The Free State Foundation's
Eighth Annual Telecom Policy Conference

"The FCC and the Rule of Law"

March 23, 2016
National Press Club
Washington, DC

"A Conversation with FCC General Counsel Jonathan Sallet"

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* This transcript has been edited for purposes of correcting obvious syntax, grammar, and punctuation errors, and eliminating redundancy. None of the meaning was changed in doing so.

P R O C E E D I N G S

MR. MAY: A lot of you weren't here this morning when I got started. When I woke up this morning I told my wife, "My God, I can't believe it's our eighth annual conference." I guess time really does fly when you're having fun or when you're busy, but this is the eighth annual conference. So thank you so much for being here. I appreciate it.

I should say Jon and I were just outside and I apologized to him. I said a little bit earlier that I'm recovering from a bit of a cold, so I might sound nasally and Jon told me that he's got allergies.

MR. SALLET: So we thought we might make this into a sniffle-thon.

MR. MAY: Right. We might do that. But I was thinking mine are not allergies. I think it might be some bug, so, I'll just say that if you're not really responsive, then I'll lean over and breathe on you. But if not -- no, I'm just kidding. I'm not going to do that.

Well, the other thing we've said all along is we're just doing the very brief version of the bios because you've got those in the materials. All of you know Jon is General Counsel of the FCC. Previously, he was a partner at at least three very distinguished law firms. In 2008, he served on President Obama's transition team for Technology and Economic Development at the Department of Commerce. He also, by the way, was a law clerk to Supreme Court Justice Powell. And that may be relevant later when we start delving into what the rule of law means and so forth.

So, Jon, I'll just say that I've been fortunate that we've had a number of

what I consider to be distinguished guests at what we call the lunchtime conversation, and some of them have been the FCC Commissioners that were here earlier, and other FCC Commissioners. Last year it was House Majority Leader Steve Scalise, and I think he's fourth in line, or something like that, to the succession after the presidency. But when people found out that you were going to be here, they told me that you were probably number two in line to the succession at the FCC.

MR. SALLET: I think that's not right.

(Laughter.)

MR. MAY: All right. Well, maybe that's Phil Verveer who's over there.

MR. SALLET: There is nobody more distinguished at the Commission than Ambassador Verveer.

MR. MAY: Ambassador Verveer. Anyway, I'm really glad you're here.

MR. SALLET: Thank you.

MR. MAY: I'm going to start off with some questions that are maybe a bit personal only in the sense of relating to your job. So tell me what job that you've had in the past that you think best prepared you for the general counsel's job.

MR. SALLET: I've got to give you more than one because I can't get it to one but to the first three jobs I had after graduating from law school, which is now a long time ago. I was a law clerk for Judge Edward Tamm on the D.C. Circuit, a law clerk to Lewis Powell, then an Associate Justice to the Supreme Court, and I went to work at the firm Miller Cassidy for Jack Miller. And I think I learned from those three men lessons that have endured for a long time. I'll tell you about each of them quickly.

Judge Tamm was on the D.C. Circuit. He was a former FBI agent. I will tell you, I was walking through the chambers one day and I noticed this little framed

letter on the back of a room, a little interior room, that I never noticed before. I walked over. And it was a thank you letter to Edward Tamm from J. Edgar Hoover, thanking him for his help in solving the Lindbergh kidnapping. He was the only person I had known who was involved in solving the Lindbergh kidnapping. He had -- perhaps because of his FBI background -- a very practical sense of the law and that was, I think, very useful.

Lewis Powell was just a wonderful man. People talk about why Supreme Court clerkships are prestigious or something, I don't know. But the chance to work for him as a man was extraordinary. He was a guy who had been head of the ABA, who'd been very active in Richmond, where he had practiced law until age 65 when he was appointed to the Court, and very important in the days during the 1950s in keeping the Richmond school system open at a time when that was in question in the wake of *Brown vs. Board of Education*. He had come to the Court with a wealth of experience. And we'll talk more about this, but he had a very, very distinct notion of the importance of facts and judging each case on its own terms.

And I'll just tell you one thing. He was a very reserved courtly southerner and I'm an introvert. So the day I went for my interview with him in his Supreme Court chambers, it is a very intimidating place. There was not a lot being said between us until he raised the one topic on which we were both enthusiastic and that was Ted Williams and the Boston Red Sox.

(Laughter.)

MR. SALLET: And then Jack Miller. For those who don't remember, Jack was a Republican who served as head of the Criminal Division under Bobby Kennedy in the Justice Department and then achieved renown some years later when he

represented Richard Nixon in the negotiation of Nixon's pardon. Not everybody had been so associated with the Kennedys and Nixon. And I tell you what, I went to work for him as a young lawyer and this I think about a lot in terms of the Office of General Counsel.

