability. In my state of Minnesota, formed shortly after, or at least in the strong presence of mind of the *Dred Scott* decision, accountability was a very meaningful concept to a large number of people.

I think that the way to navigate the tension is to return, first, to principles, to basics. What is it about courts that is unique? What is it about the judicial office that is unique? And, what is unique — I think that Professor Fuller is right — is the interest of litigants; not the interest of the public in general; not the interest of the National Abortion Rights Action League; not the interest of Operation Rescue — except insofar as they are litigants because that is what is distinctive about the mode.

So, what does that mean in practical nuts-and-bolts terms? I want to address specifically the pre-commitment problem. What if a nominee is actually asked to promise not to overrule a specific precedent and they should actually

make such a promise and say, I will be bound, I will never vote to overrule case N. Probably, you would consider that an ethical violation. Probably, you would reject them. First, you should just check them for a pulse. It's just unrealistic in our current world.

What we really have are three choices. We have a choice, if asked about one's views on a case, to say nothing; to discuss fully, completely and honestly what one's views are; or to do that on some issues but not others. What I want to suggest that either the first or the second option falls within the reasonable range of ethical behavior — and this is the "ought" sense Judge Randolph discussed —, in that it is consistent with Canon 2 of the Code of Conduct for U.S. Judges, taking that as a normative statement, rather than arguing with whether this is going to be the basis of discipline, which instructs judges to avoid impropriety and its appearance, and states that a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The first and the second do that, in my view, because they correspond to the values that are conflicting. Full discussion corresponds to accountability. A refusal to enter into discussion corresponds with independence. The third option is the one that bothers me. It bothers me because a willingness to state a position on uncontroversial issues, a willingness to pledge fealty to decisions that everybody supports, is a deviation from the principle of independence, from the value of independence. It is a deviation precisely because it is in the direction of the majority view. It is a deviation that is costless to a nominee in the sense that, I know no one will get mad at this; that is why it is safe for me to do it. That seems to me not to be what we are trying to foster, with Canons that say things like judges should be apart from and resistant to public clamor and pressure. Judges should comport themselves in a way that enhances the meaningfulness of the parties' participation.

Picking and choosing in that respect seems to me to send the worst possible signal, which is, if I am a party looking at this person, I will deviate from the norm of independence when it is in my self-interest, when it is costless to me. When there is controversy, when there are people clamoring for me to be rejected based on what I might say, I will refuse to speak because that is also in my self-interest.

That is perhaps the most unsettling message that one can derive. It is also probably the most practical approach. I will show that I am in touch with popular sentiment and, therefore, not a dangerous person by deviating in favor of the majority, and then I will show that I am a careful and prudent person by not committing myself.

I do not contend that the mix-and-match is unethical in any strict enforceability sense. I do content that of the three available options, it is the one least to be preferred and the one that does the least to advance either of the goals, either of the values at stake in the nomination process. But rules of ethics are rules of reason, and they need to be applied in context, with an eye toward some practicality. So, let me talk about the other two.

When would you choose silence, which might call to mind, for example, Justice Scalia's Confirmation Hearings, as opposed to a full discussion? The criteria, I think, are the same. In the context of a nomination, which would include things like promises during a Presidential campaign, which would include things like the qualifications of the nominee, are they such that there is every reason to believe that this person was chosen because they were supremely qualified as opposed to political agreement? To the degree that the context and facts of a nomination suggest that litigants have cause to worry, then probably accountability is a more important consideration and full discussion is preferable.

I do not mean to imply that Judge Bork, by being the only person in recent memory courageous enough to enter onto a full and complete discussion, did anything wrong. His publication record warranted that in the sense that he wanted to explain himself, and he did.

I remember distinctly; it was my first year in law school. I was at Berkley. We went to our Con Law class, and we all asked our professor, as first-years do, "professor, can you tell us what's going on in the hearings?" And my professor, being a good Berkley professor, said, "yes, it's a great instructive constitutional debate and Judge Bork is getting vastly the better of it." That was Willie Fletcher.

That context is relevant. However, if there are not facts, if there are not things that suggest to a prospective litigant, using sort of a hypothetical projection approach, that explanation and accountability deserves primary consideration, then it doesn't.

