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"Implementing Real Regulatory Reform at the FCC"

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MODERATOR:

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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

PRESIDENT MAY: Okay, well, this is now phase two. I think Commissioner O'Rielly said this and I agree, this is a distinguished panel that we have here, and I'm grateful for that.

So what I'm going to do is introduce them in the order I would like for them to speak, and then I've asked them to take initially no more than five minutes, to react to or comment on Commissioner O'Rielly's remarks and add whatever they want within that five minutes. Then, I'm sure that will stimulate some questions from me and you as well, and you guys in the audience.

Now I will say this. I brought along a couple extra of these "Power Up with the Free State Foundation" chargers. I've done this just once or twice before. It's a little tricky, but let's see -- I've got two extras so when we get to Q and A, I'm going to award two of these to the people that I think ask the best questions.

[Laughter.]

PRESIDENT MAY: And part of that's going to be that they have to be questions and not speeches to get these.

Okay, so keeping with the tradition, you've got the bios. I'm going to give you the short version. I guess I'll start with the person that you probably don't know, Richard Wiley, down at the end of the table.

He's a former FCC Chairman but also a former Commissioner and General Counsel. You know a lot of people don't think of that, so I think he's got an especially unique perspective on these things.

Dick, tell me, I don't think anyone else other than maybe Bill Kennard was he also -- I know he was General Counsel; was he Commissioner in addition to Chairman?

MR. WILEY: No.

PRESIDENT MAY: No? So are you the only person that's been all three of those positions?

MR. WILEY: I think so, yeah.

PRESIDENT MAY: There you go. Okay, so that's Dick Wiley.

And then next I'll call on Daniel Lyons sitting next to Dick. And Daniel is a law professor at Boston College School of Law, up in Boston, and a member of the Free State Foundation's Board of Academic Advisors.

And sitting next to Daniel is Gus Hurwitz. Gus is a professor at the University of Nebraska Law School, and a member of the Free State Foundation's Board of Academic Advisors.

I'll just say this about both of them. You can read all their credentials and so forth, but they are both really fast-rising stars in the academic world in the fields of telecommunications, and also administrative law, which of course is a key part of the subject matter today. So we're pleased that they are both here.

So I'm going to ask Dick, as I said, to speak first. We'll just go down the line. I guess maybe I'll pose a question -- I won't necessarily do this for them, but with Dick, I mean, you know, there are not that many of us in the room that were actually around when Dick Wiley was chair.

[Laughter.]

PRESIDENT MAY: I know Rick Brecher was. I'm not going to call you out. Mr. Evans. Some of you weren't.

But I was, and I have at least the impression that at that time when Dick was Chairman -- and I came to the Commission right after he left, 1978 -- my impression was at that point things did seem to be more collegial and work in a more collaborative way at the Commission. And it doesn't mean everyone agreed all the time because they didn't. But there just seemed to be less partisanship.

So, you know, I don't mean to put you on the spot, but if that's part of your reflection then you can add that as well. Go ahead.

MR. WILEY: Well, Randy, thanks for having all of us here today. I appreciate it, and it is good that I can talk about the old days because other than Stan Besen back there and you, I don't think there's anybody else around that will remember whether I'm being accurate or not.

[Laughter.]

MR. WILEY: I do think collegiality is important in these multi-member agencies. After all, everybody's got a presidential appointment; everybody's got a Senate confirmation; everybody's got a vote. They are pretty important people, and I think their views certainly are entitled to some recognition.

And I really think that if you can have some degree of collaboration, some degree of, perhaps, bipartisanship, it adds credibility. It adds certain political legitimacy to what the Commission's doing, particularly when you've got a divided Washington. In my day it was exactly opposite as it is today. We had a Republican president, Republican FCC, and a Democratic Congress.

And, you know, despite all the political differences that you're going to have, the policy differences that you're going to have at an agency like the FCC or other big agencies here in town, I think some degree of collaboration, of cohesiveness is achievable.

