

**The Federalist Society for
Law and Public Policy**

Broadband Policy: One Year In

2009 National Lawyers Convention

Washington, D.C.

November 14, 2009

PANELISTS

Prof. Marvin Ammori, *University of Nebraska–Lincoln College of Law*

Hon. Robert M. McDowell, *Commissioner, Federal Communications Commission*

Hon. David M. McIntosh, *Partner, Mayer Brown Row & Maw, LLP*

Hon. Kyle E. McSlarrow, *President & CEO, National Cable & Telecommunications Association*

Prof. Gigi B. Sohn, *President and Founder, Public Knowledge*

MODERATOR

Hon. Jennifer W. Elrod, *United States Court of Appeals for the Fifth Circuit*

MR. TRAMONT: Good morning. I'd like to welcome everyone. I'm Brian Tramont, the managing partner of Wilkinson, Barker, Knauer and a member of the Executive Committee of the Telecommunications Section of the Federalist Society.

It is my honor this morning to introduce our moderator, Judge Jennifer Walker Elrod, who's a circuit judge on the United States Court of Appeals for the Fifth Circuit in Houston. Prior to her confirmation, Judge Elrod was appointed and twice elected judge of the 190th District Court of Harris County, Texas. She is a Phi Beta graduate of Baylor

University and graduated from Harvard Law School, where she pointed out that she was a member of the Federalist Society when it wasn't that cool to be a member of the Federalist Society.

Judge Elrod will be presiding over our discussion this morning and the initial remarks by Commissioner McDowell. So with that, I'll turn it over to Judge Elrod.

JUDGE ELROD: Good morning. Welcome to our discussion today. We're going to be discussing telecommunications, broadband, and net neutrality.

We're very pleased today to have, to make some opening remarks before we begin, FCC Commissioner Robert McDowell. Commissioner McDowell was first appointed to a seat on the FCC by President George W. Bush and unanimously confirmed by the Senate in 2006. He was reappointed by President Obama on June 25, 2009. Commissioner McDowell brings sixteen years of private sector experience in the communications industry to this position.

Immediately prior to joining the FCC, he was senior vice president for the Competitive Telecommunications Association, which represents competitive facilities-based telecommunications service providers and their supplier partners. Prior to that, he served as the executive vice president and general counsel of America's Carrier Telecommunications Association. He has received degrees from Duke University and the School of Law at the College of William and Mary.

We're delighted to have Commissioner McDowell make introductory remarks at this time.

COMMISSIONER McDOWELL: Thank you, your Honor, for that kind introduction. And many thanks to the Federalist Society for inviting me to appear at your convention today.

I don't know about you, but I'm here to pick up some much-needed CLE credit. I'm also here to listen to what promises to be a lively debate among our distinguished and quite capable panelists. Only lawyers could look forward to spending an otherwise lovely Saturday morning with other lawyers to discuss the finer details of "The Federal Government's Economic Role in Our Constitutional System." Being an attorney myself, I feel it is okay to poke fun at ourselves, whether that is politically correct or not. But I imagine some of you actually get to bill for your time spent here. In all seriousness, however, I wish I could spend more time listening to some of the fascinating panels you have produced at this convention, but we have too much going on at the FCC for me to be away from there for too long.

Next year may be one of the FCC's busiest ever. We are required by statute to review our media ownership rules every four years, and that quadrennial review must start in 2010. Concurrent with that, I expect that we will also examine our "localism" rules for broadcasters.

Additionally, the Stimulus Act¹ mandates that the Commission present to Congress a National Broadband Plan by February 17. We formalized our fact-and-opinion gathering with a Notice of Inquiry in April. Since then, our Broadband Plan team has been hungrily harvesting and consuming data of every imaginable kind through numerous workshops, hearings, public notices and other opportunities for public comment. In ninety-five days, it will be time to submit our concrete ideas to Congress—but who's counting?

I don't think it is an exaggeration to say that high-speed Internet connectivity is vital to our country's future. I can't think of any aspect of our society that is not affected by the Internet, either directly or indirectly. Even people who have no direct access to the 'Net feel its effects whether they realize it or not. Only fifteen years have passed since it was privatized. Not only is the Internet the fastest penetrating technology invented by humans, but after only a decade and a half, few of us can imagine an America without it.

Some say that the FCC's actions directly affect about one-sixth of our economy and indirectly affect forty percent. But considering that America's economy and culture increasingly ride on the rails of broadband, I posit to you this morning that what we do could influence nearly every aspect of our great nation. That is why it is so important not only to watch what we do at the FCC, but to commit yourself to becoming actively involved as well. We want to hear from you. As some have said before me, the world belongs to those who show up.

So please tell us what you think the Broadband Plan should look like. My preference is that it should not be heavy-handed industrial policy. It should remain flexible and iterative. I'm not sure that any part of our economy changes faster than the information, communications and technology sector, and the FCC's Plan should not restrict any positive and constructive developments that we cannot foresee today.

It is no secret that the past year and a half has been the worst period in eighty years to raise money for anything, let alone capital expenditures. Nonetheless, by some estimates, this year the telecommunications sector may spend over \$70 billion on new broadband infrastructure. That figure dwarfs any annual private or

¹ American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 6001(k), 123 Stat. 115 (2009).

public investment in broadband throughout the world. Even in this day and age when we discuss spending “trillions” of dollars without much thought or apprehension, \$70 billion is still a lot of money. In fact, depending on how fast we want broadband speeds to be in the future, what kind of facilities we want deployed and where we want them placed, the FCC’s Broadband Plan team estimates that broadband ubiquity in America could cost anywhere between \$20 billion and \$350 billion. Chairman Genachowski and I agree in our preference for those capital expenditures to come from the private sector. So the question that, hopefully, dovetails well into the theme of this convention is: How does the government provide incentives for such massive amounts of private sector investment? If the FCC’s October 1st hearing on capital formation in the broadband sector taught us only one thing, it was that one way to provide a *disincentive* for investment is to create regulatory uncertainty.

At this point, our work on the National Broadband Plan has been a bit overshadowed by the Notice of Proposed Rulemaking (NPRM) the Commission launched last month entitled “Preserving the Open Internet,” also known as our “net neutrality” NPRM. Although I dissented on the factual and legal predicates supporting the document, I concurred in opening a record to air the debate. It is important to keep an open mind in these important policy debates and to be a part of the process. At the end of a transparent proceeding that is designed to produce a deep and substantive record, it is my hope that all five of us will be moved only by the facts and law.

In the meantime, many questions swirl about this important item. Not being part of the debate on today’s panel but serving merely as an observer, I would love to hear good answers to them. Among them are:

- Is the Internet broken?
- If so, is the government the best tool to fix it?
- How has the factual landscape changed in the past two years since the federal government last examined this market, resulting in findings that no systemic market failure existed to warrant regulation in this space?
- Why aren’t long-standing, non-state-controlled collaborative Internet governance bodies the correct fora to address network management grievances?
- Is the government able to do better than the non-governmental bodies that have never failed to resolve a network management challenge?
- Can the FCC respond to cyber challenges in Internet time? Keep in mind that not one of the five current Commissioners is

an engineer and we are bound by constitutionally mandated legal procedures that consume great amounts of time.

- What would be the international implications of the U.S. expanding government's role into this area by reversing policies that have stood since the Clinton-Gore Administration? Will U.S. regulation spark an international chain reaction of Internet regulation?
- Would the rules, as proposed, unfairly distort the market to favor one kind of market player over another absent a showing of abuse of market power?

That's just a partial list of questions that come to mind. But since we are at a lawyers' convention, and I'm running out of time, let's zero in on some of the constitutional and legal questions.