Look, everybody knows the junior lawyers are there to help the more senior lawyers, but what Jack felt very strongly was that the obligation was reciprocal. And I remember one day he was forcing me to go to a hearing in Houston to cross examine the chief judge of the district court and I was, to put it mildly, extremely nervous about this. There was a knock on my door about 5:00 a.m. before the hearing and he comes in and he sits down and he walks me through the examination. In other words, in many ways he taught me that it wasn't just my job to help him, but it was his job to help me and my career. And I think these lessons, to be practical, to focus on facts, and remember always one's reciprocal obligations, I think these have stayed with me a long time.

MR. MAY: Good. I might be wrong about this, but I think Nate Lewin, was at the firm and he's someone that I admired and we don't have time to really go into it, but he was a great lawyer and especially interested in issues relating to religious freedom that I followed and I always had great respect for him.

MR. SALLET: Yeah. He was. Yes. Great lawyer.

MR. SALLET: He was a great lawyer and he and I represented Jodie Foster in connection with the Hinckley trial, the Reagan assassination attempt.

MR. MAY: Wow.

MR. SALLET: I've never seen anybody write an appellate brief the way he does. He's just extraordinary.

MR. MAY: Okay. I mean, you touched on this maybe just a little bit and this time I'm going to hold you to the one. See, I've got it in caps here.

MR. SALLET: I appreciate that.

MR. MAY: So what is the one personal characteristic that you possess, not your professional experience, you've recited some of that, that you think is most important in doing your job well?

MR. SALLET: So I can't overemphasize how uncomfortable that question makes me because I'm a shy New Englander. And the idea of talking about myself in this way is --

MR. MAY: Well, you're among just a small group of friends here.

MR. SALLET: Right.

(Laughter.)

MR. SALLET: So I asked my chief of staff, Jennifer Tatel, who does a great job, what she thought about the answer to this question because you gave me a head's up. On this one and she said humility, which I hope is true. But I would say it this way. I think it's gratitude. I am very grateful for this opportunity, right? Opportunity comes along perhaps less often that one thinks in life or might think when one is young. I am very grateful that I have this opportunity, grateful to the Chairman and the Commissioners to be in government again, and I've got to say continually grateful to the lawyers in OGC. You know them, right? I mean, people who've dedicated their careers, their professions to focusing on the law and improving the work of the Commission. And I'm extremely appreciative every day for what they do.

MR. MAY: Yeah. No, I do. You know, I was fortunate to be able to serve in the General Counsel's Office back in the late '70s. Just the one thing I'll say, I

think you are alluding to this: Some of the people in the GC's office who were top-notch lawyers, such good lawyers, they stayed for decades in that position and I think made it a special place to work, really.

MR. SALLET: That's right. Yeah.

MR. MAY: So speaking about the role of the General Counsel's Office, look, if we're honest, again, we're just among friends here, different general counsels, I think, can view the role somewhat differently. You're obviously the chief legal officer for the Commission. But the general counsel that I happened to serve under was very interested in policy as well as legal issues and he was involved in a lot of the policy.

I want you to help people here understand how you view your role as general counsel and specifically sort of address the extent to which you've been involved, want to be involved, and, you know, are involved in what we would all agree are sort of the more pure policymaking aspects of what the Commission does.

MR. SALLET: Sure. I've talked to other general counsels, past general counsels, and I think there's a tradition of general counsels who play a counselor role as part of their function. I think it goes to the three critical functions of the office, which I think of as this way. The General Counsel's Office is available as counselors to the Chairman. The Chairman is the CEO of the agency under Section 5 of the Communications Act and to the extent that the Chairman wants views, then OGC makes them available.

The second function, which is critical, is that any commissioner gets unvarnished legal advice from the General Counsel's Office any time the commissioner wants it, and thirdly, that when the Commission makes a decision, a majority reaches a decision, it's really important that the General Counsel's Office represent the

Commission. In other words, every once in a while even the Chairman will be in a minority. I think this happened in the early part of the century a couple of times. If that's what happens, if the Chairman's in the minority, then the obligation of the General Counsel's Office is to represent the Commission, the majority view.

I think those are the critical functions that the office plays.

MR. MAY: Well, in regard to the last one, we're going to get a little more into the *Open Internet Order* later, but I was at that oral argument. Thank God the decision didn't come down today because everyone would be reading it. But I told you this afterwards, and, you know, I have a different position than the one the Commission ultimately took, but I thought you did an especially able job in arguing that case.