Judge Randolph mentioned Mark Twain. I'll choose another Mark Twain. "It's easier to stay out than to get out." If you enter in and start answering on some things but not others, you will end up with the kind of dialogue we had before with Judge Souter. If you don't, you can at least consistently, with the value of independence, say, I have acted ethically in the sense that my conduct in the hearing is upholding the value of supreme importance to the very essence of the judicial function, which is the evaluation of the proof and reasoned argument that the litigants present.

It is at least, I hope, something that you would consider. Thanks.

PROFESSOR PAINTER: Thank you very much, David. And now for Professor Steven Lubet of Northwestern.

PROFESSOR LUBET: It is a tremendous privilege for me to speak with you this afternoon — a very great privilege to share the dais with Judge Randolph and Justice See. It is an extraordinary coincidence that there would be two people on

this panel — although one, quite silent — from Illinois speaking on the subject of judicial ethics, a subject on which I have some insight. About 14 years ago, my coauthors and I published the first edition of our treatise on judicial ethics. And ever since then, about once a week, I get a telephone call from a judge, always wanting advice; never willing to pay.

The most interesting calls, the ones that really stay with me, are from the judges in Chicago. One of the very first calls came just about four weeks after the book came out. The phone rang and I picked it up and the voice at the other end said, "Professor, I got an ethical problem." I don't know how many of you are from Chicago, and I'm probably not getting the accent quite right, but this guy was, beyond question, from the 11th Ward.

If you closed your eyes, you could see the iridescent suit, the diamond pinky ring, the cigar. "Professor" — and nobody can say the word "Professor" with as much derision, scorn as a Chicago precinct captain. He says, "Professor, I got an ethical problem. What I want to know is, is it ethical to duke your rabbi?"

Well, it was immediately obvious to me that he did not want to show a John Wayne movie to a Hebrew clergyman.

But I'm from Chicago, so I knew what he was talking about. In Chicago political parlance, your rabbi is your political sponsor. There are actually other ethnic terms for the same phenomenon — but even here, I can't repeat them.

But your rabbi is your political sponsor, and duking your rabbi is giving him an unsolicited gift. It is like an homage or a St. Patrick's Day tribute. And there is no *quid pro quo*. It is not a bribe. It is going in the other direction. It is just kind of what you do if you are part of the machine. So, he said, is it ethical to duke your rabbi? And I didn't really have an answer.

I thought to myself, well, you obviously could not take the money, but can you give the money? Why would that be wrong? How does that deal with the deeper issues of moral philosophy — and then I thought, this guy doesn't want metaphysics. He's not interested in deontology. He just wanted an answer.

So, I said: "you're a judge; forget about it. You can't do it."

And he said, "Gee, thanks a lot, professor. I always figured ethics would come in handy for something someday."

I think that really is the watchword. Ethics really does come in handy. Ethics really does perform an instrumental role. It has an instrumental value in ordering the relationship between judges and the citizenry, even when it comes to judicial elections. Therefore, I'm going to take issue with my good friend, Harold See.

I do agree with Harold completely that the burden falls upon people who would impose restrictions on the speech. People who are in favor of wide open speech don't have the burden to meet, particularly when it comes to core political speech. And the burden, of course, is to demonstrate — in sort of hackneyed terms – a compelling state interest in any restriction. The people who would restrict speech must show that it is really absolutely necessary for a valid public purpose.

And I equally agree that the values that Justice See mentioned as justifications don't do the job. That's which is why he chose them, of course, advocate that he is.

JUSTICE SEE: Give me another one.

PROFESSOR LUBET: And there are a couple other values that also don't do the job. The need for civility and decorum in judicial elections — that's not adequate. The sort of generalized notion of the integrity of the judiciary — I'll concede that's not adequate. Certainly public confidence, as Justice See suggested, isn't adequate either. But there are yet other values that remain to be discussed.

So, when the statement is made, "well, I didn't give up my First Amendment rights when I decided to run for Judge," I would agree with Judge Randolph basically — and say, "oh, yes, you did." You did. We can surely agree on all sorts of First Amendment rights that are necessarily given up by judges, either in the context of judicial elections or otherwise. Some of those — for example, the endorsement of other candidates — are also core political rights.