First, for all of you fans of legal flow charts, it is always good to start with this one: Does the Commission have the statutory authority to act as proposed? Has Congress given the Commission express authority to act to regulate network management as envisioned by the proposed rules? The D.C. Circuit held in 2001 that administrative agencies have "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."² If the Commission has no direct authority to regulate broadband Internet service providers, its only option is to rely on its ancillary authority because the Commission has determined, after several market analyses, that broadband is an information service that should be unregulated.³ In this light, we would have to note that Congress has spoken on the issue of Internet regulation when it codified that the Internet should be "unfettered by Federal or State regulation."⁴ So if anything, Congress is urging regulatory restraint with that language, is it not?

² Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

³ See, e.g., In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853 (2005) (Wireline Broadband Order), *petition for review denied*, Time Warner Telecomm., Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

⁴ Communications Decency Act, 47 U.S.C. § 230(b)(2) (2006).

Additionally, the D.C. Circuit has told us that the exercise of ancillary authority is only appropriate when: “(1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁵ Although Internet services involve “interstate [and foreign] communication by wire and radio” and therefore fall into our general grant of jurisdiction, the next legal step we would have to take would be to establish that adoption of rules regarding Internet network management was “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁶ But as I have said before, I question, as a matter of law, whether Title II provisions, such as Sections 201(b) or 230(b) provide an ancillary hook sufficient to survive appeal. For instance, Section 201 imposes obligations on common carriers. But the Commission already has determined that broadband services, and the market in which they operate, are different from the old common carrier market to such a degree that they should be unregulated under Title I. Although the Supreme Court said in its *Brand X* decision that the Commission could still impose some degree of regulation on Internet access services even though it had classified them under Title I, the Court did not abandon its precedent on the limits of the agency’s ancillary authority.⁷ Yet in crafting a proposed nondiscrimination rule for the Internet, the NPRM ignores the well-established limitations on our Title II authority, under which we may police discrimination only when it is “unjust or unreasonable.”⁸ Can the Commission develop regulations that are more onerous than it is authorized to impose on common carriers under the specific provisions of Title II, and then foist them on currently unregulated information service providers without explicit Congressional authorization to do so? In other words, can the Commission create and impose a new and stricter regulatory regime on a class of providers that has flourished in the absence of regulation without having the benefit of standing on the solid legal foundation of a new legislative mandate?

Wouldn’t creating such a new and untested regulatory regime without Congressional authorization cause more uncertainty and not less, as advertised? And speaking of inevitable appellate litigation, how many years will it take to resolve these issues?

⁵ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

⁶ *Id.* (internal quotations omitted).

⁷ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁸ Communications Decency Act § 202(a).

Another question to ask is: What effect will a new regulatory framework have on the economics of the Internet ecosystem? As the Commission prepares its National Broadband Plan, it is becoming clearer that two of its conclusions could be: 1) We want broadband adoption to increase, in part, through affordable pricing; and that 2) the private sector will be urged to increase its investments in broadband infrastructure.

Investors of all sizes expect a return on their expenditures. Broadband service providers pay back their investors through the earnings they receive from their paying customers. In light of the historical fact that Title II restrictions on common carriers' discriminatory conduct are, in essence, economic regulations of rates, terms and conditions, how would the proposed rules affect broadband service providers' freedom to be flexible in their pricing?

As of today, broadband service providers can use any number of pricing methodologies to recover their costs. The most common way to charge for services is flat-rate pricing, also known as "all you can eat." But as application providers write new bandwidth intensive software that some consumers want but not others, an increasing number of diners at the flat-rate buffet are eating massive amounts more bandwidth than others. As the fairness and economic realities of this natural market evolution become clearer, broadband service providers must be able to retain the freedom to be flexible and creative in their pricing.

Historically, nondiscriminatory pricing was all about ensuring similarly situated consumers were treated the same and were charged the same amount. It has never meant that the minority of heavy users be subsidized by all other users. Some who advocate for new rules are also arguing against pricing freedom. They should be careful what they wish for. Economic regulation of Internet access could very well *increase* prices for consumers. Under a new nondiscrimination construct, if every consumer is to be treated the same regardless of usage, then all prices must rise to compensate for the costs imposed by heavy users. This is especially true for shared networks such as wireless and cable where consumers share bandwidth with their neighbors whether they know it or not. In short, the average broadband consumer would pay a higher rate to compensate for their neighbors who consume more bandwidth. Higher broadband prices? Would that possible result of new regulation not undermine our efforts to promote affordable broadband for all Americans?

With the small amount of time remaining, let me also touch on a couple of other issues that haven't been discussed much yet. One can't speak at a Federalist Society event without mentioning the Constitution. I'll start with the First Amendment, because it's first. Although the

standard of review may be lower than with individuals, corporations still have a protected right to speak under the First Amendment.⁹ Additionally, the Commission bears the burden of justifying any speech regulation it imposes on corporate entities, just as it does with individual citizens.¹⁰ In fact, the Supreme Court has held, “[S]peech does not lose its protection because of the corporate identity of the speaker.”¹¹ The level of constitutional scrutiny applicable to a net neutrality “nondiscrimination” mandate is a key question to be resolved. One could easily argue that strict scrutiny, the most exacting standard, should apply because the rule regulates speech exchanged on a privately managed broadband network.¹² In the context specifically of FCC actions, the Court’s view has been that, “precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”¹³

Yet even if the government could prevail upon a court to apply only the lesser “intermediate scrutiny” standard, the Commission still would have to prove that its burden on speech furthers an important state interest and is narrowly tailored to achieve that interest.¹⁴ Even that test requires that the Commission first demonstrate, with empirical evidence, the existence of an actual problem—and then show that the challenged speech regulation actually addresses it. For instance, the Supreme Court has held that “[m]ere speculation of harm does not constitute a compelling state interest.”¹⁵ The Court has gone on to say that “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and its restriction will in fact alleviate them to a material degree.”¹⁶ And the D.C. Circuit has told the FCC that the intermediate scrutiny standard is “more demanding” than the requirement of record evidence in the Administrative Procedure Act.¹⁷ In short, clear appellate precedent mandates that the Commission conduct a serious analysis proving that the harm is real before the agency adopts rules that restrict speech. In the past two years, both the FCC and Federal Trade Commission have

⁹ *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8, 16 (1986); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

¹⁰ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000).

¹¹ *Pacific Gas & Elec. Co.*, 475 U.S. at 16.

¹² *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*).

¹³ *Id.* at 642.

¹⁴ *See Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999).

¹⁵ *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 543 (1980).

¹⁶ *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

¹⁷ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002).

opened proceedings to examine the broadband market. In neither case did an agency determine that systemic market failure existed in the broadband space. So when faced with a First Amendment challenge to a net neutrality order shortly thereafter, could the Commission clear this high evidentiary bar?

In addition to First Amendment review, any new rules would likely face challenges under the Fifth Amendment. The Fifth Amendment's prohibition on the taking of private property for public use, without just compensation, extends to circumstances where "a regulation 'reaches a certain magnitude' in depriving an owner of the use of property."¹⁸ The D.C. Circuit has highlighted that, "[t]he Supreme Court has indicated that it will find a 'categorical' or *per se* taking [when] . . . regulations . . . result in 'permanent physical occupation of property'"¹⁹ Regulating management of privately owned and funded broadband networks, which were previously unregulated, could be deemed a permanent physical occupation of private property that rises to the level of a *per se* taking. Because a network's capacity is limited, mandating a right of access to others could amount to a "practical ouster of . . . possession" by the Commission.²⁰ Under a slightly different angle of the takings theory, such regulations could also be struck down based upon the significant economic effect on the network operator and its investment-backed expectations.²¹ As we go forward, we should be mindful of these potential Constitutional pitfalls.