MR. SALLET: Thank you. I appreciate it.

MR. MAY: Really, I know it's not easy to do that. I was thinking of something while you were giving that last answer, about my experience in the General Counsel's Office that I can always get somewhat of a chuckle about. It may be different now, but when I was there, under the Commission's rules or maybe it was tradition, the General Counsel had to actually sign off on decisions that were made or actions that were taken relating to political broadcasting, like equal time or whatever. It was, I think, in the rules. Bill would remember. There was Bill Ray and Milton Gross and some real career people that had been there a long time, but the GC would have to sign off on those. And I was up as Associate General Counsel then, but it was interesting to me and the Deputy General Counsel at the time. He shall go nameless. It was just something I found interesting. So during election season, you get a lot of these things coming up. Is there a violation or not? And he would frequently sign these things in the space that was put there for the general counsel. He would write, "Signed but not

read."

(Laughter.)

MR. MAY: Do you do any "signed but not read"?

MR. SALLET: It had not occurred to me that that was an alternative. So I appreciate the advice.

(Laughter.)

MR. MAY: Yeah. I guess it worked.

Now, I have a question here, but I don't want it to be open-ended. Then they're going to get a little tougher, right? I mean, this has been really softball, but --

MR. SALLET: That first personal characteristic one was tough. I just want you to know.

MR. MAY: I know there's nothing I can throw at you, but can you give a couple of examples in which you, as General Counsel, have played a more significant role than other proceedings in giving the Chairman what most of us would consider to be, more purely policy advice rather than legal advice? And I hasten to add, I don't think there's anything wrong with that, as I've intimated. But people would be interested in knowing, I bet.

MR. SALLET: Yeah. There is one area in which we've played a particular role with a historic basis and that's in the review of some large mergers. So in 2000, when Chris Wright was the General Counsel, the Commission formed a transaction team in the Office of General Counsel. At that time, we recruited Jim Bird from private practice, who still heads it, does a wonderful job, and created it as a place so that merger related expertise, no matter what part of the agency it involved, is in one place. And so OGC has played an important role in merger reviews.

Chairman Wheeler has asked us in three large mergers to serve as chair of the steering committee inside the Commission. In each instance, there's been a lawyer in OGC who runs the project day-to-day and in each of these instances, a lawyer who had previously worked at the Antitrust Division in the Department of Justice, which I think is very important, and so in these cases we have played a particular role as a facilitator.

Now, the policy bureaus, of course, take the lead on policy questions. There are wonderful economists inside the Commission. As one would expect in a transaction review, the economic analysis is very, very important. We pay close attention to it as we put together the staff recommendation to go to the Chairman and the Commissioners. So this is a very particularized example.

MR. MAY: Okay. I want to ask you to describe your legal philosophy or approach in resolving a purely legal question, put aside the policy aspect. There are different schools of thought that even have names associated with them, you know, textualists or living textualists or whatever. And by the way, I don't think you were here, but Commissioner O'Rielly and Commissioner Clyburn had a lively exchange this morning about how they approach interpreting the Communications Act. They were talking about Section 629 in that instance. But I want you to talk about your approach. And then, if you want to, you can lead in to my next question or two, which relate to the rule of law. You know, that "The FCC and the Rule of Law" is our theme for this conference. So talk about what your philosophy is and specifically how that relates to your understanding of what the rule of law means in the context of what the FCC does.

MR. SALLET: Yeah. So let me give you an overall sense. I've talked before about the experience of having worked for Lewis Powell and to me, this was

very important. In other words, Justice Powell had a particular way of looking at facts, of looking at circumstances, of looking at context as critically important. And he was not unique in the jurisprudence of the Supreme Court. I think Justice Holmes, Justice Brandeis, the second Justice Harlan had similar views.

This is the way I was taught and I have to say I believe that law ought to be applied. I remember one instance. What would happen is he would go to the conferences and he would take notes. Then when he came back to the chambers, he would read his notes to us, because we had to know: Had he been assigned any opinions? Was he likely to be assigned any dissents? Occasionally he could be the senior Justice and make an assignment himself.

We had a case, it was a criminal procedure case, and I felt pretty strongly about it. And I did something that was unusual for me, which was right before he went to conference. I went in one last time and explained to him my views. He came back from conference, he looked at me, and he said, "Jon, you got four votes, but not mine."

(Laughter.)

MR. SALLET: It was a good illustration of the influence or limits thereof of a law clerk. But it was also an illustration of how this was a very fact bound criminal procedure case. I offered him one reading of the facts and he offered another reading of the facts. That was the way he judged and he knew it, right? He was conscious of it.