I think we can be absolutely certain that if we had judges endorsing senatorial, gubernatorial, or Presidential candidates, that the legitimacy of the judiciary as a depoliticized branch of government would crumble. So, the fact that it is core speech does not get us everywhere that Justice See and others would want us to go.

And to make the case that judges are different, let me point out that, even when elected, judges are not "representative." That is, the job of the judge, once elected, is not to fulfill the will of the majority — not to keep promises; not to engage in constituent service; not to meet with constituents in town hall meetings or behind closed doors, or to listen to lobbyists, or to reward friends and punish enemies, or to change policy because there has been a change in Administration, or to distribute patronage to allies as an aspect of coalition building. All these aspects of political office are antithetical — indeed, I'd say subversive — of the idea of an independent judiciary.

And as to whether judges, because they are elected, are political, I am almost certain that if we read through the Federalist Papers, we would find a reference to the political departments of government by which the framers meant Congress and the Presidency, excluding the judiciary from the definition of the political departments.

Once on the bench, the duty of the judge, as Professor McGowan ably pointed out, is to do justice between the litigants. And that justice can't be subjected to a vote. We do not have elections about case outcomes. Now, does that justify all of the restrictions sometimes placed on judicial campaigns? It does not, and again, I would agree with Justice See.

There are really three types of restrictions that we have seen on judicial campaign speech. One is the so-called "false statements or misrepresentations" restriction. And I agree, that one has no standing at all. That problem can be remedied within the campaign. And the idea of disciplining candidates, as has been tried in Alabama and Georgia and Ohio, because they said things that weren't true, well, that's nonsense..

The second restriction is somewhat more viable, the so-called "statements on disputed legal issues," or the announce clause, as it's sometimes called in the literature. This one is tougher, of course, because you have judges signaling how they might rule and giving a general outline of their positions. Professor McGowan thinks that is all right, if you do it consistently. And I pretty much agree with that — so long as the statement is confined to what Professor Gillers calls the "major premise;" that is, the broader issue of the law.

The reason for this is that no matter what you think about the general outline of the law, every case comes forward on its own facts. One can even see someone as committed to a major premise, as Justice Scalia on abortion questions, voting for the pro-choice litigant on an issue such as standing or ripeness or jurisdiction or justiciability. In fact, I am certain that, somewhere along the line, Justice Scalia has voted to deny certiorari in abortion cases because he did not feel they were cert-worthy. So, there, you see, even a solid commitment to the general framework of law does not pre-judge, necessarily, the individual case.

But the third category, the "pledge or promise of conduct in office" is absolutely subversive of due process and judging because it commits the candidate to an outcome before hearing a case. And that is pernicious not only because it damages confidence in the judiciary, it's pernicious because it causes the denial of due process to the litigants. And it is pernicious for another reason as well — because these promises multiply each other. That is, if someone tells a lie about you, I can react by telling the truth, and they cancel each other out. But, if someone makes a promise — I'll cut your taxes; no, no, I'll cut your taxes even more — if someone makes a promise, the response is to make it worse, not to make it better.

So, my brief, then, is to argue in favor of this narrow restriction on speech in the course of judicial campaigns. I'm probably close to out of time, but I have a clever thing to say, so I'm going to finish with it. One of the objections often made to my position is that justices have views, judges have views, anyhow. So why not express them? We are better off knowing what the judge is thinking, than we are causing the judge to remain silent.

To this, I say, there are views, and there are views. And they don't spring fully formed from the forehead of Zeus. The problem with making promises in judicial campaigns is not the long-standing, firmly held, well-developed legal ideas that the candidate holds. Rather, the problems is created by questionnaires from interest groups that demand promises on a wide range of issues where there aren't pre-existing views.

You know, judges have views; why not say what they are? Well, judges have genitals, but we make them wear robes.

And there are just things better left unsaid. Maybe that was one of them.

PROFESSOR PAINTER: Thank you very much, Professor Lubet.

I guess I will break my silence first. A question, perhaps. Assuming, Steven, your premise here that there ought to be some narrow restrictions upon judicial speech, let me inquire of you and others in the room who might advocate such restrictions, at least in some context, one, who should be the decisionmaking body which sits in judgment on the judges? Should it be an official disciplinary commission of other judges, or simply the court of public opinion? And secondly, is it so easy to define the boundaries of this narrow restriction on free speech? Is there really a difference between the judicial equivalent, we might say, of a promise, "I will lower your taxes" and the statement "I absolutely am convinced your taxes are too high"?

