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

"The FCC and the Rule of Law"

MODERATORS:

- **SETH COOPER** – Senior Fellow, The Free State Foundation

PARTICIPANTS:

- **DANIEL LYONS** – Associate Professor, Boston College Law School and Member of FSF's Board of Academic Advisors
- **ROBERT QUINN** – Senior Vice President - Federal Regulatory at AT&T
- **PHILIP VERVEER** – Senior Counselor, Federal Communications Commission

[*] 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. COOPER: The FCC and the Rule of Law is the theme for this panel. It is also the theme for this conference. The rule of law is, of course, foundational towards having "a government of laws and not of men." The basic concept of the rule of law is often described as consisting of at least four essential components: first, a system of binding rules; second, rules that are sufficiently known or knowable in advance and that are clear, predictable, consistent, and apply equally to all; third, rules that are adopted by a legitimate governing authority; and fourth, rules that must be applied by an authority independent of the authority that adopted them.

So understood the rule of law is a concept or a set of principles that should be basic to all laws. That is, the rule of law provides a gauge for weighing the legitimacy of all laws and even all regulations, including those adopted by the Federal Communications Commission.

So how do these FCC's processes, its policies, and its actions stand in light of the rule of law? Our panelists will offer their views. And on behalf of the Free State Foundation. I'm pleased to welcome back each of our panelists, as we have had the good fortune to hear from them at prior Free State Foundation events.

Seated closest to me is Professor Daniel Lyons. In addition to being a member of the Free State Foundation's distinguished Board of Academic Advisors, he is Associate Professor of Law at Boston College Law School. Professor Lyons' major areas of research include telecommunications and cyber law, administrative law, and property.

Next is Philip Verveer, who is Senior Counselor to FCC Chairman Tom

Wheeler. From 2009 to 2013, Ambassador Verveer served as U.S. Coordinator for International Communications and Information Policy at the State Department. For over 35 years, he has practiced communications and antitrust law in the government and in private law firms. Ambassador Verveer is the only person we know of who has served as bureau chief of three different bureaus at the FCC, the Cable TV Bureau, the Broadcast Bureau, and the Common Carrier Bureau.

And finally, we have Robert Quinn, Senior Vice President, Federal Regulatory at AT&T. Mr. Quinn leads AT&T's federal regulatory group which is responsible for all matters affecting AT&T and its affiliates before the Federal Communications Commission.

Bob, does "affiliates" include the little 20 million subscriber service Direct TV?

MR. QUINN: Yes, it does.

MR. COOPER: Okay. So AT&T and its little affiliates.

So with that, I'm going to go right into the questions. And I'm going to start by directing a question to Ambassador Verveer.

Ambassador, the FCC is governed primarily by communications laws that date to the 1990s or much earlier. So that does create some kind of a disconnect in time between the law and the technology of the past and the technology of the present. Does that pose any challenges? That disconnect between the time and technology that these laws and statutes, government communications policy were adopted, that disconnect between then and now – does that create any difficulties in advising the FCC on its legal courses of action and its ability to carrier out its policymaking functions?

MR. VERVEER: It's not a new proposition at all. This has been

something that's attended the life of the Communications Act from 1934 to the present. We've seen many instances when things that hadn't been contemplated in 1934 or indeed, things that might not have been contemplated in 1996, have emerged in the marketplace from a combination of technological change, new business models, and changes in consumer preferences.

The agency has had to contend with that kind of reality in terms of trying to interpret the statute right along. And there are many, many aspects of the statute -- in fact, the ones that I would regard as the foundational aspects -- that provide a great deal of discretion to the commissioners in terms of the ways in which they approach their obligations, something that very early on the Supreme Court underscored in terms of its decisions.

So it's not a new issue. It's an evergreen issue in a sector like communications and the related industries. It's going to be a continuing issue. We will never be able, I think, to have statutory arrangements that with any great precision describe what Congress believes the correct policies are. Hence, the wisdom of having an administrative agency with commissioners and staffs who can become experts and make their best judgments about how to proceed in light of whatever the contemporary circumstances are.