Now Randy, you asked me if I could talk about what I tried to do to make that happen, and I'm going to be at the risk of sounding overly altruistic or maybe a little Pollyannish, but, in truth, what I tried to do was in my own selfish interest.

I wanted to get support -- we had seven commissioners then, you think five is difficult to deal with, you try seven -- and I wanted these folks to be with me.

So I did, you know, go down to their offices. I mean I actually walked around the 8th floor, and it was the 8th floor at 1919 M Street in those days, and see them in their offices, talked to them about what I was trying to accomplish, and, you know, consult with them pretty frequently.

And I made sure that my staff, including Mike Senkowski who was my chief of staff, and Larry Secrest, went down and talked to their staffs.

And so we basically got to know these commissioners and knew kind of what made them tick. Each one of them would have a certain interest, certain matters that were of particular interest.

I mean Abbott Washburn was particularly interested in international matters. Another commissioner would be interested in children's issues, or what have you.

And we tried, if we could, to accommodate those interests through edits, through wording that lawyers do, without undermining the basic decision or basic order

or goal that I was trying to reach. And, you know, I think those things are still achievable today.

I think also that it's important to have certain confidence on the part of the Commissioners and the Chairman. So I made the bureau briefings that I got available to my other commissioners.

I don't think that was any great concession on my part. I wanted my commissioners to be informed because I thought the bureau was going to come out, or I was going to come out, obviously. I had met with them earlier and I thought that this is a way of persuading them that what we were trying to accomplish was right.

Most importantly though, if I had to pick one thing, I tried to get to know them as individuals. I tried to develop a personal relationship with them because in Washington it wasn't as partisan perhaps as it is today, but still, you know, you've got differences.

And so we frequently had lunch together, and we started an idea that I had of having rotating dinners at commissioners' homes. And, you know, it's pretty hard to eat at somebody's table on Friday night and then curse them out on Monday morning I found. So I thought that was a very good process.

Now let me say a couple of caveats in this whole regard. It was a different era then. Things were not perhaps as political as they are today. The appointment process was quite different because today everybody comes to these agencies with a congressional background.

You take a look at all the members other than the Chairman, who's picked by the President, they all have a relationship to Congress, and so the agencies become

like little Congresses, in truth. And so I suppose it's natural that you'll have some 3-2 votes. That wasn't true in my era completely.

Number two, I don't think it's possible for any of us up here to judge from the outside what's going on inside the current FCC. So I'm not going to say it's this person's responsibility or that person's responsibility.

But I do say this: I think I know all the Commissioners pretty well, and I respect all of them. And guess what? I actually think they would like each other if they got to know each other a little bit better.

[Laughter.]

MR. WILEY: Now on process reform, I'll just say the most important thing that I think is needed, and I thought so at the time I was there, is the speed of the whole procedure at the FCC. I certainly agree with that applications for review. That's where items go to die, you know, when they go up to applications review. I think you've got to set deadlines.

The first day that I was Chairman -- and of course I'd been a Commissioner and been General Counsel so I had been there; I knew where the bodies were buried -- is I called all the bureau chiefs together and I said I want you to identify every item that's over a year old -- and we're going to set a deadline for getting those items up to the Commissioners or getting rid of them or doing something about them.

And then we published actually three-month calendars for the Commission publicly. So we'd say on June 17th we're going to take up this item; July 18th we're going to take up -- sometimes the bureau chiefs said, I can't get it up in June. I said, okay, we'll do it in July or August.

But I got them to get to commit to a particular date. And I think the Commission needs to set deadlines for decisions -- for mergers -- to have a true shot clock that really is there, not one that stops at 170 days and never starts up again.

[Laughter.]

MR. WILEY: And take statutory deadlines seriously, I think.

Also, number one, I was a hawk on trying to eliminate outmoded rules. I didn't get it all done, obviously, because a lot of those rules are still around, including newspaper-broadcast that I put into effect, but that was at a different era as well.

I think the Commission can forbear on all platforms, all industries, and not just telecom. And I think, you know, also justify any new rules with cost-based market analyses, and maybe set a sunset on new rules. That's not a new idea. I think some of the Commissioners have suggested that.