Today I've tried to flag a few issues and arguments I am examining as part of our work on the National Broadband Plan and our "Open Internet" NPRM. I invite all parties to this debate to fill the record with detailed and substantive analyses of these, and other Constitutional, legal, economic, factual and public interest issues.

In the meantime, I truly hope that the Commission will seriously consider a different course—a course that does not carry with it the unforeseen liabilities new regulations are sure to bring. The FCC could forge a new partnership with the appropriate non-governmental collaborative Internet governance bodies that have worked flawlessly on these issues for years. Working together, we could collectively shine a bright light on allegations of anticompetitive conduct and work directly with the established Internet governance community to resolve

¹⁸ *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 878 (D.C. Cir. 1999) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

¹⁹ *Id.* at 879 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982)).

²⁰ *Loretto*, 458 U.S. at 427 (internal quotations omitted).

²¹ *Dist. Intown Props.*, 198 F.3d at 878–79.

controversies. This approach, coupled with strict enforcement of our antitrust laws, could very well provide the benefits sought by proponents of new rules without incurring the unexpected costs of a new regulatory regime. After all, this way of doing business has worked quite well thus far.

The Internet has flourished because of its loosely-knit, non-governmental, “bottom up” governance structure. So if it’s not broken, let’s not break it. In the meantime, the best antidote to potential anticompetitive behavior is more competition. Let’s hope that all future FCC policies encourage more competition in lieu of regulation and rationing.

Thank you again to the Federalist Society for inviting me to participate this morning. I look forward to hearing the debate among these talented panelists.

JUDGE ELROD: Thank you very much, Commissioner McDowell.

At this time, I’m going to introduce our panelists. Thereafter, they will have approximately five minutes to give opening remarks. We may have a couple of questions to the panelists after that, and then we want to get right into your questions. So we’re going to have very brief opening remarks from the panelists.

Our first panelist today is Kyle McSarrow. Kyle began his tenure as president and CEO of the National Cable and Telecommunications Association in 2005. In this role, he is the cable industry’s primary public policy advocate in Washington, D.C., and he represents the industry’s interests before Congress, the FCC, and the administration. He was appointed in 2007 to serve on the President’s National Security Telecommunications Advisory Committee. And prior to joining the NCTA, McSarrow served as the deputy secretary of the U.S. Department of Energy. He holds degrees from Cornell University and the University of Virginia School of Law, and he wanted me to specifically mention that he’s one of the founders of the UVA Fed-Soc chapter.

Our next panelist is Gigi Sohn. Gigi Sohn is President and Cofounder of Public Knowledge, a non-profit organization that addresses the public stake in the convergence of communications policy and intellectual property law. She is a frequent speaker and frequently quoted in the national media on issues of communications policy. She also serves as a senior adjunct fellow at the Silicon Flatiron Center for Law, Technology, and Entrepreneurship at the University of Colorado. She is also a senior fellow at the University of Melbourne faculty of law in the graduate studies program in Australia. What a great gig.

PROFESSOR SOHN: Long commute.

JUDGE ELROD: She holds degrees from Boston University College of Communications and a law degree from the University of Pennsylvania Law School. Thank you for being with us today.

Our next panelist is David McIntosh. Former Congressman David McIntosh is a partner at Mayer Brown, and he focuses his practice in the area of government affairs. His extensive government experience includes stints in both the Reagan and the first Bush administrations, as well as service in the United States House of Representatives. He has worked for a tax coalition on Alternative Minimum Tax reform, and during the Reagan administration, he served as Special Assistant to the Attorney General and as a special assistant to the President for domestic affairs. During the first Bush administration, he served as executive director of the President's Council on Competitiveness, and assistant to the vice president. He holds degrees from the University of Chicago Law School and Yale University. Thank you for being with us as well.

Our last panelist is Professor Marvin Ammori. He is the founding faculty member of the University of Nebraska Lincoln College of Law's Space and Telecom L.L.M. program. He is the former head policy lawyer of Free Press, which is a non-partisan media and Internet issue advocacy group. He is also a fellow at Yale and Georgetown Law, and he holds degrees from Michigan and Harvard Law School.

Let's give a warm welcome to our panelists before they make their opening statements.

Take it away, Kyle.

MR. McSLARROW: Okay. Mr. Commissioner—actually, I agree with you—I don't think I have to file an *ex parte* anyway.

Let me just say at the outset, it's been a long time since I've held myself out as a lawyer, unlike everybody else on this panel, so I'm going to come at this really from a marketplace and business perspective—although you can't, in this town, talk about anything without thinking about implications of policy on the business—and try to draw some strands from Commissioner McDowell's remarks together.

Imagine two worlds. The first world is a world where, after the commercialization of the Internet, people in a garage came up with something called an Internet browser and launched it, and changed the face of how we use the World Wide Web.

Telecommunications industries across the country started providing what was then dial-up Internet Service Provider (ISP) service. By the

year 2000, the cable industry led the way in terms of the rollout of broadband across America, matched, then, by the telephone companies with what was then DSL broadband service, and now with Verizon's FIOS service. It has been a time where the contribution to the economy of the Internet and commercialization of the Internet, became an extraordinary thing.

With the advent of broadband, something else took place, which is it affected how we interacted with each other. So, in addition to the selling of goods and services, we had something called a social networking site, and many other creative models that changed the way we interact with each other, how we influence policy, how we engage in public discourse.

All these things took place against a backdrop of market capitalization. Take Google, which went, again, from the proverbial guys in the garage, in the space of five years, to perhaps a larger market capitalization than the rest of the world combined. And that's to say nothing of all the other big applications providers who provide goods and services that every one of us in this room uses. In that world, imagine that the entire time, ISPs, Internet service providers, were unregulated. That's the world we have.

Imagine another world. Imagine a world where, after commercialization of the Internet—when I say “commercialization,” I'm talking about the transfer from the origins of Defense Advanced Research Projects Agency (DARPA) and the original Internet to what we freely access and use today—and imagine a world where you had a bunch of toll roads where you had content providers and applications providers and ISPs who basically had gated communities you had to pay to be in. You couldn't access any services or content or applications that weren't provided by that ISP. They controlled everything you did.

You were not, unlike in World One, able to freely access every service, application, and content on the web to your heart's content. That is the world that is described by my friends Gigi and Marvin—this is sort of a serial debate that we've been having for three years; I hate going first. That world does not exist, but that is the world that's being described as speculative harm to justify why we need something called net neutrality regulation, which means many, many different things to many, many different people. But in essence, it is some variation of economic regulation over the pricing and marketing and services provided by Internet service providers to their customers.

I'm not going to take my full five minutes. My thesis statement, as it were, is simply that, for the reasons Rob identified, both in terms of statutory authority or the Constitution—it's been a long time since I've

even thought about the Administrative Procedures Act—but I do believe it still calls for comment, still calls for reasoned decision-making. There still has to be a problem that then is responded to by either the statute, the regulation, and then, when you layer on, on top, as a First Amendment speaker that we would call ourselves out as, all of the constitutional hurdles that ought to come to bear when you're talking about controlling, essentially the editorial decisions of cable operators or phone companies or any other Internet Service Provider, the bar is very high.

So when you balance the speculative harm to the consequences, but also the legal realities, this is a classic solution in search of a problem.

JUDGE ELROD: Would you like to respond?

PROFESSOR SOHN: Of course. But, I just want to say, first, thank you so much for inviting me to be here, and also just say, Commissioner McDowell, we all agreed; we only wanted to talk for five minutes. But you know, I could spend twenty-five minutes responding to your very provocative speech. I thought it was really terrific, and I really appreciate you being here.