MR. COOPER: All right. Professor Lyons, the FCC's *Open Internet Order* reclassified broadband as a Title II telecommunications service. It includes a general conduct standard, a catch-all for regulating broadband network practices it finds to be unreasonable. It also established a process by which the FCC can be solicited for advisory opinions about how its rules governing broadband and network management could be applied to certain practices, although it sets forth that those are nonbinding

advisory opinions.

In your view, how does the general conduct standard and this advisory process fit with rule of law concepts for clear and noble rules?

MR. LYONS: One of the seminal documents that Justice Scalia wrote before he was appointed to the bench was his piece about distinguishing between rules and standards. Those are the two basic types of law that we have. Rules are very specific. They provide a lot of guidance, but the downside to rules is sometimes they're over- or under-inclusive and they're not particularly flexible. On the other hand, you have standards, which tend to be much more open-ended and flexible and allow the decision maker to adapt policies to the facts of an individual case. But you sacrifice the predictability that comes with a clear rule.

And Justice Scalia's point was a good one. There's a time when you want rules and there's a time when you want standards. Neither one is better or worse than the other. It's a matter of how you deploy them.

One of the big debates that was going on during the comment period leading to the *Open Internet Order* was whether, assuming the FCC had jurisdiction over broadband Internet architecture, it is better to proceed via rules or via standards. The general conduct standard is, without question, a standard. And so I think the idea was technology moves so quickly that the decision maker regulating this field needs to be able to be nimble and adaptable. But again, because it's a standard, the downside is you don't have a lot of predictability.

What I would've preferred was a general conduct standard coupled with maybe a series of guidelines as to how we might anticipate applying this standard going forward. Because the more guidance you can provide, the more you can temper the

potential rule of law problems that come with applying a standard retroactively to conduct that you think is legal at the time you undertake it.

MR. COOPER: Okay. Now, the U.S. Supreme Court's decision in 2011 in *Fox vs. FCC* -- it's known to many of us as the fleeting expletives case -- discussed the Fifth Amendment Due Process Clause. This is what it said: "Even when speech is not at issue, the Void for Vagueness Doctrine addresses at least two connected but discrete due process concerns. First, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."

To go back to the *Open Internet Order* just one more time and its general conduct standard -- I'll direct this to you, Ambassador Verveer, before I go on to you next, Bob. Gow do you see the *Open Internet Order* and it's general conduct standard in light of these concepts of fair notice to parties and as well as precision and guidance to the agency itself in carrying out and enforcing the standard?

MR. VERVEER: Well, I think there are probably a lot of different levels on which one could try to respond to that.

MR. COOPER: Sure.

MR. VERVEER: There are foundational questions about rule of law, the nature of law, what are your philosophical preferences with respect to law. But I'll try to resist going quite so deeply into that as my colleague Jon Sallet did a little while ago. It does seem to me that the notion that absolute precision should be required before people are asked to adhere to any kind of a standard, norm, rule, describe it as you wish, is largely illusory. It is, in fact, not emblematic of the realties in the world of time and space in which we find ourselves.

Is Bob in the unenviable position of having to work with and advise his client in circumstances of some ambiguity with respect to FCC requirements? The answer is yes. Has that been true from 1934 to the present? Yes. There have always been times like that.

I mean, the way I think of the particular regulation you're describing is not really so terribly different abstractly from Section 201 and 202 of the Communications Act. These are relatively open-ended propositions. It's frankly not so terribly different from Section 1 to Section 2 of the Sherman Act. It's not so terribly different from Section 5 of the Federal Trade Commission Act.

This is a kind of inevitable aspect of the world in which we live. The notions of absolute certitude would be at terrible, terrible tension with ideas of permissionless innovation and things of that nature. So the only way you're going to get that level of certitude is if you go into a prior approval regime and a prior approval regime would be the last thing we would want in terms of this particular sector of our economy.