And finally I'll touch on a sensitive subject probably here, but on merger conditions I think they should be transaction-specific. I think we ought to look at the economic impact of those conditions and we ought to avoid a grab-bag that would not be otherwise attainable through the rulemaking process because I think it gets a little off track.

I could talk about others, but I think my time is up. Randy, thank you.

PRESIDENT MAY: Well, we're going to probably come back to you so don't forget anything that you may want to talk about.

Daniel, why don't you go next for four or five minutes.

MR. LYONS: Thanks. I'm really glad that Commissioner O'Rielly has taken leadership on this issue. It's not sexy like the "order that shall not be named,"

right? But it is vitally important I think to good governance in the communications law landscape.

My civil procedure professor in law school was the great Arthur Miller who used to always say, "look, we're going to sit down; you make whatever law you want; you decide what the substance is going to be; I'll decide on the procedure; and I'll beat you every single time."

And he's absolutely right, right? The procedure by which the law is carried out winds up being at least as important as what the rule itself is.

So I want to comment a little bit on some of Commissioner O'Rielly's proposals and then throw in a couple of my own, sort of toward the tail-end of my remarks.

I really appreciate Commissioner O'Rielly's focus on the Commission's ultimate decision-making authority. I think it's not unreasonable for him to ask that all five commissioners be able to have exactly what it is they're voting on before they vote.

The idea, I think, is that we want to be a nation that's under a rule of law and not a rule of ideas. We don't want to vote generally on sort of the broad strokes of a particular proposal because the details wind up being what's litigated. And so I think it's important for the decision-makers, three of five of whom turn the order into law, to be able to have the law before them in final form before the decision is made.

Speaker Pelosi was lambasted, right, when explaining that we needed to pass the bill in order to know what was in it. That soundbite really caught fire, and I think it indicated everything that's wrong with process, at that level, which is sort of similar dynamics to what Commissioner O'Rielly's speaking about at the FCC.

That particular quote, I think, really altered at least the public perception of the legitimacy of the Affordable Care Act. And it's the same sort of thing that's going on in agencies in general, and I think the FCC in particular now, is sort of suffering from similar optics that nobody's really sure what it is we're voting upon at the time that it's created.

And frankly I think that's driving a push back not only among those of us in the academy, but also I think in the greater sense by judges on the D.C. Circuit and elsewhere who are beginning to push back against agency power for exactly that reason.

So I really like that much of what the Commissioner was talking about was focused on the difficulty of delegating authority, right, particularly delegating authority, I think, to the enforcement bureau.

I think it's problematic for the FCC to take so much substantive law and push it one level beneath Commissioners down to staff, in part because staff is not confirmed by the Senate, they're not subject to fixed terms of service necessarily, and so they don't have the same democratic checks on their power that the Commissioners at least do.

But I think it's particularly problematic the way that, for example, the net neutrality proceeding is playing out where big questions of decision-making are being pushed not only down to the staff, but down to the staff at the enforcement bureau, right?

So it's not even being pushed to the staff who has special knowledge with regard to wireline or wireless or whatever. Instead it's being pushed down to the enforcement guys who are left making really big decisions about, for example, whether

AT&T's "unlimited" policy violated the transparency rules.

I think it's also helpful -- this has been said a number of times in connection with net neutrality and elsewhere, but I think it's right of Commissioner O'Rielly to reiterate the need for a pre-meeting release of draft orders so that everybody knows going into the FCC's open meeting what it is that's being voted upon.

I think the big push back has always been, well, if we release the draft order 21 days in advance, then people will read it. And I'm not really sure why that's a problem.

I think the concern from a work force level is that if people read it, then they'll generate comments on it; we'll get more comments, we'll get more *ex partes*, and because of the way the Administrative Procedure Act operates, if more substantive comments come in, then the agency has to respond.

So the Chairman has mentioned the concern with a vicious cycle, right? If we release stuff in advance then we'll get comments, and then we have to respond to those comments, and we'll get more comments and we'll never actually get anything done.