I'm going to make three very quick points about why conservatives should like net neutrality, and then I want to address one or two things that Commissioner McDowell talked about. But before I do, let me describe what net neutrality is very briefly. I think it is simple, and the way folks like Kyle like to mess up the debate is by saying, well, it means different things to different people. I think it's actually quite simple, and—

JUDGE ELROD: I have to interrupt you, and you're such an experienced speaker that I know that it won't throw you off.

They've asked me to have you all move to the podium because they're having some sound system issue. So would you mind moving to the podium. I figure it wouldn't throw you off, so—

MR. McSLARROW: Do you want me to go again?

JUDGE ELROD: No, you don't get to go again. Absolutely not. Good try, though.

PROFESSOR SOHN: The problem of these podiums is that I'm five foot tall and the microphone is like poking my eye.

JUDGE ELROD: I'm right there with you.

PROFESSOR SOHN: So, let me explain what net neutrality is. First of all, net neutrality is not about regulating the Internet. I think that's really important. It's not about regulating the content, services, and applications that make up the Internet; it's about regulating the on-ramps, the ISPs that provide the on-ramps to the Internet, to ensure that they don't pick winners and losers.

We come from a world of broadcasting and cable-casting where the network owner gets to determine who wins and who loses. Cable operators determine who gets on the digital tier and, with the exception of broadcast channels, who gets on what channel; who gets Channel 500 as opposed to Channel 100. We all know about broadcasting and how *they* control content. The thing about net neutrality is it levels the playing field so the smallest business can compete with the largest media company in a way that their bits are carried. So it's not regulation of the Internet, it's regulation of the on-ramps, and that's important.

The other important thing to remember is that prior to 2005, in the *Brand X* case, these on-ramps were required to be nondiscriminatory. This was communications law from 1934. It was, if you provided the on-ramps in a communications system, you could not, for instance, say "okay, Kyle, we're going to give you the best quality phone call, but Gigi, we're going to make sure your phone call comes out fuzzy, or we're going to block your call." All users were treated equally. So the radical change is what happened in 2005, when the Supreme Court said, okay, FCC, you can un-regulate the on-ramps to the Internet. I think that's an important thing to remember.

My three very quick points about why conservatives should like net neutrality:

Number one, net neutrality promotes individual freedom. The founders of the Internet wanted the Internet to have the control at the ends. They wanted the user to be in control. They didn't want anybody in the middle to be in control. So again, it ensures that somebody who wants to start a business on eBay and make a living that way can compete against Nordstrom or Neiman Marcus. Neiman Marcus, under a net neutrality regime, can't pay the ISP to make sure that their website comes up faster or without jitter, as opposed to how the small eBay person might operate. So it really levels the playing field, and again, promotes individual freedom.

Secondly, it's a check on market power. Now we can have a debate, and we will, about whether the broadband market is competitive. I think, for the most part, we've got a regional duopoly in this country, telephone and cable. Obviously, that's not true in big cities like this.

Twenty percent of the country only has a choice of one broadband provider, and ten percent of the country has a choice of no broadband providers. But that, to me, is not the problem. We can debate about that. I think I'm right, but we can debate about that.

But what is not debatable is that each ISP has a termination monopoly. Now, what does that mean? That means that if I am a small eBay businessperson and I want to make sure all Comcast customers get equal access—"equal access" is not the right term—good-quality access to my business, the only way I can do that is through Comcast. I can't do that through AT&T; I can't do it through Verizon. That's what's really important.

If you want to reach the customers of a particular ISP, the only way to get there is through that ISP, and if that ISP decides to make sure that Neiman Marcus and Nordstrom bits have better quality of service than I do, I'm screwed. There's nothing I can do about this. There's no switch I can make. It would be up to the other person to make that switch. So even if there weren't high switching costs, and so on and so forth, it doesn't end the termination monopoly. It's very, very important.

The third, and I'm going to leave this for Marvin to talk about more, is, net neutrality is great for economic growth, and not just the economic growth of the applications providers. There's really no debate that Google has profited from an open Internet; Skype has profited; eBay; Yahoo. But also, it profits the networks as well, not only in that they have their own applications and their own content and their own services, but as the Internet grows, an open Internet, to the extent that it promotes the use of more applications and the creation of more applications, that means more people will adopt broadband, and that benefits everybody. So it's not a zero-sum game—it's either the applications providers who win or the networks win. Both of them can win under an openness regime.

I want to very quickly respond to just two points. I'm going to leave the constitutional stuff to Marvin. Number one is—it's so hard to call you Commissioner McDowell, but I will call you that because I'd love to call you Rob instead—regulatory certainty. You raised that. I actually think that net neutrality rules will *give* the network providers and the applications providers the regulatory certainty that has been lacking since 2005.

Right now, we're in this world where maybe the *Comcast*²² decision is going to be overturned. This was the case where the FCC

²² In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008) (*vacated*, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)).

told Comcast that it had to stop blocking BitTorrent or throttling BitTorrent. I don't know if you're familiar with that; we can get into that in Q&A. But right now, we live in this kind of netherworld where we don't know who's enforcing what or whether we're actually able to use these principles to enforce. Having rules will actually create regulatory certainty, and again, I think that's good for everybody.

The second point is statutory authority. I know you want to ask a question about this, Judge Elrod, so I'm going to make a very, very quick point. With regard to ancillary jurisdiction, there is nothing more in the wheelhouse of the Supreme Court's and the D.C. Circuit's ancillary jurisdiction jurisprudence than the actions of a facilities-based provider who leverages their power over that system and its effect on broadcasters, Voice over Internet Protocol (VOIP) providers, applications providers. This is *Southwestern Cable*,²³ right? This is the case where the Supreme Court upheld regulation on cable operators that affected broadcasters. This is really very much the same thing.

I read Comcast's brief in the *Comcast* appeal, and it was an excellent brief. But the fact of the matter is, as you admitted, *Brand X* itself says that the FCC has, you know, broad discretion to regulate ISPs. Now, if the question is, as you say, whether these regulations will be more onerous than common carrier regulation, let's have that debate. I probably agree with you; they shouldn't be more onerous. I'd love to just stick everything under Title II and go back to common carriage, but I don't think that's politically feasible. But if that's where we are in the debate, let's have that debate.

But that's a different question as to whether the FCC has the power, and I do think, between *Southwestern Cable*, the *CCIA v. FCC*²⁴ case, *Brand X* itself, and this brand-new case which, I believe, Judge Sentelle wrote, the *Ad Hoc Telecommunications* case²⁵ in the D.C. Circuit makes it very clear that the D.C. Circuit and Supreme Court believe that when you're talking about facilities-based providers leveraging their power over their systems, the FCC has ancillary authority over that.

So I'll stop there, and I look forward to hearing from David and Marvin.

MR. McINTOSH: Thank you, Commissioner, for your remarks, and thank you Judge and the panelists. In particular, I appreciate Commissioner McDowell's remarks because, of my five points, he covered three of them, so I don't have to do it.

²³ United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

²⁴ Computer & Commc'ns Indus. Ass'n, v. FCC, 693 F.2d 203 (1982).

²⁵ Ad Hoc Telecomm. Users Comm. v. FCC, 572 F.3d 903 (D.C. Cir. 2009).

But I will comment on the constitutional question, both of them, in the sense that the rationale for not applying First Amendment and Fifth Amendment protections is a rationale of scarcity, and one of the things that we don't have in information service providers is scarcity. You've got a relatively easy ability to enter into that marketplace and expand it. You got people spending \$70 billion a year to do that.