MR. COOPER: Bob, I'll direct this to you. When the FCC first sought to adopt broadband Internet regulations in 2010, I don't know if AT&T more or less endorsed the order. You certainly weren't part of the legal challenge that was *Verizon vs. FCC*. But the FCC's next time around in 2015, its *Open Internet Order* took a very different approach when it came to mobile broadband. The 2010 order was much more of a light touch or a hands-off approach and it emphasized some of the technological distinctiveness of mobile broadband and spectrum and the limitations. So the 2015 order reclassified mobile broadband as a Title II service.

From a rule of law or a legal standpoint, can you give us your view of the

2015 order specifically as it applies to mobile broadband?

MR. QUINN: We appealed it.

(Laughter.)

MR. QUINN: I think it's in trouble.

MR. COOPER: Well.

MR. QUINN: I appreciate Ambassador Verveer's observations. And I told him before the panel that I would always agree with him 100 percent. Obviously, I do agree with Ambassador Verveer 100 percent. But it gets to kind of the first question that you asked. The legal gymnastics that the FCC had to go through in order to reclassify mobile broadband as a Title II service essentially led them down a road which is fundamentally fatal to their argument on the merits. It led them down the road to basically saying that the Internet was the same thing as the public switch telephone network. That's what they did. In order to get around the statute, they had to make that finding, that mobile broadband Internet has basically replaced and become the public switch telephone network. They're synonymous, one with the other, which means that opens the door to Title II regulation in this whole place.

I think as a practical matter, that's the problem. Yes, the statute has been around for 80 years and it didn't contemplate everything that comes after 1934. But I don't think even in 1996 that people contemplated that the PSTN and the Internet were the same thing or were even in the same ballpark with one another. That's the problem with the approach. And as a practical matter, the FCC had difficulty at the oral argument with that approach.

The other area that I think is problematic, and I appreciate Professor Lyons' remarks on this, but the general conduct rule, as it currently is structured, is there

to basically allow the Commission to apply Title II to services that don't fit within their definition of broadband Internet access service. So broadband Internet access service is the one service that was declared to be a Title II service in the Order. It has a very specific definition -- oddly, so that it doesn't really even apply to services that are sold to enterprise customers. It only applies to services that are sold by ISPs to consumers. Instead of looking at a technology neutral basis, they defined the service so that it would only impact ISPs, period. And it won't impact CLEC selling services. CLECs are competitive carriers selling services to business or enterprise customers. But yet they're going to use the general conduct standard to examine services that are sold to those same entities by ISPs.

So when we talked about the sponsored data, the 1-800 data services that are in the market, very clearly those services do not fit the definition of broadband Internet access service. They're not Title II services under the Act, yet the FCC has retained jurisdiction to regulate those services as if they had declared them Title II services. And I think that when you have a general conduct rule that is disassociated from any real guidelines -- maybe these are the guidelines that Professor Lyons was looking for -- it basically opens the door to regulate anything as a Title II service. The Court had problems with that as well when the oral arguments were held last December.

MR. COOPER: Professor Lyons?

MR. VERVEER: I'll put you down as leaning against, I think.

MR. QUINN: Leaning against, but totally agreeing with you.

MR. VERVEER: Yes. I'm constrained to point out no one has made any judgments whatsoever about the sponsored data activities, whether or not they're jurisdictional and whether or not there's anything objectionable about them.

MR. QUINN: Binge On. We know that [John] Legere last week amended the Binge On service to change it fundamentally and change it to allow the content providers to be able to opt out of the service. Are we to assume that that happened in a vacuum, that this is a voluntary merger commitment that just happened? No. They did it because they got called on the carpet by the FCC and they changed their standards because of it.

Now, I wasn't in the room, so don't quote me like I have any clear insight here. But we've been in this town, we've been in this rodeo for a long time. We know exactly what happened. We got called in on the carpet. They got called in on the carpet. Comcast got called in on the carpet. And guess what? T-Mobile changed their product.