Well, I don't think that pre-release will generate additional comments; it may just generate better comments. Because the way things work right now is we get a press release that kind of summarizes the draft order, and so those of us who read the press release assume what's in it, and begin to file comments or *ex partes* with the agency anyway, some of which are off-topic and the agency has to deal with them.

In the meantime, in that 21-day period between the circulation internally of the document and the open meeting, policy is being driven largely by leaks, right? The

people who have more information about what's in the order, that's supposed to be secret, wind up being the ones who drive the process.

I think it would be better if we're all on the same playing field information-wise so that what comments or *ex partes* we do generate wind up actually going to the point and improving the FCC's process.

And if it is true that in response to those comments, or in response to those *ex partes* that the staff is going to have to revise the order, maybe that means the order wasn't ready for prime time. And so it's not necessarily a bad thing to let it slip another month in order to make sure we're producing good quality regulations as a result.

And then, finally, I think it's helpful to introduce some level of cost-benefit analysis, at least when the FCC's making important rules. This is not something that Commissioner O'Rielly mentioned, but it's something that has come up a number of times in the past.

I think after the Supreme Court's decision in *Michigan v. EPA* it seems like that's where the courts are going to be pushing the agencies anyway, to begin thinking through what are the costs and what are the benefits of all of your rules.

And so not only do I think the law's going to push the FCC there anyway, I think it's a matter of policy, a really good idea, before enacting something seriously to sit down and codify what all the benefits and all the costs are going to be in order to make sure on the record we're making a reasoned decision.

So a lot of other thoughts, but I think I've already exceeded my five minutes. I'm going to yield.

PRESIDENT MAY: Okay, thank you, Daniel. I'll turn to Gus in a

moment, but Daniel mentioned his law professor, the great Arthur Miller, and quoted that well-known quote from him.

So here's one that -- and some of you have probably seen me quote Alexander Bickel before in connection with this subject of process. He was a great constitutional law professor, at least in my estimation, and he wrote a well-known book "The Least Dangerous Branch," and another one called "The Morality of Consent."

Alexander Bickel said in that book: "Process is almost always the highest form of morality."

And, you know, that's something to think about. There are times when we can all think "substance" might be more important. But I think his point is relevant to what we're discussing today.

So with that heavy thought I'll turn it over to Gus.

MR. HURWITZ: Thank you, Randy. And you've asked me to speak for about five minutes. I'll speak for six or seven minutes.

PRESIDENT MAY: See, that's what I like about these law professors.

[Laughter.]

PRESIDENT MAY: Five minutes, go ahead.

MR. HURWITZ: And I know why you put me at the end. It's because I love administrative process; most exciting thing in the world, so you put me at the end to make sure everyone's still awake by the time I speak. Yes, I love administrative process and I think it would be a great idea if the FCC had some.

[Laughter.]

MR. HURWITZ: The previous two discussions, I think, segue well into

the comments that I want to make.

I want to take a step back and put what's going on at the Commission in a broader context of what's going on with administrative process in the current government and at other agencies.

And I want to actually start by recounting -- I won't get into the details of the social event -- but I was at a social event this past weekend that had a lot of politicos, politicians there -- not politicians, but D.C.-types, mostly from the right-side of the aisle -- and I was really pretty shocked whenever the topic of the Commission came up because there seemed to be a sort of consensus emerging that I have not heard before, which is that the Commission is a problem and we need to start thinking about getting rid of it.

There's a real crisis of legitimacy I think going through a lot of agencies right now, and in a way that I haven't heard before, those concerns are starting to be reflected on the Commission as well.

And this is in part due to the "order that shall not be named." But it's also due to the aggressiveness with which the current Commission is pushing forward its agenda items without regard for minority concerns such as those that Commissioner O'Rielly and Commissioner Pai present to us so forcefully.

So what are these other commissions, just to frame this a bit in the broader due process concern, that we're seeing a lot of. Over the last several years, the FTC and the SEC, in particular, have been making very aggressive use of adjudication to bypass the standard notice and comment procedure -- and a lot of standard administrative procedures. And what I think we're seeing at the FCC is that sort of thinking is starting

to be embraced.