I believe he understood that as he was viewed on the Court, he would be viewed differently than some of his brethren. At the time, Justice Brennan and then Justice, before he became Chief Justice, Rehnquist, were seen as justices who had large overarching ideologies. And he understood that he wouldn't be seen in that way. But he really believed the job of a judge was to face the facts and that law ought to be anchored

in facts and that that didn't mean it wasn't important to reach important constitutional values, right? He was the fifth vote, one of the five in the majority, in *Roe vs. Wade*. But it did mean that he grounded in this. And I think a good illustration is one of my law school professors, now judge on the U.S. Court of Appeals for the Fourth Circuit and also a Powell clerk, Jay Wilkinson -- Judge Wilkinson. He wrote a book last year, which I think is very interesting and I hope people will read it, called "Cosmic Constitutional Theory." He talked about different kinds of constitutional theories. He talked about the importance of judicial restraint, understanding the role of judges. He talked about the importance of recognizing fundamental rights and what the process of doing so was. He talked about Holmes, Brandeis, Holland, and Powell.

And he came away, I think, with a conclusion that was not overarching, but was very practical and very common sense. I hope people read this book, and I hope as you continue to think about these issues, you will as well, because I think it explains the art of judging in a very powerful way and in a tradition with which I'm proud to be associated.

MR. MAY: Okay. Just earlier today with the Commissioners when we were talking about the rule of law I gave them what I think is a commonly accepted definition. I think you won't disagree, but it may impact some of our later discussion. I want to give you that and tell me if there's any part of it you disagree with: "The rule of law regime is a system of binding rules of sufficient clarity, predictability, and equal applicability adopted by a valid governing authority and applied by an independent authority."

Is that a good definition of the rule of law?

MR. SALLET: I think those are all important concepts of the rule of law.

I think there's more to the rule of law and I think there are different perspectives of the rule of law.

And, by the way, I appreciate coming and having a chance to talk about this because I'm talking about stuff I don't get to every day, but I think is important to understanding our legal system.

MR. MAY: You guys should talk about it more over there at the FCC as you go along.

(Laughter.)

MR. SALLET: Well, maybe you should hear my answer. Then you can decide, right?

MR. MAY: Okay.

MR. SALLET: Let me offer you four perspectives on the rule of law that I think are important.

MR. MAY: All right.

MR. SALLET: One is the understanding that no person is above the law, right?

MR. MAY: Right.

MR. SALLET: And Tom Bingham, the late Lower Chief Justice of the United Kingdom, has a very important book on rule of law where he talks about this. He takes it back to Magna Carta, and to the provision in Magna Carta that says "to no one will we sell, to no one deny or delay right or justice." This notion that everybody gets governed by the law and no one's apart from it has been traced by some scholars back to Aristotle. I think it's a fundamental notion and I think it finds voice, for example, in our equal protection clause.

A second meaning of the rule of law, and I've referenced Holmes in the past. I think Justice Holmes' understanding of the common law, his lectures on the common law in the book by that name, are incredibly important. And I've written in the past and I believe that the common law notion of precedent, of factual examination is not only very important because it is our legal tradition, but it's well-suited actually to times of dynamic innovation. On page one of his book, "The Common Law," he talks about history, and he talks about statutes, and he talks about the combination of the two into "new products at every stage," that's a quote, "of legal development."

So I think common law reasoning is very important because I think it provides a way for the law to learn, which government institutions don't always do well.

And then I want to do one more. Look, sometimes the rule of law just means there's a law and you have to follow it, right? There are scholars who look at Ancient China and think that's what was going on. I don't know if people have seen the Francis Fukuyama book "The Origins of Political Order." It's a wonderful book and he talks about development of the rule of law.

MR. MAY: Are you going to get to a point where you recommend my book or just all these other books.

(Laughter.)

MR. SALLET: I was doing them in ascending order of importance.

MR. MAY: Oh, okay.

MR. SALLET: So I hadn't come to yours yet.

(Laughter.)

(Applause.)

MR. MAY: All right. Go ahead.

MR. SALLET: I've read your book. I mean, Randy and I had lunch a little while ago and he was kind enough to let me get to a copy of his book. I think this question of copyright and the constitution, constitutional values is very important, right? I think Randy's contribution to the scholarship is very important. I had understood that the first copyright law was created by the first Congress, and we talked about that. But I hadn't understood its constitutional overtones. And as a way of stimulating innovation, it's really important. But I want to give you another history lesson.

MR. MAY: All right. Pretty quickly.

MR. SALLET: I know, but this one is important.

MR. MAY: Okay.