PROFESSOR LUBET: I'm willing to defer to others, if they want to answer it. I've had my chance to speak. No? Okay.

As to who decides, every state, I think, by constitution now, has a constitutional body that is given authority to decide these issues. And Federalism is a perfect opportunity. A lot of people in the state can decide whether they want to have the issues addresses, and if it doesn't work, they can change it. So, I don't have a fixed opinion about that.

And of course, it's hard to decide what constitutes signaling and what constitutes promise, and there's a continuum. But this is what judges do all the time. And there are people in jail today who thought they were on the right side of the continuum and it turns out they were on the wrong side. And you know who put them there? Judges.

So, I'm not too sympathetic to the idea that judges will not be able to figure out what constitutes a promise and what does not. I mean, there are examples in the literature. You know, the person's running for county court judge and says no bail in drunk driving cases. I promise I will not grant bail in drunk driving cases. Well, that is a promise.

The judge who says, bail should not be easy to get in drunk driving cases, might be signaling an intention, might be going after the same voters. But I think it is a statement of a very different quality, and people charged with making that decision will have to make the decision.

PANELIST: How about the statement, I believe that it would be professionally irresponsible for a judge to grant bail in drunk driving cases?

PROFESSOR LUBET: You and I will be on the body. We'll hear the evidence. We'll consider the context. We'll listen to the arguments and we'll make a decision.

PANELIST: In the context of the federal judiciary, it is not very well known. There's a committee of the Judicial Conference called the Codes of Conduct Committee, which I sat on and was chairman of for a number of years. It is difficult to decide these issues.

There was one judge from every circuit in the United States on the committee. And we sit *en banc* and issue private rulings; somewhere in the neighborhood of 150 a year, very carefully-researched opinions using the professor's book. But it is just advice, and it is before the event; it is not adjudicating whether a speech was or was not permissible, or whether an article was or was not permissible.

Believe it or not, the federal judiciary is so conscious of the ethical restrictions that we would get hundreds of letters a year and hundreds of phone calls "Can I do this? Should I do that? Am I allowed to do this? Is this permissible?" And the idea behind it was that it was our own self-policing mechanism. Once again, it was not any separate independent body deciding whether judges were complying with the rules or not complying with them. Self-policing; I think it has worked very, very well. It has been in effect for about 30 years now.

PROFESSOR PAINTER: We will take questions from the floor, if there are any questions for the panel. Sir.

AUDIENCE PARTICIPANT: Clark Nealy from the Institute for Justice. A question for Judge Randolph. I am fascinated by your discussion of Congress's attempt to outlaw judicial honoraria, and I had a question that flows from that.

It seems to me that the real right that is at stake in that situation is not really so much a First Amendment right because Congress is not saying you are forbidden from going out and speaking, although there may be ethical canons about what you can speak about. It is just saying you cannot get paid for that activity.

And at the Institute for Justice, one of the areas that we litigate is economic liberty. I'll give you a comparison. We work in the transportation industry, or we represent clients in the transportation industry, and so they might be engaging in the constitutionally protected, the First Amendment associational activity of picking people up and riding around. As soon as they try to get paid for that, the state says, you can't do that without complying with all these regulations.

You mentioned earlier, that the fact that Congress had not a shred of evidence that there was any problem that needed solving made that law an outrage. Yet there isn't a shred of evidence that there are people, for instance, driving others around and getting paid for it creates any kind of problem. Congress doesn't have to have, or state legislature doesn't have to have a shred of evidence that there's any problem. Yet, they can interfere with the economic liberty of these people to do what they want to do.

Is there a distinction in your mind between forbidding judges from getting paid to speak without a shred of evidence before the legislative body on the one hand, and forbidding people, for example, from getting paid to drive other people around without a shred of legislative evidence on the other?