Daniel mentioned the concern about relying more heavily on enforcement actions and pushing those actions into the enforcement bureau. I think that is a grave concern. I think that's a direction that the Commission goes at its own peril, and it is a direction that the FTC and SEC have been pushing aggressively.

And I expect on the due process front we're getting ready to start seeing the courts really push back against them, and the Courts really demand more rigorous process on the part of all federal agencies, and the FCC I think should be cautious of and aware of this trend, and should really embrace and take seriously this need for greater attention to process reform.

And the biggest hope and aspiration that I would have for the agency as it does this is try to conform the Commission's process with the APA. We have this thing, the Administrative Procedure Act, that's supposed to provide the ground rules for administrative procedure that all agencies provide. No agencies actually follow the APA. Every agency has its own procedure.

There's this long discussion in administrative law: Is there such thing as administrative law? Or rather is this just the study of what each agency independently does?

Well, I think that as the agencies have been more aggressively pushing their own procedures, the courts are starting to say, "Hey, you guys need to start more rigorously following a common set of procedures."

I think *Michigan v. EPA* is one example of this where the Supreme Court is trying to say: "Hey, cost-benefit analysis, this is basic; you all should be doing this."

So look to the APA for guidance. Try and conform with the APA, and also look to what other agencies are doing and try and conform with what they're doing to the extent that it's in accord with due process.

So what is the purpose of process? Process serves a number of fundamental and important goals. It serves the goal of establishing legitimacy, making sure that what the agency is doing is legitimate, providing notice to those who are governed, and improving the quality of decision-making.

Generally, the purpose of process is to protect and benefit those who are governed by those making the rules. It is not to protect the rule-makers. It is not to protect the governors.

And one of my great concerns about how the Commission, in particular, and other agencies generally, view process is they view process as a set of hurdles to jump through to ensure that whatever they want to do will be upheld by the courts.

And I think that as Daniel was commenting on the Chairman's vision and concerns about the vicious cycle of providing notice and what we'll have with *ex partes*, that's a perfect example of a misunderstanding of what process is about.

Process is not the enemy. Process is about making sure that what the Commission does is good. If there's going to be this barrage of *ex partes*, as Daniel said, that suggests there's a problem with the order. This isn't something to be feared. This is something to be embraced.

On a related front, the Commission's use of the notice and comment procedure really makes a mockery of what notice and comment is about. And the Commission isn't the only agency to be getting into trouble with this.

The EPA had a recent rulemaking with a couple million comments from concerned citizens, and when you have that large a record it becomes a shield that an agency is able to use. They can pick and choose the comments and construct a narrative and ignore the critical comments and really abuse process.

I expect that I've spoken too long, so three specific things that I will mention I think the Commission really should do on the procedure front. Crack down on leaks. This is another thing that Daniel commented on.

It's really problematic and unfair to consumers, citizens, and parties when so much of the process is run through an informal process of letting preferred participants know what's coming. It's really very problematic, and I'll note that in previous commissions, I know some examples where when there have been leaks from commissioners' offices, there have been repercussions. There have been people silently leaving the office in following months. That is not something that we've seen recently.

The editorial process concerns, I really don't know what the status of, legally speaking, a lot of the Commission orders are. The orders that are released are not the orders that were voted on. If there are substantive changes being made, what is this thing that the Commission releases? I would love for the courts to take a look at that.

And the last thing, this is something that Commissioner O'Rielly commented on with the use of witnesses, the Commission's PR machine. Both the witnesses and their use of Twitter and their PR office, this is something that in the modern age, as Twitter has become a thing, lots of agencies are really embracing to control their messaging. It strikes me as really problematic.

So Randy, hopefully I didn't speak too long.

PRESIDENT MAY: No. That was very good. We've put a lot on the table. You can see why I'm proud of our two Free State Foundation Board of Academic Advisors board members. I'm proud of Dick Wiley, too, but he's in a different category.

[Laughter.]