MR. SALLET: There's another notion of the rule of law that I think is elemental to the U.S. So I'm going to go to ancient history now. We all know in what's known as the Old Testament, the Book of Deuteronomy, it's the covenant between the people of Israel and God. And there are biblical scholars who say it came up in a very particular historical context when the Syrian Empire ruled what's now Israel. And the people of Israel wanted to not be ruled by a foreign kingdom. So they replaced the idea of fealty to an overlord with fealty to a law-giving God. And when I read that last year, because I don't pretend to be a biblical scholar, I was struck by the sentence we all know from the Declaration of Independence, right, that we hold these truths self-evident, that all men are created equal, that they're endowed by their creator with certain unalienable rights and among them life, liberty, and the pursuit of happiness.

Now, in the new musical "Hamilton," there's a female character who says, "I'm going to go to Thomas Jefferson and tell him to write a sequel where he includes women," which is right. But this notion that there are some things that are so important

to us that they precede government, that they should govern government, is I think fundamental to the unique American experience in creating our rule of law. And these principles of equal protection, of protection of fundamental rights and of case-by-case adjudication, to me, are all at the heart of the question of rule of law.

MR. MAY: Well, honestly, that was really well stated and I appreciate that. You know, I confess I go to Torah study once in a while. But I don't have anything to add that I'm afraid wouldn't be challenged back if I started to comment on Deuteronomy. So that was very good.

I want to ask you this, and as part of your role as general counsel, of course, you have to be an administrative law scholar.

MR. SALLET: Yeah.

MR. MAY: You're dealing with administrative law. Earlier today, I know you weren't here for the discussion, but I talked with the Commissioners about the increased number of partisan votes that are taking place and a general sense that there's less collegiality than at times in the past.

I don't want to actually get into and I don't think you do either, but I'm not asking who's at fault. But to me, part of it has to do sometimes with process and with how you conceive of administrative law. So you have the bird's eye view of this.

What one process reform do you think you can name that would improve the collegiality? Just take it as a given that it would be a good thing to improve the collegiately. Is there any process reform that could be implemented by the Chairman? I mean, let's be honest, Chairman Wheeler's the one to do it with your advice. What could be done?

MR. SALLET: Well, I think these policy questions are for the

Commissioners, not for staff like me. But there's one that does require Congress, that I do think goes to collegiality, and that I would like to address. And that is the proposals to make some changes to the Sunshine Act so that commissioners can deliberate, so they can talk to each other more directly. There are some proposals on the Hill, for example, that would allow, if I understand it, a majority of commissioners, so long as they're not of one party, to talk and have a record made of that conversation. I really believe when people talk face-to-face their understanding improves, their understanding improves about where they're coming from, sometimes because they're tested. Their understanding always improves about where the other person is coming from.

I think more direct conversations between commissioners would be a very helpful step in improving the deliberative process of the Commission.

MR. MAY: Okay. Well, I have actually been a long-time supporter of changing the Sunshine Act and I've written about it and all of that. I actually served on a committee of the Administrative Conference of the United States that made a recommendation to change it. But I'm glad you brought that up.

You talked about increasing, understanding among the commissioners and also among the public. So one of the issues about process that's received a lot of attention -- Commissioner O'Rielly has brought this up mostly.

MR. SALLET: Yeah.

MR. MAY: It has to do with releasing the text of orders before the vote so that the public would know what's before the Commission, what they're voting on. Actually, I was on the Administrative Conference of the United States' committee that recently reviewed this. I know you're familiar with the Administrative Conference. There is an ACUS recommendation that says in effect that to the extent possible in

advance of Sunshine meetings that it's useful for the public to have all of the memos and so forth, materials, related to that item the Commission's going to vote on. This all has to do with the Sunshine Act and how the Sunshine Act operates.

I know that hasn't happened. I know Chairman Wheeler has resisted it, but, again, this is in your bailiwick. Just tell us briefly what the argument is for not releasing the draft items so that at the Sunshine meeting, where the public is listening in, they know what's being voted on.

MR. SALLET: I think you and I both appreciate the fine work that the Administrative Conference of the United States does. So I went back. I think you're referring to a 2014 recommendation and part of it says materials ought to be released except for those documents that may be exempt from disclosure under the Freedom of Information Act. Now, this is very important because, as everybody knows, the Freedom of Information Act and its Exemption 5 protects the disclosure of materials that fall within what's called the deliberative process privilege, and the deliberative process privilege has been recognized as being very important.