JUDGE RANDOLPH: Well, whether there's a distinction in my mind or not is really quite irrelevant. It's the Supreme Court's mind that matters. The Supreme Court has required, in *Edenfeld v. Fain* and the City of Cincinnati in *Bartnicki*, which came down last term, in the *NTEU* case that I mentioned, that before Congress passes a law that touches on First Amendment rights, it's got to have evidence that there's a problem existing.

A lot of this in the area you're talking about is what the court refers to as predictive judgments. And in that area, they've been much looser in terms of economic regulation and have been since, I guess, *Lochner* was overturned. So, the Supreme Court has drawn the distinction. I'm just following it.

PROFESSOR PAINTER: I believe that may go back to what I led into this with a discussion of proxy regulations. I think I have a panel coming up on this, the SEC infringing free speech. But regulation of commercial speech has been treated with a lot more deference than regulation of political speech and whether or not the distinction that we ought to have in the law is indeed one we have.

PROFESSOR LUBET: Can I comment just briefly on that? In one sense, what we're trying to do when we talk about the free speech aspect of this is isolate what, in a philosophy of language, you would call a performative utterance, a verbal act; words that we read as conduct. "I offer", "I accept", "Will you marry me?", "Yes". "Is this a real gold watch?" "Oh, sure." The fact that you're lying to somebody and committing fraud to 10,000 people does not make it different in its performative aspect than if you're doing it to one.

The problem is, exactly because there is this tension in the selection process between the judicial function which we ideally would like to be independent and various methods of accountability, what you're actually coming out with is this sort of hybrid instinct. What is performative? A promise to judge a certain way. The national commitment is a no-brainer violation for the reasons that we've talked about, but backing away from that point between comment and action, that is never going to be clear. It's just not. And it is in large part a social context question.

Am I kidding? If two people are standing together in front of a third person, one of them says, "Will you marry me?" The other says, "Yes." Are they married if they're on stage? You say no. If they're in a church, you probably say yes. If they're two men in a church, you probably say no. But then you think it might be a political protest. Thirty years ago, you wouldn't have thought that.

The context affects the way that you view these questions, and that's one of the reasons you're getting this feel-your-way-along impulse. It's not going to be easy.

JUSTICE SEE: Could I just follow up. It's related. Somehow, Steve and I arrive at very nearly the same position, having started at very different places. My argument is that we must specifically demonstrate what the problem is and why regulation of that speech is the answer to that problem. Steve mentioned those three types of restrictions on judicial speech, and I would agree with him on the three categories. I share the concern about what we mean when we talk about signaling, but I would note that what we mean by signaling really does matter when there is a governmental agency regulating political speech. And, it seems to me that there is a difference between that and making decisions about who goes to jail for fraud.

With respect to pledges or promises, remember, there's another possible answer, and this goes to the question of speech and conduct. The argument is, we should regulate the speech because the judge has made a promise, and heaven forbid that a judge do that. We could, instead, regulate the conduct. That is, the judge has made a promise; therefore, the judge may not sit in judgment on that case.

PROFESSOR PAINTER: Next question.

AUDIENCE PARTICIPANT: My name is Jim Bopp. I'm general counsel for the James Madison Center for Free Speech, and I've handled a few of these judicial canon cases.

I have a question for Professor McGowan. I wonder if what you're talking about when you talk about accountability, is part of it this concept, that judges in their role as judges have, I think, two roles. One is to be impartial with respect to the two litigants. But the other role is making policy. And that can be either done legitimately, where state courts, have constitutionally conferred power to develop the common-law and, in fact, then do regulate much of our conduct through the development and creation and change in law through the common-law.

And the other part, of course, I would consider illegitimate, which is the seizure of power, which, any number of federal and state courts have done over the years. But if we are going to have an election where the people have decided that they are entitled to select the policymakers that are going to occupy the judiciary, that they have both a prospective right to know the views generally of the candidates and retrospectively when they stand for reelection, that it's fair to discuss their record while in office.

PROFESSOR McGOWAN: Yeah, my comments were directed toward the federal side, which is in some sense easier for me because the mix of accountability and independence is very different in the federal context than it is in the state election context. State courts are courts of general jurisdiction. Your advisory opinions are all over the map. You've got a lot of different considerations going in there.

My sense is that it is proper to put the parties and prospective parties first in any list of audiences because when you talk about the judicial power, those are the people who feel it. There are ripples, obviously. And there are ripples affecting everybody else. There are external effects, if you want to put it that way, to every decision.