That then leads me to the point I do want to make, which is, one of the things that this whole debate reminds me of is the unbundling policies that were brought in the 1990s, after Congress tried to deregulate telecommunications. And Gigi's comments that she'd like to see things move over to Title II reminded me of that all the more. Essentially, there, you had the FCC trying to use its regulatory powers to force the major carriers of phone service to allow new upstart competitors to use their infrastructure to provide that service. The analogy is the ISPs will be forced to allow content providers to use their physical infrastructure in order to bring what is really at stake here, television programming—but that is a few years away—to the American families.

So you've got a question—in fact Gigi mentioned it—is it a net zero-sum game, or is there a win-win situation? The real question here is, do you want an environment in which that negotiation between the content providers and the physical delivery system, the ISPs, is regulated or unregulated? If it's regulated, the public choice theory tells us that you then have two avenues for each side to gain an advantage in the negotiations. In an unregulated marketplace, each of them has to negotiate. They have their economic positions from which they negotiate. They need each other. And they eventually reach a price at which the service providers provide the content; the providers, access to the ultimate customer.

By the way, I don't really buy the fact that there's a termination monopoly. Anybody who has Verizon FIOS at home and an AT&T iPhone can get to the Internet through two different means. And increasingly, families today in this country do that. So if the ultimate customer is an individual—and then they've got the Internet at work, which in theory you're supposed to use for work, but in practice gets used for all sorts of purposes. So there's lots of ability for people to hook into that Internet in their lives.

But you've got this negotiation going on, and what net neutrality does is shift some of the bargaining power from the Internet service providers to the content providers. You ask yourselves, why do they feel they need that? The Coase theorem²⁶ says they'll negotiate, and it

²⁶ BLACK'S LAW DICTIONARY 291 (9th ed. 2009).

doesn't matter which side you assign the right to; the least costly provider will end up carrying out the obligation and they'll reach a price. You know, they want it because the price will be less. That's one reason.

But there is also a desire to re-create that scarcity that has gone away because of the ubiquity of the Internet information service providers because when you have that scarcity you get back to the content provider model that they're used to in Hollywood, where the scarcity is at the delivery end, and they have, therefore, an ability to exact monopoly rents for the content, the television shows and the movies they produce. In the absence of that scarcity, you've got so many delivery mechanisms that you don't have an opportunity to create that monopoly power, and the rents are driven down, and the consumer ultimately wins in that.

So that's what's really at stake; which side will get additional leverage in bargaining with the other; and do we want to create a system where that bargaining goes on in the presence of politically determined regulations and the opportunity, therefore, for one side to create a situation of scarcity and increase the opportunity for monopoly rents.

Public choice theory tells us that individuals in the presence of that type of government regulation will spend roughly up to the amount of those economic rents on lobbying and hiring lawyers, so all of us as a profession may have an interest in the outcome of that. But the problem is that that money, instead of being used as consumer surplus, a benefit for the individuals to have greater access to entertainment, is absorbed into the political process. When you start having a government body regulating not only the policies and the economic terms, which you had in unbundling, but also the physical regulation of packets and other items, as somebody pointed out, in the absence of a lot of engineering expertise, then you create a situation that is rife with opportunities for political actors to be advocates for different constituencies.

I appreciate you mentioning some of my background, but I spent years working for Dan Quayle analyzing regulations, and you would think that typically business would come in and say regulations are bad—and we heard a lot of people saying that to us—but you also had a lot of business coming in and saying, we actually kind of like this regulation. I had one of my constituents in Indiana tell me that about a regulation of faucets, that they liked the way EPA was regulating it because they were the only company that had that certain type of faucet.

And so, if the regulation went into effect, they've got an additional market monopoly. They refused to support my campaign when I told them I wasn't going to support the regulation. So you've got that choice in the decision of how you want to proceed in net neutrality. And

frankly, I think that is the fundamental choice: Do you want to create an environment where the negotiation between those major players, service provider and content provider, have to negotiate with other, or do you want there to be a government overlay and therefore subject the entire process to the politicalization in the sense of each side trying to gain economic advantage by layering on additional regulatory oversight?

My choice would be to keep it free and unregulated because you don't have that scarcity.

Thank you.

PROFESSOR AMMORI: Thank you to the Federalist Society. I actually wrote my remarks because I'm a law professor, and it's very hard to speak for less than five minutes.

I was afraid that I would spend all five minutes on rebuttals, so I wanted to make sure that I got my point out. I'll do rebuttals in the Q&A. I'm going to talk about history a little bit and then also about innovation. I think history is very important here, as Kyle alluded.

I'm going to go back to the Dark Ages. I don't know if you remember dial-up. If you had dial-up, you could dial up any ISP. You could dial up EarthLink or AOL or NetZero; you had a choice among different ISPs. And even if AT&T was your phone company, you didn't have to dial up the AT&T ISP; you could dial up any of them. You had competition.

If AOL or AT&T or your ISP was limiting your access on the Internet, you could simply end your service and dial up another. It was the beauty of competition at work. As a result, you got the unfettered access on the Internet that you wanted based on ISP competition. It was actually a law that required Verizon and AT&T and SBC to permit that kind of access to all ISPs. And as Gigi mentioned, it was around 2002 to 2005 that those rules were changed for cable modem service and for DSL. The way it works, as I'm sure you know, is, if Verizon is your phone company, that's the ISP you get to use. You can't dial up another. If Comcast is your cable company, that's the ISP you get to use. You have, now, two choices of ISPs, so, far less competition as a result of those decisions.

When those decisions were made, there was a fear that the phone and cable company could leverage their new-found market power in the ISP market into market power over applications and services. On the same day that the FCC changed the regulations for DSL, eliminating independent ISPs, the FCC issued an Internet policy statement which was essentially the FCC saying, we will try to keep the Internet open and

free even though we've eliminated ISP access.²⁷ That was a unanimous policy statement. It was the middle position between ISP access and no regulation.

The Chairman, Kevin Martin, a Republican, was in favor of the policy statement. It was based on a speech by another Republican, Chairman Michael Powell, and that was essentially a promise from the FCC, and the middle position shifted rather quickly. A few months later, the AT&T CEO made the announcement that Vonage and Google were using his pipes for free, and he should have control of them. Verizon made a similar comment.

This didn't look like speculative harm, but then there were also some violations. A small company called Madison River, a phone company, blocked Vonage. And then also, the second largest ISP in the nation, Comcast, was caught secretly blocking, after denying, some of the most popular online technologies out there. They're versatile technologies used by open-source, online, TV, distribution, and government agencies; so the solution to the problem, the second largest ISP and major, important, innovative technologies.

At the time, 20,000 individuals filed complaints with the FCC. Tech companies filed complaints. Consumer groups filed complaints. The collaborative Internet bodies whose standards were being violated, they weren't able to do anything. It was the FCC that had to step in and issue a bipartisan order under a Republican chairman requiring Comcast to stop. The NPRM on net neutrality that hopefully the FCC will turn into a solid rule could essentially extend that order and make it a rule and provide more certainty. So that's the background.

To me, net neutrality has always been a middle ground that would preserve competition among applications and content. To talk about innovation, I think it is important to understand what could happen without net neutrality. Gigi mentioned cable TV and broadcasting. One way to think of what could happen without net neutrality is one giant app store. The carriers would turn the Internet into a giant app store, and if you created an application, you would have to go to each network and get your application approved for that network—Verizon, Comcast, AT&T, et cetera. Usually, you have to get a cut of profits, negotiate some sort of resolution, and that would be the sort of model of the Internet.

It would be sort of like being every appliance having to negotiate with the electricity company to get on the electrical grid to plug in. And

²⁷ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC Policy Stmt. 05-151 (Sept. 23, 2005).

rather than simply the best appliance winning in the market, you would have, essentially, rent seeking, with companies having to try to lobby the electricity company for the best deal. And the Coase theorem, of course—there are transaction costs; there are issues. It wouldn't work out perfectly.