For example, the Department of Justice guidebook on FOIA talks about this in terms of "encouraging open and frank discussions of policy within an agency, protecting against premature disclosure, and protecting against public confusion that might result from disclosing rationales that are not finally the grounds for decision." Now, I think deliberation is important. The Supreme Court in this context talked about the fear that officials will not communicate candidly among themselves if every remark is subject to civil discovery or might end up on the front page of a newspaper.

I think one should take the deliberative process as important. I think Commissioner Rosenworcel has said it very well. We need transparency and we need

deliberation. And the commissioners, not staff like me, can figure out best how to strike that balance. But I do think in the context of this ACUS recommendation we should recognize the importance of providing space for deliberation for the Commission.

MR. MAY: Actually, I think it might be a different recommendation that I have in mind, but we're not going to resolve it here. This was one that dealt with best practices under the Sunshine Act, and I think did suggest that materials like the draft items to be made available.

MR. SALLET: Randy, the sort of the quintessential example of documents that courts find subject to the deliberative process privilege are things like draft items. Those kinds of drafts.

MR. MAY: Yeah. Okay. Well, let's delve into that further at the next conversation we have because I want to get a little more into the substance of a couple of things.

MR. SALLET: Okay.

MR. MAY: I want to talk about the *Open Internet Order*. Again, I commend you on the argument you made. There are lots of different issues here, of course. But I want to focus on the process in this one respect that everyone knows is important. It was the subject of an inquiry at the oral argument, a line of inquiry really. And that has to do with President Obama's involvement in the proceeding through the video and statement. And then obviously it's now come out just recently, I think it may have been intimated anyway, that there was a change that took place rather abruptly. There seemed to be some staff confusion, if you believe the e-mails that were released, and a switch in course. And, of course, there was no notice, no further notice about the change in course.

I'm just going to ask you, Jon, to talk about that involvement and how that relates to your understanding of the FCC as an independent agency.

At that oral argument, I remember Judge Tatel. I think he was pursuing it. And he got to a point where he said I want to ask you to give your, quote, "crispest answer," I think he said, as to why the FCC abandoned its proposal to rely on Section 706 rather than Title II.

MR. SALLET: People may know this issue, the *Open Internet* case, is still in litigation. So I want to limit my comments to what we've said to the Court. What we said to the Court was very straightforward, which was that it's totally appropriate for people to make their views known to us. That included millions of Americans. It included many members of Congress, both parties. It included the President of the United States. And as we explained in our brief, the comments of the President were filed with us entirely in accord with the Administrative Procedure Act, and therefore, were appropriate as a matter of process.

You and I have already talked and you were very kind to me at the day of the argument. I had not done an oral argument in a long time and I will say I prepared a lot for this argument. It was a really interesting experience. I thought all of the lawyers did a great job. I thought the judges asked a series of very, very helpful questions and it was a privilege to argue it. And whether I did a good job or bad job, that's for other people to assess. But for me and my career, the chance to be in court that day was a considerable honor.

MR. MAY: Okay. Just to be clear, I think I said this earlier. What I said to Jon, I said it a couple times and I really meant it. I thought he did a fine job. But I think I did add I hope you lost, right?

MR. SALLET: You did say that.

MR. MAY: Okay.

(Laughter.)

MR. SALLET: You did say that. And I said I appreciated the first part of your compliment.

MR. MAY: Right.

(Laughter.)

MR. MAY: That is all true. Well, look, let's stay with the *Open Internet Order* for just a minute. This goes more to the substance, but you alluded to it earlier when you were talking about the common law and that approach. I really appreciated the depth of that answer, really. So I was digging around. This was actually just two days ago. I've always kept up with your work, tried to. So I found a paper released in November 2011 titled, "The Internet Ecosystem and Legal Regimes: Economic Regulation Supporting Innovation Dynamism." And I looked at that and I just want to quote from it because I found a lot there to like. Then let's relate it to the current things.

It mostly had to do with regulating broadband providers. You said, "Without preemptive regulatory intervention, the market will tend to provide numerous benefits in innovation, price, and general consumer welfare. Moreover, the boundaries of the Internet marketplace are not sufficiently stable for regulation to have a reasonably predictable effect over time, which should be a prerequisite for predictive rulemaking. Because rulemaking may incorrectly predict the source or extent of those benefits, the risk of stifling competition and innovation is not worth taking in the Internet marketplace. Adjudication in a more common law approach that can learn and respond to the developing Internet marketplace is better suited for policing competition in that

space."

MR. SALLET: Uh-huh.

MR. MAY: I thought that was really a nice statement. But it seems really to me so much at odds, frankly, if we can be candid, with the approach taken by the Commission in the *Open Internet Order* where it established these bright-line rules, no paid prioritization and so forth, as preemptive regulatory --

MR. SALLET: Uh-huh. Sure.