PRESIDENT MAY: One thing that Gus just said that struck me, and you guys can go back and think about it or check it out. Maybe some enterprising reporter can finish the job that I started.

You can take a lot of commission orders and see this same phenomenon. You talked about how notices are constructed, I think. If you look at the Lifeline order and proposed rulemaking, I think part of it was an order that came out, but there's a rulemaking part, and you look at the Commission's proposal, I submit to you it is just a series of questions.

If you just count the question marks, go through and look at it. It's just series of questions. I stopped counting when I got past a few hundred, but there may well be a thousand questions.

And the problem is that's what in the old days we used to call a notice of inquiry, perhaps, but the Commission doesn't offer very many of its own thoughts. And so you got, what I think, is a change overtime that's not really useful.

The same thing was true in the "proposal that shall not be named" that led to the "order that shall not be named," if you look at that.

I want to hone in and we're going to get to questions, and remember these two battery backups as you're thinking about that.

One of Commissioner O'Rielly's proposals -- it's also one that's been offered on the Hill as well -- it's embodied in the legislative package that the House Committee put out that's on FCC's reform, and it's just "posting Commission items in advance of the Commission meeting", okay?

The Commission does a draft order, as all of you know, and the public doesn't have that draft order even at the so-called Sunshine meeting. It doesn't know what's being discussed except what's been telegraphed.

And I confess that my own view -- I used to, when this was first offered, I recoiled a bit against this because that's the way it's always been done since shortly before Genesis. That's just the way it's been done.

But I've come to change my mind a bit in this sense: Oftentimes when you talk about it, those that oppose it say, "well, that's not the way courts operate." They don't release a draft order before they issue an order.

That's true enough, I think, the last time I checked. But the problem is the Commission's not a court; it's issuing rules. It's basically issuing regulations so I don't think that analogy, which I hear all the time, is really a good one.

So I want to just ask each of the panelists what they think about that release of items in advance, and also put this spin on it: If you don't think that the draft order should be released 21 days in advance when the Chairman circulates it to the other commissioners, should it be released to the public some time before the Sunshine meeting? Seven days so the public at lease has an understanding of what's going to take place at the Sunshine meeting?

Go ahead. I guess Daniel may have answered that, but does anyone else

have a thought?

MR. HURWITZ: I'll definitely defer.

PRESIDENT MAY: It's a hot potato you say.

MR. HURWITZ: So the basic critique that you're making is important -- it's important to remember and recognize that agencies have both an adjudicative and a legislative function. They have quasi-judicial and quasi-legislative powers.

And this is a fundamental struggle that we have in the administrative state. How to determine when an agency should be acting as a court and when it should be acting as a legislature.

I don't have strong views on whether or not the Commission should release what it's voting on 21 days or 1 day before the order. I do think that it is important that the thing that they vote on be the thing that they release.

The broader concern here is a broad concern in administrative law. What is sufficient notice? What is so-called logical outgrowth? How much can the rule that is adopted differ from the proposal that was put forth? And I don't think that the Commission is the right place to answer those problems. Commission process reform won't address those problems. These are things that the Court and Congress struggle with. And I think that there is interest in the current Court to try and better define what a "logical outgrowth" is. And I think that's the right place to see action.

PRESIDENT MAY: Okay. Dick -- just hold your questions for a minute. But Dick, you can respond to that if you want. But on the other side of the question, when the Commission's taking a vote, this question of editorial privileges comes up.

I think what Gus is getting at, and maybe Daniel, at least in theory you want what the Commission votes on at the Sunshine meeting, because that's purporting to be the official action of the Commission, to be the ultimate order that's released to the public. But then everyone understands you want to correct typos and maybe syntax and stuff like that, perhaps.

So I want you to offer whatever thoughts you have on this question. Were there editorial privileges when you were chair?

MR. WILEY: Yes. We had editorial privileges. But I agree with what Mike O'Rielly said. I think once you've adopted it, I don't think the Commission should go back and rewrite the item, so to speak. I think that's a mistake. But to clean up typos, clean up verbiage, and stuff like that, maybe that's okay. But I would not allow the complete rewriting of the item.