The Internet's history has been innovation without permission. You didn't need a permission slip from a cable company or a phone company to innovate, and so, as it turns out, many of the most innovative applications that you use were very cheap and almost accidental. EBay was a weekend project that became surprisingly popular, and then a billion-dollar company where small businesses make a lot of their living; many of them do. Google was a research project to rank scholarly papers. Twitter was a side project that became huge. I'm glad Kyle mentioned Google since they're huge net neutrality supporters. A lot of these innovations couldn't have happened if these people would have had to go get permission in sort of a mother-may-I approach to the Internet.

So let me explain for a moment how innovation doesn't happen. AT&T invented cellular technology and then didn't deploy it for many years because they were afraid it would compete with their landline business. AT&T turned down a contract to build the original Internet for the same fear. AT&T, Verizon, and Comcast have not invented a great search engine, a great social networking site, micro-blogging/blogging, a lot of the software that you use Internet for. They could; they're totally free to innovate in that way. But they haven't. These large corporate bureaucracies have not been able to innovate nearly as well as an open and competitive Internet.

In closing—I look forward to the rebuttals—the net-neutrality community has always been a middle position. I think it's very important for the future of innovation in our nation. As Commissioner McDowell said, we use the Internet as a sort of general-purpose technology in everything we do, kind of like electricity, from banking to speech. It shouldn't be like cable TV. It shouldn't be like an app store. It should be like electricity and like the way the Internet has always been.

Thank you.

JUDGE ELROD: Do you want to say something?

MR. McSLARROW: Sure. I think there's a little bit of debate about history that's actually relevant here, and I can't remember the aphorism now, but there is something about staking the high ground on events that have come before us.

First of all, as Marvin pointed out, it is true, when you had dial-up, ISPs—AT&T, Verizon, SBC, whatever the Bells were called in those days—could not block your ability to access multiple dial-up ISPs. What he forgot to say was, those ISPs themselves were unregulated.

Second, and there's a theme, there's a real, I think, desire to paint this story as: something happened in 2005; the world changed. Usually "the world changed" is defined as, we had the *Brand X* decision. Let me just tell you, I'm not the telecommunications expert that others are on this, but cable modem service has never been regulated. *Brand X* affirmed an explicit FCC finding that it was an information, and unregulated. And before that, I suppose it was just murky. But I can tell you, our guys who were rolling out cable modem service were not complying with any economic regulation at the time and were free to roll it out in a manner that they thought made sense to serve their customers.

The third point—I don't want to steal everybody's time here—the third point on *Comcast*, and we probably need to have a longer conversation about *Comcast*, but as Marvin said, Madison River, Small World, Telco clearly blocked Vonage. I don't think there's a person on the planet that disagrees that that was a clear example of anti-competitive conduct. The FCC acted in a nanosecond to tell them to knock it off.

Comcast was a different case, and it's actually relevant to my point. As we went through, first, Chairman Cannard's vigilant restraint policy, which our industry supported, then Chairman Powell's "Four Freedoms," which was the predicate for the Internet policy statement under then-Chairman Kevin Martin, our industry supported vigilant restraint, the four freedoms statement, and the Internet policy statement. Why? Because they weren't regulation, they were principles. They were principles we abided by as a matter of business practice, so there was no harm in doing that.

At the time we were having the net neutrality debate, I would go up dutifully to Congress every two months to talk about net neutrality, and I would read from a statement somewhat like you would do if you were like sitting in a chair with your kidnapper right behind you, where I would foreswear any desire lurking in my heart to block or to do all these nefarious things, because they weren't happening, and it wasn't part of our business model, and we know that if we're screwing around with our customers over here, Verizon or AT&T or RCN or somebody else, or wireless now, is going to take them away from us.

So, after 2005, from our vantage point, nothing else happened other than we had a little more clarity that the FCC's information services ruling, at least as applied to us, had been affirmed. Again, nothing has actually changed. We're still talking about future speculative harms.

JUDGE ELROD: Thank you. I think you can sit right there.

Commissioner McDowell started with what he thought was the first question, and I feel really good about this because this was *my* first question, and it has to do with the statutory authority to regulate in this area. Some have maintained that the FCC lacks this authority, and others have said it's covered by some of the ancillary authority. We've had some discussion of some of the key cases that you've already pointed.

Does anyone else want to be heard on this authority question? And also, is it affected in any way by any of the pending bills in Congress on this issue?

PROFESSOR AMMORI: I'm going to build on the remarks of Commissioner McDowell. The way that the jurisdictional question works is that the FCC has either direct statutory authority or it has ancillary authority. And this is essentially an authority, a provision that says the FCC can enforce the provisions in this Act through orders and rules. There are several different provisions in the Communications Act that say that. And the feeling you get from the Supreme Court decisions is that Congress wanted to delegate to the FCC pretty broad powers to manage communications. This was a complex, fast-moving area. Congress doesn't want to deal with it. I mean, that's sort of the tone you get from the decisions from the Supreme Court down.

People could disagree with that. People could say, oh, it would be better if Congress had to speak every time; it would be better if the FCC didn't have such wide ranging authority. But it's hard for me to read those cases and read them any differently. And even the opponents of those cases of ancillary jurisdiction—and the most notable opponent is Jim Speta at Northwestern, a law professor I've debated often on this point, and he has to make the argument that those cases can't mean what they say; they have to be narrower than that—you know, kind of like in Constitutional Law. A lot of the cases couldn't mean what they actually said; they have to be narrower.

The cases are actually fairly broad, but with the idea that Congress doesn't want to regulate; Congress wants to leave it to the FCC. The *Comcast* appeal will help determine that case, but I think it's really hard to read those cases other than providing a lot of jurisdiction authority.

PROFESSOR SOHN: Can I speak to the pending—

JUDGE ELROD: The pending legislation?

PROFESSOR SOHN: Yes. I think I made my thoughts clear on the statutory authority in my original remarks, but pending legislation pretty much is not important at all. Imagine if somebody introduced a bill—there is a bill in Congress that would be more explicit about the FCC’s authority—and if that actually had an effect on this *Comcast* case, you’d have the absurd result that anybody, any single member of Congress, who wanted to take away the FCC’s authority on a particular matter could just introduce a bill.

So the courts have recognized that, pending legislation or even legislation that was considered and didn’t pass, really doesn’t say anything to the legality of any particular measure or statutory authority of any particular measure. I mean it’s pretty well-settled.

JUDGE ELROD: So you don’t think this is going to pass?

PROFESSOR SOHN: Look, Congress is dealing with healthcare. You know, they’re dealing with climate change. This is not high on their list, so there’s a lot of other things—they’re dealing with an economy that’s in the toilet—so there’s a lot of other things on their mind than passing net neutrality. And there’s this NPRM out there. That’s what’s really important. You’ve got the expert agency that’s already moving forward. So I don’t think Congress necessarily sees the need to do anything here.

JUDGE ELROD: Did you want to respond, or do you not feel it necessary?

MR. McSLARROW: Well I—

JUDGE ELROD: Or did you want to respond:

MR. McINTOSH: You go.

MR. McSLARROW: Okay. I mean, I do agree with Gigi that the most likely congressional scenario is that net neutrality legislation doesn’t pass.

We do have this interesting situation where I think the oral argument in the *Comcast* decision is like January 7th, 8th. You’ve got the *Comcast* decision going down one path, so the court makes a decision in late spring maybe, sometime, and the NPRM on the net neutrality, which to some extent is predicated on an assumption about authority that’s called into question in that case—I don’t know which one goes first.