MR. MAY: How do you square what you wrote there with what the Commission did?

MR. SALLET: My background, before I came here, I was doing a lot of antitrust law. So I tend to think of antitrust as a metaphor for this. And what one wants to do is to understand the extent to which facts matter in a particular setting. The more we know about something, the more we may feel confident that we don't have to go into a detailed, factual examination.

So think of three categories. There are times where we feel so certain about the effect of a practice, that we feel the most efficient way is to give people guidance and identify the practice. In the antitrust world, that's the *per se* rule against price fixing, right? We don't need to have a big, factual examination about two CEOs who compete against each other having conversations about fixing prices.

In a similar vein, the *Open Internet Order* says there are three practices, blocking, throttling, paid prioritization, where we've been looking at this, well, really going back to the 2005 policy statement from the Commission. And we now understand enough about these practices that we can give specific guidance because we understand the facts and we've thought about them so long.

A second category, and I think you're going to come to this, but I want to talk about this, is sometimes we know a lot about the facts but we don't feel we know as much. And that's the world of rebuttable presumptions. The Commission last year reversed the presumption about whether there's competition in local cable markets because of the now ubiquitous presence of DBS. So the Commission said, "Look, we used to have a presumption against competition. Now there's a presumption that it actually exists because as we look at the facts, it's a good enough starting point." But rebuttable presumptions can be, by definition, rebutted. Maybe there are specific facts on the ground that take us a different way.

Then the third category is sometimes we really understand that issues are in flux and that we need to know more. So in the *Open Internet Order*, the Commission, for example, in what's called the general conduct rule, decided that its state of knowledge and change in the marketplace was swift enough, or its understanding of the state of affairs not yet established was well enough, so that it was important to use the kind of common law case-by-case approach. This strikes me as a very intelligent design of a system where we have certainty, then we can give guidance and that creates efficiency. Where we have a basis to start our analysis, then we can adopt a presumption, understanding it's rebuttable, and where we are at the beginning of a learning process, then we look at the traditional American approach of common law.

That's what the *Open Internet* does and I think it's a very reasonable approach.

MR. MAY: But you'll concede, I assume, that there's a large area of activity that is contrary tot he mantra that came out initially about establishing certainty, where the order really creates uncertainty because of this general conduct standard. I

mean, you've got these zero-rated plans and sponsored data plans and there's a lot of experimentation taking place. Chairman Wheeler at one point said Binge On looked to be highly innovative and competitive. But nevertheless, the providers that offer those plans are now subject to some type of inquiry. I know it's not a formal proceeding.

Don't you think in light of what you had written earlier, really, that that does have the possibility or maybe even probability of chilling developments in the marketplace?

MR. SALLET: I don't think so. The Chairman has talked about the importance of permissionless innovation, right? Permission means one has to ask before one can act. In none of these circumstances did anybody have to ask before they acted. In fact, in each one of them, they acted. People brought new products to the marketplace.

Now, the Commission is an expert agency and it remains expert by understanding what's happening in the marketplace. So the Chairman has said he's asked policy bureaus to understand what's happening. That seems to me what one wants in an expert agency. But the fact is, in these instances, there was permissionless innovation and the innovation has reached consumers. And by the way, how it plays out in the market provides greater understanding to the Commission and, I think, everybody else in the ecosystem.

MR. MAY: Okay. God, I know, in theory, or in reality, we could go on forever. But I know your time's valuable and I'm just going to ask a couple more questions.

MR. SALLET: Okay.

MR. MAY: Then I'll let you go, but you'll have to promise to come back

at some point in the future.

MR. SALLET: Sure. Of course.

MR. MAY: You mentioned, I think, that you and I had talked about the use of presumptions by the Commission

MR. SALLET: Yep.

MR. MAY: You gave an example. For a couple years I have been trying to urge the Commission to adopt that approach, whether we agree on to what extent and how quickly the market seems to be moving at a more competitive pace. And you did that with regard to the cable systems.

MR. SALLET: Yeah. Yeah.

MR. MAY: This isn't even a question. I just urge you to think about using that more. But I will ask this question.

You've got this special access proceeding going on. I mean, is there any statute of limitations to how long a proceeding can go on at the Commission?

(Laughter.)

MR. MAY: No, that's a trick question.

MR. SALLET: That's a good question.

MR. MAY: Don't answer.

MR. SALLET: Does anybody have a copy of the Communications Act?

MR. MAY: Don't answer that. It's been a long time. But here's what I want. Two things here. Number one, if I understand this proceeding correctly, and it's not one of the ones I've followed as closely as some others, but I do believe the Commission is asking for information really on a building-by-building basis almost across the country in terms of what services or whether services are being offered.