MR. LYONS: I'll take that business conversation up to the ivory tower for a minute. We've been talking quite a bit about the statute. But in fact what we have are two different statutes with two very different ideas of how the rule of law ought to operate. The original Communications Act was a function of 1930s ideas about administrative law conducted against a backdrop of a very hostile Congress and bad politics, wherein there was a consensus that really what we needed to do is take the very difficult questions of policy and get them as far away from the bickering, day-to-day political process as possible and instead vest them in these experts who are insulated from politics who can make the best judgments for the rest of us as to how to live.

This was the idea behind James Landis and the creation of the administrative state. And it's part of the reason why the original Communications Act's Sections 201 and 202 give us these very open-ended, flexible standards. It's because we want to give our delegated agencies as much authority as possible. Now, what we

learned in the years since the FDR Administration was sometimes it's a really bad idea to give a whole lot of power to people who are not particularly accountable to the public. The development of agency capture theory and things like that suggested that maybe that's not necessarily the best idea ever.

So when you look at telecom laws that were adopted in the '70s, '80s, '90s, they're much more specific and much more directed as to what the agency can do. Commissioner O'Rielly mentioned that a little bit earlier when he said that words have meaning. And the words in the '96 Act, for example, are much more specific and much lengthier than the general grants of authority in the '30s Act.

Part of the problem then becomes the taking of this 1930s mindset that administrators should have a lot of flexibility and applying it to a statute that's quite a bit more specific. And I think the way you reconcile the two is to say when Congress used specific words, you have to give those words specific meanings and you should have less flexibility in stretching them.

MR. COOPER: All right. Daniel, I'll stick with you for just a minute and then I'll want to hear Bob's take on this. Kicking it back out of the ivory tower for a moment, you've written about interconnection policy, comparing and contrasting how telephone networks interconnect as opposed to how broadband Internet networks interconnect and exchange traffic. And you spoke earlier in this panel about the difference between rules and standards.

How does that play out when it comes to the issue of interconnection and the *Open Internet Order*?

MR. LYONS: A couple of points. First of all, I think there's a real rule of law problem with regulating interconnection the way the *Open Internet Order* suggests.

That's because of the failure of the administrative procedure process. One of the compromises when we delegate this authority to agencies and insulate them from the political process is we attach to it the Administrative Procedure Act. It requires that agencies jump through a number of procedural hurdles before we trust them to make the substantive judgments that they're making. One of those is when engaged in rulemaking, you give a lot of notice beforehand and allow the public an opportunity to comment on what the proposed rule is before it becomes a final rule. And that I don't think happened with regard to interconnection.

The notice of proposed rulemaking in the *Open Internet Order* pretty clearly suggested that interconnection was not on the table and when questioned about it, spokespeople at the FCC said interconnection is not on the table in this proceeding. But when the final rule came about, lo and behold, there was at least a claimed authority by the FCC that "we're going to review and, if necessary, intervene in interconnection disputes."

I actually think that's one of the more vulnerable areas of the *Open Internet Order* appeal. There's a good argument for the FCC to win on a lot of other issues, especially with the reclassification debate. But I think that's a pretty clear APA violation. That having been said, assuming that's a valid rule, then the question is: How does the FCC apply it? Well, it gets back to the point that Jon Sallet was making a little bit earlier about fact-specific determinations.

The FCC has a big body of law in its history about how to handle interconnection disputes with regard to the public switch telephone network. To the extent that it thinks similar issues of localized market power or bottleneck facilities, things like that, are at play here, it can draw upon those prior decisions to help inform

its guidance in these cases. But to the extent that you can factually distinguish the PSTN from what's going on in the Internet space -- and I think you can because it's much more competitive -- those become much less useful guideposts.

MR. COOPER: Bob, did AT&T appeal that part of the order as well?