If you do not put parties first, I am not entirely sure what you do. You talk about common-law adjudication and I agree with you. It's almost said that Congress makes law wholesale; judges, retail. You are going to get some sort of policymaking.

My view is that is inevitable but we should try, to the extent possible, to make it bottom-up, not top-down, meaning necessary to decide the case and, as a consequence of the decision between the parties before you, a by-product of the necessity of resolving an actual dispute, rather than the judges' exercise of will, as Hamilton would say. And to the

extent possible, we need to preserve that model in order to preserve the distinctive function of the judiciary. If you don't value, to the extent that you value the distinctiveness, the consideration of proof and argument, relatively less than accountability to the public at large on the theory that press then affects everyone, you are going to get a much more lenient set of restrictions; a much more speech-friendly, if you will, set of restrictions.

There's nothing as good as a promise that could be enforced by a private attorney general claim for damages. You want accountability? There you go.

California Business Professions Code Section 17.800 makes it an unfair business practice to do anything that's unfair.

PROFESSOR McGOWAN: That's literally true. You promised — we'll say this business and I can pass a law that gets this far. We'll say it's a business. You made a promise. You haven't kept it. I should be able to get damages from you. I relied on your promise. That is accountability.

If we're squeamish about that — and I hope we are — then you're still back to striking this balance. And I think the only way to do that is rank-order your audiences.

AUDIENCE PARTICIPANT: Hi. My name is Nathan Sales. My question is for the whole panel. Judge Randolph proposed that it's acceptable to restrict the speech-related activities of federal judges because you voluntarily accept those restrictions as a condition of joining the federal judiciary.

My question has to do with the applicability of the Unconstitutional Conditions doctrine, which of course holds that the government cannot condition the receipt of a benefit on the recipient's agreement to forego the exercise of a constitutional right. Does that principle have any applicability here?

JUDGE RANDOLPH: I don't think there is any such principle. For example, it's clear that the government could not pass a law, Congress could not pass a law, saying that women should have two children. Everybody knows that, right? But can Congress pass a law that says we're only going to give welfare benefits for up to two children? The answer is yes.

So the whole area of constitutional conditions is a muddle, as far as I'm concerned. If you found a principle, I'd like to talk to you afterwards because we get these cases.

I have no problem whatsoever with the conditions that are put on federal judges. We wouldn't have a judiciary that functions as well as it does not if it were not for these conditions. But remember they are largely self-imposed. It is not Congress passing laws requiring us to do things. The Code of Conduct has never been enacted into law. It is something that the judiciary imposes and can change at any minute. I think that's the best system of all.

And as I said before, I'm not bound to follow it. I could say, oh, to heck with it. I'm going to write an editorial in the *New York Times* criticizing the Supreme Court. Some Ninth Circuit judges have done just that.

JUSTICE SEE: I find myself with Judge Randolph and Professor Lubet. I have only a couple of minor disagreements with Professor McGowan. I think it is an excellent system that they have in the federal courts. What frightens me is, and you might contemplate it — imagine Congress setting up a body that would determine whether federal judges abided by their ethical standards, and would determine what those ethical standards mean. Imagine further that this regulatory body were empowered to remove a judge if it determined that the judge had not abided by those ethical standards as construed by the regulatory body. Would you then not have a body with enormous power over how federal judges decide their cases?

JUDGE RANDOLPH: It's clearly unconstitutional.

JUSTICE SEE: Oh, yes.

JUDGE RANDOLPH: I'm not supposed to say that.

JUSTICE SEE: But someone else might say it. But, what would that system be like? Is that a system that we would like to have, or do we prefer a system that assures First Amendment rights but encourages judges to act in a particular way, and, then, presumably, the President and the Senate look for candidates who will behave in that way.

The question is, can voters do the same thing? Can they look for judges who meet those requirements?

I guess that would be my disagreement with Professor McGowan. He seems to think — and it may be a wrong characterization, but I understand him to say **B** that voters really can't do that; they vote for the people who are representing them, who are giving them "patronage."

No, I think voters are going to vote for candidates for judicial office that they believe are going to behave like judges.