Now, you talked about your antitrust background and your approach to markets. How in the world can a market -- I mean, why are you trying to collect information on a building-by-building basis? Is that the market? I guess that is what I'm asking.

MR. SALLET: The Commission hasn't ruled that that's the market, to my knowledge.

MR. MAY: But have you asked for information on a building-by-building basis.

MR. SALLET: Oh, sure. Suppose we were going to do a study of consumer products, diet soda, and we want to know if it was a competitive marketplace. We'd ask about individual consumer transactions, right? Were consumers buying diet soda? Who were they? How many were they buying? Where were they located? What products seem to be substitutable for diet soda?

The fact that we were asking about individual consumer transactions would not make every consumer a market. And so here, we are asking for information about how the market works, including where facilities are located. But we've not made a market definition decision. What we have done, and the staff of the Wireline Competition Bureau is working very hard with the help of very useful comments from people who don't necessarily agree, is helping us understand the market so that we can think about the definitions of products in geographic markets. It's a very fact-based review.

MR. MAY: Okay. I just want to say, I know you appreciate this anyway, but it's important I think for people to understand. It's sometimes missed. In the past couple of weeks, I saw a pleading filed by NCTA in the special access proceeding, and it's a competitor. Again, we can argue about the extent of competition. But cable wants

to compete in what you call the special access market. Basically it seemed to be pleading with the FCC not to regulate in markets in which there was one other provider, and it was actually pretty explicit. It said the reason is if you force down the rates of the ILECs, you're making it harder for emerging competitors to compete. And a lot of times, people don't understand that dynamic. They think if you're a competitor, you want to see the other guy regulated. So I know you appreciate that.

MR. SALLET: Look, I mean, it's one of the questions about market definitions that are in this proceeding, right?

MR. MAY: Right. Okay. So the last question, and this'll be another softball like we started off with. I'll just asked about the muni broadband preemption thing just to help us understand. Not even the substance of it, we talked about that earlier. Can you tell us why the Department of Justice refused to join the Commission's brief defending your decision? And then the second part of the question is if you happen to lose that appeal, without the Solicitor General, can you take that case to the Supreme Court? We obviously don't know what'll happen, but I was never clear about this or have forgotten it.

MR. SALLET: Yeah. Look, I think that first question is better addressed to the Department of Justice. I'm not sure I'm in the position to know the answer.

MR. MAY: They didn't tell you anything sort of off on the side or anything?

MR. SALLET: I think that the Justice Department should have the ability to explain its own decisions.

I'm not going to indulge in hypotheticals. But the issue here is a very straightforward one and an important one. We have two state laws, one in North

Carolina, one in Tennessee, that in the Commission's view impair the federal interest in broadband, which is an interstate communication. It is interstate commerce over which the federal government has jurisdiction and over which it has made competition policy choices. And the Commission found in these instances that municipal utilities that were operating successfully were being unfairly barred, inconsistently with federal law and federal interest, from providing broadband to citizens who wanted it, including I think in Chattanooga, which has been very successful in its system, from providing broadband to people who had no other broadband, had none, had zero.

And so the Commission order explains and this was recently argued I think on St. Patrick's Day in the Sixth Circuit.

MR. MAY: Right.

MR. SALLET: A very good lawyer from OGC, Matthew Dunn, explained to the Court this is a federal interest that we believe supports the Commission's actions in preempting these two state requirements.

MR. MAY: Okay. Well, I appreciate that. I want to ask you to join me in thanking Jon. Bbut I'm just going to tell you what's going to happen the rest of the day here. As soon as we get through, then the panel on the rule of law is going to come up. And we'll continue that discussion with Ambassador Verveer, Bob Quinn, and my friend Daniel Lyons from Boston College Law School. And then right after that, one of AT&T's senior officials, Glenn Lurie, is going to give a closing keynote.

But, look, what I want to say is I thought this was really terrific.

MR. SALLET: Well, thank you.

MR. MAY: I learned a lot. I'm sure people in the audience did. I think you and I could continue to have a great discussion about Deuteronomy and the rule of

law and things like that.

MR. SALLET: I have extra index cards on that if you want.

MR. MAY: Yeah. Now, you were really prepared, but I knew you would be. It was very, I think, interesting and lively. So I want to thank you for it and I want the audience to join with me in thanking Jon.

MR. SALLET: Well, thank you. Thank you, Randy.

(Applause.)

MR. SALLET: I appreciate the chance to be here.

(Applause.)

MR. MAY: Good. Thank so much.

MR. SALLET: Thank you.

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