MR. QUINN: Yes, we did. First, if you look at the statements that Chairman Wheeler made in May when he circulated the item for comment, he made very clear statements that interconnection was not a net neutrality issue and not covered by the confines of the proposed rulemaking and the proposals that he had out there. Then later, based on meetings that I had at the Commission and press accounts, the FCC decided to regulate interconnection as a Title II service. And then we'll all remember the famous 11th hour Google edit that came in and said, "Oh, please don't do that." Then the Commission changed the item to accommodate Google's request not to regulate interconnection as a Title II service. And now we're back in the mix where the FCC is asserting jurisdiction over interconnection.

They've indicated that they will adjudicate those with Title II concepts in mind. Yet this was another area that the Court had trouble with, which is, "Hey, aren't we back to having a *Verizon* [*v. FCC*] problem?" Aren't we back to the same kind of problem we had in *Verizon*, that you're regulating non-Title II services as Title II services? And I think the Court had problems with that. We definitely appealed that part of the order and we're confident that we're going to prevail there.

MR. COOPER: Now, Bob, I'll stick with you again for a minute. And I could've brought this up earlier when we were discussing the old laws and the new technology issue. The Commission does have in place some processes for at least granting regulatory relief from regulations that it considers outdated. It's got a Section

10 forbearance authority. It's got its Section 11 review process. Section 10 came up again in the *Open Internet Order* because it helped the Commission sort of customize its order. And forbearance comes up again in the context of technology transitions.

Do you think the life of Section 10 and 11 is spent here? Are there things that could be done to revive the process short of a legislative overhaul? Or is that something that just needs to go back to the drawing board for a new Communications Act?

MR. QUINN: Ultimately, we need to go back to the drawing board for a Telecommunications Act. Maybe we'll see after the appeal comes down. But once you start doing the legal gymnastics of deciding that the Internet is the public switch telephone network, I don't think that there's enough guidance in the Act. If you can twist that, you can twist anything, in my view.

But I'm going to come out of the ivory tower because I'm not in there very frequently. I have to talk about this from real practitioner's perspective. This is the unenviable task that Ambassador Verveer described that we've actually got to give counsel to clients on. And one of the reasons why I think we really do need an overhaul of the Act is because I don't believe that the Act really contemplates the kind of things that we're dealing with in terms of the Internet.

I think what Chairman Wheeler's putting on the floor in the privacy realm and what FTC Commissioner Ohlhausen talked a little bit about this morning is that we're basically back in the smokestack. We're operating in the Internet where we compete with everyone.

So to give you a perfect example of that, look at Section 222, which is what the Commission is going to interpret when they issue their NPRM in the privacy

realm. They're going to interpret 222 as giving them the authority to put special rules on ISPs when we're competing against everyone. The example I always make in this area is under 222, under CPNI, who you call is defined as customer proprietary network information. Why is it defined that way? It's defined that way because back in 1934, when we did the Act, and maybe even back in the 1990s, who you called, the only person that really knew who you were calling, other than the person that you called who picked up the phone and saw it was you, was the telephone company. We learned that because we had this proprietary information, and we needed that data in order to be able to complete your phone call.

In today's world when you pick up your iPhone or your Android device, there's an app on your phone. It's called the phone app. So now who you call isn't known only by me. It's not proprietary to me anymore. Who you call is now going to be known by your phone, so the person who operates the OS on your phone's going to know it. If you've downloaded the app in the Android environment, you have unwittingly given the app provider access not only to your contacts, but also all your telephone call data in terms of who you call. In the world that we live in, I'm going to have one set of rules on how I can use that data. But that phone app on your phone, that belongs to Google when it's an Android device, and it belongs to Apple when it's an Apple device. None of that's going to be governed by CPNI and that's the fundamental problem that we have.

10 years ago, every text you completed was just done through a carrier. Only the carrier had the data around the text messages that you sent or received. Not the case anymore. Yet, we're going to have a set of rules that applies to us. Look at texting. That used to be a huge source of revenue. Ad-supported vehicles have come

into the marketplace. There are like 3.4 billion text messages a day that are completed on WhatsApp. They've completely taken over the marketplace. It's a totally unsupported market in the text messaging realm.