AUDIENCE PARTICIPANT: My name is Eric Jaffe. I'm an attorney here in Washington, D.C.

Talking primarily of the state court system, I agree with Professor McGowan that it depends upon how high you elevate the public function of judging over the litigant function of judging. And I think in the state court system, the elections do precisely that. It elevates the public component of the act of judging.

So limiting to that, I was curious about the distinction between signaling and promising. It seems to me that there is not much of a distinction, but in the example, the actual distinction boiled down to promising to do that which you cannot or should not do, or promising to do that which would be illegal if you did do it. And if that's the true distinction, then signaling it or promising it would be improper and should have some remedy — perhaps the recusal remedy, as Justice See suggested.

But it's not really a function of the strength of your signal that creates the problem. It's a function of what you are signaling.

So in the bail instance, if you say, "I promise to deny bail." What you are effectively saying is, "I refuse to consider the multiple factors that the law requires me to consider and I guarantee an answer regardless of what those factors say."

Whereas, if you say, "I think it's very important to keep criminals off the streets and so I will keep that in mind in bail considerations," you're not promising to ignore all other factors. You're just signaling your weighting of certain factors and the importance you place on one. And so I think that's true, perhaps, in any legal example.

"I promise to overrule *Roe v. Wade"* — well, *Roe* is a better example. "I promise to overrule the state analog of *Roe*, if and when that case properly comes before me." So long as the promise is that, which is not "I'm going to ignore all other legal restrictions upon me in order to get to that result," it seems to me that that's a perfectly legitimate promise, as much as saying, "I think our state analog of *Roe* was wrongly decided and should be overruled," whether you say that in a campaign speech or whether you say that in a dissent or whether you say that *in dicta*.

I don't see any significant distinctions, so I was wondering whether it's the strength of the signal versus the substance of the signal that is really the problem.

PANELIST: Well, the promises — all promises, I suppose, to decide cases in a specific way have that aspect of derogation of duty or illegality to them. That is, you do not have to be promising to do something illegal. It is the act of promising that makes it unjudicial. And when signaling morphs into promising is a question of fact that would be decided by whoever decides these things, if you ever get to the point of deciding them.

Your last point, Eric, though — what was it?

AUDIENCE PARTICIPANT: Oh, I'm sorry. The question was whether it matters whether the signal or the promise, however strong it may be, shows up in a campaign speech or —

PANELIST: Oh, yeah. A campaign speech with judicial opinion.

AUDIENCE PARTICIPANT: — *in dicta* or in a defense.

PANELIST: Yes. This is a very common argument, which is that people running for judge have frequently expressed their views previously. If they are judges, they have written opinions. And if they're not judges, maybe they've written op-eds or they've been in the legislature or, you know, they've written law review articles. There are huge numbers of law professors becoming state court judges all over the country.

It's almost a coup, I think, actually.

PANELIST: I'm not running.

PANELIST: Only the good ones. But I think it's really a false argument. It's, "we can't eliminate the problem entirely, so let's not eliminate it all." Of course, people running for judge have a background of expressed opinions, and voters will consider those things. None of those are in the nature of promises, and they are unavoidable.

But the campaign promise, is of a different nature and consequently falls under a different rule.

JUSTICE SEE: Could I just touch on that a little bit and ask you to answer this. Suppose I'm up for reelection and I know the state analog of *Roe v. Wade* is a big issue. And so, I drop a footnote in an opinion, in a dissent, unrelated to the text, saying I believe our analog of *Roe v. Wade* ought to be overruled. Now I've been able to publish that, but my opponent can't say anything about it?

PANELIST: That's right. Aren't you happy?

PANELIST: Like I was saying, there's a French proverb, which I would mangle in French, but the rough English translation is "perfect is the enemy of good." I agree. There's no perfect system that captures all the problems and there are means of evasion, always, in campaigns.

But perfect is the enemy of good. And I think a rule against promises of decisions is good.

PANELIST: Can I say one quick thing. Just, apropos. I would add opinions into this, and I have in mind I am 84 years old, lobbed into the middle of the 1992 Presidential election. I cannot stay here forever. The next President will pick my successor. Ring any bells?

You can use an opinion to politick. In my view, first and foremost, it's inconsistent with the values of the judicial office because it derogates from the litigants' interests. I'm talking about Justice Blackman's concurrence, obviously.