But I do think an interesting way, I have to say, as somebody who's really closely followed the *Comcast* case, and again, I don't know if you want to get into it in more detail at some point, but it calls into question not just the FCC's authority, the facts in the decision called into question how you could manage your network. So there is, in some sense, just from a practical business perspective, a desire to have some certainty, which is one of Gigi's points earlier, which I agree with.

Squaring the circle of providing certainty without producing onerous regulation or onerous rulemaking is very tough to do.

JUDGE ELROD: I want to let you know that we are open for questions now. I would remind people asking questions to please ask questions so that others can also ask questions.

AUDIENCE PARTICIPANT: Two questions. We've watched Carter Phone and MCI and the explosion of Internet Protocol (IP) services and various networks, and before I was a lawyer I spent significant time in telephone companies straddling divestiture and also in core network hardware computer/server design and rollout. My two questions are, I guess, one for—I can't read your name tag very well, Ms.—

PROFESSOR SOHN: Sohn.

JUDGE ELROD: It's for you.

AUDIENCE PARTICIPANT: If network neutrality is merely the leveling of the playing field, if you will, at the on-ramp level, what would you do to prevent, with regulatory measures, the use of either hardware or software, be it on an IP level for broadcast network protocols or at the switching level with telecommunications, more traditional protocols, packet switching and their evolutionary paths, on the net itself?

In other words, within the network, if you want to make a level playing field like a traffic light on a freeway entrance ramp in a busy time, it'll just be regulated with the packet switching on the net at some level or by manipulation of broadcast technologies. That's the first question—

JUDGE ELROD: I'm going to limit you to one question because we have several other questioners and very short time.

PROFESSOR SOHN: I mean, I doubt that this is going to satisfy you, but, look I would say that even though Marvin and I are proponents of net neutrality, we don't want this to be a massive regulatory scheme; you know, a hundred pages of regulation. In fact, if you look at the actual Notice of Proposed Rulemaking,²⁸ it's a page and a half of regulation. So I think it's going to be up to the Agency, and I'm sure Commissioner McDowell is going to be a huge help in this regard, to ensure that the regulations are very narrow and that they're targeted to the on-ramps and not to the Internet as a whole.

JUDGE ELROD: Yes, sir.

AUDIENCE PARTICIPANT: About the only thing that all of you seem to agree on is that more competition would help alleviate any concerns here in the first place. And I was wondering if any of the panelists had ideas for promoting more competition in the area of, for example, maybe through changing the terms of use of the public airwaves to lower barriers to entry in that market or just any other ideas that you panelists might have.

JUDGE ELROD: Promotion of competition.

PROFESSOR AMMORI: I'll try, and I'll say some things that are, I'll explain what's controversial and what isn't. So the question about, can we get more spectrum for mobile broadband—this is a question that's being discussed in terms of the national broadband plan that the FCC is putting together. The FCC would like to find spectrum, which is like wireless frequencies, that are being underutilized or utilized in old, antiquated ways, and make them available for mobile broadband.

The two largest candidates for transitioning of use over to mobile broadband happen to be the TV spectrum, and the reason why is because a lot of people watch TV over satellite and cable, not over the air, and it might be cheaper to just give everyone satellite service and auction off that spectrum to higher value uses. It's very controversial among the broadcasters. It's been suggested and it's been heavily debated.

The second place to look for spectrum would be the military and the government. Lots of spectrum there that people aren't sure how it's being used, and you can't be sure how it's being used because in national

²⁸ In the Matter of Preserving The Open Internet Broadband Industry Practices, *Notice of Proposed Rulemaking*, FCC 09-93, GN Docket No. 09-191, WC Docket No. 07-52, at P 2 (Oct. 22, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

security, you can't always ask, how is this band being used? But the government is working with the private sector to figure out how to get more spectrum out there.

In terms of more competition on the wire-line side, the main two options you could think of are, one, an entirely new wire-line deployment like broadband over power line or some new wire-line facility. Those have all seemed to be doomed and not have succeeded for the last twenty years of predictions. And then there's also the option of sort of moving back to an open-access, unbundling regime where competitors could put their technologies and lease the incumbents' pipe, and put technologies at the end and compete with them.

There was just a big report commissioned by the FCC, done by Harvard, suggesting that a lot of the nations around the world have succeeded as a result of policies like that. They have broadband speeds ten to 100 times faster in some areas, far cheaper. There are a lot of difficulties in implementing that kind of policy, and it failed in the U.S. for a lot of political reasons as well as perhaps technical reasons.

JUDGE ELROD: Would you like to be heard?

PROFESSOR AMMORI: One final point. Getting more competition is a lot easier in big cities than in rural areas. So you'd have two different issues: one for rural areas, one for cities.

MR. McINTOSH: Thank you, Marvin. The last idea would be the worst thing to create competition. I mean, if you want to see that \$70 billion a year that's deployed to build the infrastructure dry up overnight, you put a requirement that they have to share that infrastructure with yet-unknown competitors.

Taking some of the things Marvin said one step further, particularly on the spectrum, if we transition to a regime where spectrum was, in fact, a property right, and you took away the restraints on how you use individual sectors in that spectrum, I think you could have enormous additional competition in broadband and the various services that traditionally we use the spectrum for.

One of the things that I had wanted to note was Marvin mentioned all the problems with the old AT&T. They originate because they operated under a culture of regulation under Title II, and so they became a common carrier that was quite happy with its profit margin and unwilling to take risks and invest in new ventures. Cable came in relatively unregulated and now is competing with them for phone service. Cellular and wireless services came in completely unregulated

and are the new horizon for broadband to gain even more universal application.

So the second thing you can do is make sure you resist temptations to move all of this into a regime where the delivery system is regarded as a common carrier along with all the federal regulation.

JUDGE ELROD: Yes, sir.

MR. WEISSMAN: I'm Henry Weissman, from Los Angeles. I'd actually like to pick up on David's last comment.

One of the proposed rules would prohibit network operators from discriminating in the terms on which they provide service to content providers. I wonder if the panel could comment on whether that's the same thing as common carriage regulations or if there's a difference?

PROFESSOR SOHN: It's a little bit different because common carriage said that you cannot unjust or unreasonably discriminate. This is a flat prohibition on discrimination but there is an exception for reasonable network management, and that really is where the game is. I mean, Rob raised a lot of great questions, but there's basically, to me, two battles that are really going to go on as the FCC collects data and so on and so forth on this Notice of Proposed Rulemaking.

Number one is, how broad or narrow should the reasonable network management standard be? The *Comcast* decision had a standard that was of sort of like a—since Marvin created it, he's probably a better person talk about it—a sort of quasi strict scrutiny standard that said that a network provider had to show that its network management practices were a tight fit or narrowly tailored to some important interest.

In the *Comcast* case, the FCC said well, you're throttling back BitTorrent, it's a high-bandwidth application, but it's the only high bandwidth application you're throttling back. And you're throttling it back at all times of day and not just in times of day where there is congestion, so therefore, it's not narrowly tailored. Now, the FCC has already concluded that they're not crazy about that standard, and they've asked for comments on a much looser standard—in fact, so loose that we're not very happy with it. So the fight is going to be, where is the right point?

The second important question is going to be, should a net neutrality nondiscrimination provision apply to wireless? And in fact, right now it's unclear whether the four principles even apply to wireless. So that's where the other fight is going to be. Now the FCC, I think, has wisely said that we know wireless is technologically different, we know

it has different bandwidth constraints, so we think that if somebody were to file a complaint against a wireless provider, we'll give them more rope as far as reasonable network management is concerned.

And in fact, when we talk about the solution in search of a problem, most of the problems lately have been around wireless providers blocking. So, Google Voice, Sling Media, Skype, those have all been blocked by AT&T.