When we get these privacy rules, Chairman Wheeler is going to recommend that we have to go to an opt-in model. We're not going to be able to play by the same rules as everybody else and increasingly we are competing against these companies in different services. But their response to that is going to be: "Under the 1934 Act, the only people I can regulate is you guys." So if all you have is a hammer, then we're going to look like the nail. That's going to happen and that's where we're going to be. And we're going to live under a whole different set of rules.

So when you ask me about the Act, if that's how the Commission is going to interpret the law and that's how we're going to proceed in this area, then I'm telling you the only answer is a new law. Because if the courts don't stop the Commission from doing these things, we're going to have completely different sets of standards out there that are an anathema to the way that the Internet works and the way that services are delivered over the Internet.

MR. VERVEER: Could I first express my sympathy and concern for this incredibly bleak outlook that you've just described, Bob. I mean, it's hard to actually believe that.

MR. QUINN: I'll just give you the Moody's speech so you can look at it.

MR. VERVEER: I did, actually, and had an interesting discussion with the folks at Moody's about it. But there's one other thing I want to say, which is since I'm old enough to be able to say this with some authority. I know public utility regulation. I actually enjoyed being a public utility regulator long, long ago when

Randy May and I worked together at the FCC. And what you're confronting is not public utility regulation.

MR. COOPER: Ambassador Verveer, I'll continue with you. I know particularly in your service in the State Department and dealing with Internet governance, you certainly would've encountered nation states where the rule of law doesn't exist or it's in shambles. Just to take this from your everyday work at the FCC, the rule of law is, of course, enshrined in American constitutionalism. With that understanding and those concepts -- could you maybe touch on how that influences your work in shaping the work of the FCC or perhaps are there any ways in which you feel that the rule of law has been strengthened during your time at the Commission?

MR. VERVEER: The international comparison in some ways and in certain dimensions inept. It is true the United States conventionally -- and that's international activities -- presses as hard as it can with counterpart nations to indicate that the rule of law is very important. Now, the thing that almost always is at the base of that that kind of advocacy -- if you will, internationally -- is that corruption is an appallingly difficult problem in many parts of the world.

From the standpoint of most Americans, it would be inconceivable to live in the kinds of societies that many, many other people live in -- in the world in terms of both deep, deep corruption and also everyday petty corruption.

So we have argued at the State Department for more regularized, if you will, approaches to the ways in which citizens are to be treated, the requirements, the equivalency, if you will, for requirements, things like our equal protection obligations, things of that nature.

When we start talking about the FCC and the question that you've just

raised and the issue of what underlies it, it does seem to me that it requires some reflection on what we mean by the rule of law. That is do we mean the kinds of precision that you described at the beginning or do we mean something else?

I think as somebody who would describe myself as a legal realist. That is, to somebody who in the unvarnished version of legal realism, what the law is is what judges say the law is. You cannot extract or eliminate the role of priors, the role of philosophical preferences, ideological preferences, and all the rest with respect to most of the decisions that are made, both by judges and by regulators. And it's illusory to think that you can.

There are some provisions, for example, in the Communications Act that, as we were saying earlier, are so precise that it's clear what ought to happen. To take a kind of workaday example, there's a lot of controversy these days about retransmission consent. The retransmission consent provisions have been looked at with some care over and over and over again with a conclusion that emerges over and over and over again that the FCC has very, very little discretion to deal with that. But most of the Communications Act and most of the significant issues that come before the agency aren't of that nature at all.

There are areas of discretion, whether they're either missing terms or there are ambiguities that have to be dealt with. This, again, is part of our judicial reality. And if you have any doubt about that, think about the contention right now about the confirmation of a Supreme Court Justice. Why does that matter if, in fact, we're in an environment where the law is, in some mechanistic sense, knowable? You put your question in at the top of the machine and at the bottom of the machine, according to all the rules of logic, comes the one inevitable decision? If that were remotely true, we

wouldn't have the controversy that's raging right now about whether or not there should be a confirmation of Judge Garland.