But the point is that this is not mathematics. I think the rules are derived from the values the institution has to advance their purposes. If you change the purposes of the institution, you are going to change the rule structure. That works both ways.

So, in part, when you decide these questions, you are deciding what kind of court you want to have. And in particular, I think with the use of opinions, using the parties as a soapbox is actually even worse than the other forms that people worry about.

PROFESSOR PAINTER: We have about three more minutes. The Secret Service is keeping everything on a very tight schedule because we're going to get things done in time for this evening's dinner.

The question here?

AUDIENCE PARTICIPANT: Actually, this may be a better topic for another day. You may need a whole new session.

Judge Randolph referred to Judge Posner's books, which are on quasi-legal subjects, things which may not come in front of him, but might. President Clinton's sex life or the sex life of people in general have been some of his subjects, just as the Chief Justice has written about historical controversies before the Supreme Court. On the other hand, Justice Douglas wrote books on his mountain climbing expeditions, which would not seem to have any effect on the court.

Does anyone see any difficulty raised by judges attempting to write on ostensibly unrelated subjects that aren't immediately connected to their work but might publicize themselves or might someday come back in the form of an issue that they will face?

JUDGE RANDOLPH: Well, they are beautiful examples you give because one of them, and I won't say which one, seems to me to be close to the line in violating the rule about speaking about the merits of a pending or impending case.

Justice Douglas' book was *Go East, Young Man*. I argued cases before Justice Douglas and I was hoping the title would be *Go West, Old Man*.

Justice Douglas's book was just historical. It has nothing to do with much of anything except his biography. And the Chief Justice's book is very general. And it's in a historical context.

There's a Canon that encourages us to write, speak and teach about the law, so I think most of those books were consistent with that. But there may have been a pending case involved in one if them and I wondered about how close to the line that was.

PANELIST: There was definitely an impending case involved in one of those books. I've written an article about that. You can find it on Lexis.

PROFESSOR PAINTER: With that, I am going to have to bring this to a close. So I thank our participants.

[1] *UNITED STATES V NATIONAL TREASURY EMPLOYEES UNION*, 513 US454(1995)

TELECOMMUNICATIONS & ELECTRONIC MEDIA

THE FCC VERSUS THE CONSTITUTION

Hon. Jane Mago, *General Counsel, Federal Communications Commission*
Mr. Randolph May, *Senior Fellow, Progress & Freedom Foundation*
Mr. Andrew Schwartzman, *Media Access Project*
Mr. Gregory Sidak, *American Enterprise Institute*
Hon. Stephen Williams, *U.S. Court of Appeals, D.C. Circuit (moderator)*

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

Greg, you are closest.

MR. SIDAK: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

HON. WILLIAMS: Okay. Thank you.

Randy.

MR. MAY: Thank you, Judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will wind up now. Thank you, Judge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

apply.

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

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

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

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

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

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

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

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

I could go on, but I won't.

HON. WILLIAMS: Thank you.

Jane. Wind up.

HON. MAGO: All right.

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

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

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

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

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

MR. SCHWARTZMAN: Something like that.

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

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

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

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

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

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

We also have due process issues that are raised constantly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HON. WILLIAMS: Clarifying question.

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

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

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

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

HON. WILLIAMS: All right. Questions. Yes?

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

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

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

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

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

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

MR. SIDAK: Can I add something to that?

HON. WILLIAMS: Sure.

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

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

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

HON. WILLIAMS: A call for volunteers.

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

HON. MAGO: One can only hope.

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

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

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

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

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

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

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

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

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

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

SPEAKER: Even reading these wonderful quotes?

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

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

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

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

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

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

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

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

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

HON. WILLIAMS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SIDAK: No.

PANELIST: Will you elaborate?

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

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

PANELIST: This is on the interference issue.

MR. SIDAK: On the interference issues, yes.

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

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

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

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

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

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

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

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

HON. WILLIAMS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

PANELIST: In the public interest.

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

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

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

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

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

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

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

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

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

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

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

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

SPEAKER: You didn't say when.

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

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

PANELIST: Fifty-one, I think.

MR. SIDAK: Fifty-one? Okay.

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

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