Do you want to add anything, Marvin?

JUDGE ELROD: Did you want to be heard? Why don't you go?

MR. McSLARROW: Think about what Gigi said for a moment. Internet service providers, cable operators, providing broadband service are First Amendment speakers. See *Turner I*²⁹ and *II*.³⁰ Normally when we think about strict scrutiny, we think about a restriction on the government's power in terms of its impact on the private sector and private citizens. But here, we have the government imposing regulation on a First Amendment speaker and using strict scrutiny against *them*. It's kind of bizarre.

In the *Comcast* case—we should really take a minute just to describe this because we really do have a fundamental difference of opinion. Gigi is right; probably, the game here is all about something called reasonable network management. When the Internet policy statement came out in 2005, it was subject to that exception. Why? Because everybody said, look, we get it; we're not trying to manage your networks. We know you have to fight spam and bot armies and deliver the service, and you have to deliver quality of service in real time for certain applications, not so much with e-mail but definitely with voice, et cetera.

And so one of the things a lot of ISPs discovered was that something called peer-to-peer networks, which can be, as a technology, a perfectly legitimate business but often used for pirated material, was very popular. It was chewing up massive amounts of bandwidth, and it was congesting the network.

So when Marvin said earlier—I love the way he put it—he said, I think, Comcast first denied and then admitted their “secret” blocking mechanism. What does that really mean? What it really means is that no one at corporate had a clue what the issue is about because these were decisions being made by engineers. It took a couple of weeks to even

²⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*).

³⁰ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

figure out what the engineering protocols were that were causing the issue that suddenly flared up into a public controversy.

I would argue that they actually should have been *more* aggressive about throttling back, but I certainly am willing to rest on the ground that as long as there is no evidence of anti-competitive animus, they should be free to manage the network for the benefit of their consumers.

JUDGE ELROD: Okay. Let's roll quickly if you have something different, but we're going to get to the next question.

PROFESSOR AMMORI: Yes, I have something different I would say.

JUDGE ELROD: Well, of course, the—I mean—

PROFESSOR AMMORI: I was going to clarify something that Gigi said, but I won't. I'll simply clarify, based on something Kyle said. Kyle mentioned that real-time applications need certain kinds of network management, such as voice and video. If that were true, then a VOIP application like Skype, which provides high-definition video, teleconferencing and phone calls, they would be in favor of his position. Instead, they are in favor of net neutrality because they don't need quality of service. They can operate just fine on a best-efforts Internet wherever it gets the same treatment.

One of the reasons why I think the rule has nondiscrimination plus a reasonable network management exception is because of the way that the burdens of proof are fit. And another reason why is because the Internet is an open platform that was nondiscriminatory, and the applications would make all the necessary discriminations to provide services. And then the phone network, the application itself was a voice-controlled by AT&T; they would actually make the discriminations.

I do want to talk about the First Amendment issues briefly, and so, although I get credit for the *Comcast* standard, Kevin Martin proposed it to the Senate, and then I tried to change it. The First Amendment argument over carriers having free-speech rights was made aggressively by Time Warner Cable especially in the *Comcast* docket. It was rejected by the FCC in a footnote.

Essentially, common carrier regulation is constitutional. Lots of regulations—economic regulations of sorts and other kinds of regulation—burden the abilities of carriers to do different things. This is hardly a free-speech issue, and if it were, it promotes free speech. There's a footnote. That has not been on appeal, hasn't been debated, and so the *Comcast* decision won't even address it, but I guess it will be

a brought up again. And I think the history of regulation of telecom suggests that First Amendment scrutiny will not be very strict.

JUDGE ELROD: Yes, sir.

AUDIENCE PARTICIPANT: My question's for Professor Sohn. My question would be, one of the arguments you gave for why conservatives should be in favor of net neutrality was that it was good for business. You went on to say, I guess Google has been, you know, thinks it's profitable and Yahoo; they benefit from the Internet. But you also said that it would be good for the ISPs. They would benefit as well.

So my question would be, why wouldn't the competition drive the neutrality in that sense? If it was profitable, wouldn't they, by choice, without federal regulation—barring the fact that geographical portions of U.S. don't have choice in their ISP and any kind of pernicious plots of the ISPs getting together and not competing—wouldn't competition drive, in effect, the same neutrality that regulation would be enforcing?

PROFESSOR SOHN: Well, again, I don't come from the position that there's strong competition. It's regional duopolies for the most part; it's either a telephone company or a cable company. It's only in huge metropolitan areas like D.C., New York, and Chicago, where there is any semblance of competition. So the premise, the premise is not one that I necessarily believe in.

On the other hand, you also have to think about—I talked briefly about switching costs, and I also talked about the termination monopoly. I mean, if David's answer is the way to get around a termination monopoly is to have to pay for three different kinds of ISPs, I don't think that's a very compelling case right there. I mean, if you tell most people you have to pay for one broadband connection, that's an awful of money. But if you're telling them that you have to have two, and by the way, while you're at work and do all the things you're not supposed to be doing at work, I think that's an extraordinarily problematic.

I go back and forth on this competition issue. Let's assume that we had lots of competitive broadband providers. Would we not want them all to be nondiscriminatory? There's lots of restaurants in Washington; right? What if we said, any restaurant who wants to, can keep people of color out because there's lots of restaurants in Washington. At a certain point, what is nondiscrimination and the ability for people to speak freely? And it's individuals. We keep talking about war of the corporate titans, but what about me and you? What if we want to make sure that the little eBay guy gets to us unfettered by Neiman Marcus and

Nordstrom? Isn't nondiscrimination a good enough social good that it should apply to everybody?

If we ever get to a world where we have ten ISPs competing in most markets, we can have that conversation, but we're so far away from that, that it's hardly worth talking about.

JUDGE ELROD: David, do you want to respond to that?

MR. McINTOSH: Yes, very quickly. Thanks.

My point is the examples Gigi gave proved the questioner's point. You have eBay in your house; Neiman Marcus hasn't tried to stop them, even in the existing configuration of ISPs. And just look at the development of blogs on the Internet. That's an individual who sits at their computer and writes, and many of them have a huge impact on the public discourse. So I think the facts show that there's not a problem in search of a solution here.

JUDGE ELROD: Do you want to ask the last question of the day, sir?

AUDIENCE PARTICIPANT: Okay. Professor Ammori, I found it interesting that you mentioned an app store in relation to net neutrality. Why wouldn't the same logic that applies to what you're saying in net neutrality also apply to Apple in respecting applications that aren't expressly approved by Apple? It seems to me that once you make the argument in one area of computer technology, then the same argument would apply in others. Could you please respond?

PROFESSOR AMMORI: That might require a long answer, so I'll try to be brief.

When it comes to the cell world, the wireless world, we generally have about four large competitors, two of which are pretty dominant, AT&T and Verizon, who I think have eighty percent of net ads, and so their market power is pretty strong. And the contract between Apple and AT&T gives, according to what we've learned, gives AT&T certain authority and power over what can get into the app store and what can't.

Generally, I think the FCC is on surest footing, historically, regulating the networks, which have traditionally been very high cost, some costs, very high barriers to entry and not on as sure footing in other markets that could be competitive. I need to give you a moment of history, which is, you know, until about the 80s—

JUDGE ELROD: Our panel is about to be history.

PROFESSOR AMMORI: Great. The FCC has historically not regulated devices and software as aggressively, or on as sure a jurisdictional footing. But the Department of Justice, or the FCC, may want to study the question.

JUDGE ELROD: Well, why don't we give thanks to our panelists and our questioners, and of course, Commissioner McDowell.

(Panel concluded.)