MR. COOPER: Bob, I'll direct this to you. There's been a lot of discussion about terms in the law that are open-ended or ambiguous or those that are specific. I'll go to the *AT&T vs. Iowa Utilities Board* decision from 1999 and the late Justice Scalia wrote this: "It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity, or indeed, even self-contradiction. Of course, the FCC is given admittedly broad discretion to regulate in many instances in the public interest and when things are ambiguous, the courts, as an administrative law matter, give the courts *Chevron* deference."

So in looking perhaps to a new Communications Act or a new Digital Communications Act, what are some areas in which you think that the Congress needs to be unmistakably clear the next time around in what it's directing the Commission to do?

MR. QUINN: You assume that it will be directing the Commission to do that. That's an assumption. I wouldn't necessarily say that it would direct the FCC to do anything.

I think the narrowness of the jurisdiction that the FCC has as it applies only under the current construct to what were once the phone companies or now the ISPs, who are the successors to the phone companies, is inherently too narrow a focus for the broadband Internet world that we live in. And so we have to come to grips with that and we have to decide as a policy matter for the country exactly what role the government is going to play in terms of regulating in the Internet space.

I point you to the areas of privacy. I think we're fast coming to the place, and it's not just our industry. So of all the people in this room, I'll bet you, probably half of you have Fitbits on, right? These apps are collecting health information that's probably more personal to you and more sensitive than the data that your doctor gets, but it's not governed by HIPAA. So we just have to make a decision how we're going to treat this information, what our role in the world of advertising is going to be, what controls, if any, that consumers are going to have in this world. And we have to take a holistic approach to it.

At the end of the day, that's going to be it. And if it turns out that the agency that regulates this is the FCC, then so be it. But the way that that jurisdiction currently exists, it's really too narrow to say, "Okay, FCC, take one piece of the Internet and go do a bunch of rules over there and apply it only to a certain number of participants in the Internet ecosystem." That's the most fundamental thing and then you have to go from there and be as specific as you can be.

MR. COOPER: All right. Is there any other contribution any other panelist would like to make before we wrap up?

MR. LYONS: One thing I found interesting, relating back to the earlier conversation, is the way rule of law issues are playing out in the municipal broadband proceeding. One of the things that's long given me comfort is the fact that the Chairman is in the good hands of Ambassador Verveer. I always get a little bit nervous when non-lawyers -- and I say this as a lawyer, right? -- are in the chairman roles because I'm much more concerned that the agency gets driven by questions about policy than about questions about rule of law. And they will say, "Well, the courts take care of the rule of law issue."

I think the muni broadband example is a good one. I think the Chairman has a pretty good idea of where the law ought to go in this area. Unfortunately, the path that he's taken is pretty clearly foreclosed by the *Nixon vs. Missouri Municipal League* precedent. And it becomes very difficult to drive the agency in that direction and force the legal side of the house to engage in the types of really legal gymnastics that they had to engage in before the Sixth Circuit last week in order to try to defend that position. Ultimately, the Sixth Circuit is almost certainly going to strike that down. The question it raises from a rule of law perspective is whether that should've happened in-house long before. I mean with all due respect.

MR. COOPER: Well, thank you very much to our panelists. We're going to wrap this up, keep this one tidy, and keep us on schedule. So give a round of applause for our panelists.

(Applause.)

MR. MAY: I want to thank the panelists too. I wish for all of these sessions, we had more time, but that was a terrific discussion. We'll continue it.

It was a privilege to have Phil here, Ambassador Verveer. I know you keep that title for life. I knew Phil when we were at the Commission together and I know this is true. He was the only person -- I think it's still true -- he served as Chief of the Common Carrier Bureau, the Broadcast Bureau, and the Cable Bureau, each one of those bureaus, which is quite a distinction. But you might know that none of those bureaus has the same name today. Each one is different and so maybe that's at least some comment on how the world has changed since Phil was there. But thank you all for being here today.