I think this whole question of release of the document in advance is sort of tied in with the Sunshine law. This is going over familiar territory, maybe, and it's not something that obviously the Commission can affect.

I served both before and after Sunshine. It came in in the middle part of my term as Chairman. In the old days, before that law was passed, and it was with all the good intentions in the world, but I don't think it's worked out the way that people wanted it to, the meetings today are just highly scripted. Everybody comes in and reads their speeches.

I think the best part of it used to be the formulation of the document, where the Commissioners interacted with each other and could work out things. And I would really be for a change in the law that would allow pre-decisional bipartisan discussion

between the Commissioners so that you could have some interchange there and the meetings would be something that would be real.

If you watch those meetings, in all due respect, unless you just like to hear the speeches read, the best part is the press conference that comes afterward because it's actually a live thing. It's not something that's already been precooked.

So I would like to see the Sunshine law changed and that, I think, would take care of this whole document issue.

MR. HURWITZ: Yes. Isn't that an interesting thing to note, how perverse an effect the Sunshine requirements have had. The result of the Sunshine requirement is that the orders get prepared behind closed doors by just one or two of the Commissioners, as opposed to in this public, collaborative, back-and-forth, give-and-take process. That's the exact opposite of the purpose of Sunshine.

MR. LYONS: Yes. The Platonic ideal of the agencies is that the five commissioners come together and there's a give-and-take at the open sunshine meeting happening live before the eyes of the public where policy is being made.

In fact, policy has been made long before, and the votes are already cast before everybody comes into the room. It's almost a kind of Kabuki dance. And if that's the case, if the actual give-and-take among the Commissioners is all scripted, then shouldn't we at least know what it is that they're voting on before we walk in?

I think it's a double farce, that then whatever it is that they voted on that they preordain hasn't been decided in final form until one or two weeks later.

PRESIDENT MAY: Yes. I think Daniel just said “almost Kabuki theater.” I don't know why you added "almost."

[Laughter.]

PRESIDENT MAY: If you witnessed one of these meetings in the last 20 years where anyone said anything spontaneous, then send me an email on that one.

MR. WILEY: But Daniel has gone too far in one thing when he talks about, as one who earns his living at the FCC, getting rid of that agency. That's really going too far, Daniel. We don't want that.

[Laughter.]

MR. WILEY: Because I think, really, when you look at it, the Commission deals with a lot of really tough issues. And you have to say, whether we can criticize the process -- which is what we're really working on today -- but you have to really admire a lot of the expertise that the Commission has, not only at the eighth floor level but in the bureaus.

A lot of those people that were there when I was there are still there, many, many years back, and I think they're great public servants. So with all the brickbats, I want to say that I admire the Commission.

PRESIDENT MAY: Duly noted. And did you say you wanted to get rid of the agency? I probably --

MR. WILEY: He said that.

MR. LYONS: That's not my words.

PRESIDENT MAY: Okay. The record will speak for itself, as they say.

[Laughter.]

PRESIDENT MAY: Okay. Now, I'm going to ask one more question, and then I'm going to turn it over to the audience. Just because it's important, and actually, I

was trying to listen along to Commissioner O'Rielly and take notes, and I may have missed it, but before he listed specific reforms, and I think there were nine of them, he talked about principles that should govern this process.

Now, I think that's important. And I think the principles that he mentioned were: functionality, improving the functionality of the Commission; legitimacy; and transparency. And then I think he said something about the reform efforts should not attempt to undermine the authority of the majority, or something like that.

I was thinking, and I didn't have a chance to explore it with him but I'll just pose it to the panelists this way, that those first three principles -- and there may be others you can think of -- legitimacy and transparency and so forth, they sound like underlying fundamental principles that you want to think about when you're thinking about process.

The last one about not undermining the authority of the majority to me seems a little more transient. Maybe it's about political realities, what he had in mind. But it seems to me, and I want you to comment, that some of the principles, some of the specific reforms he suggested or others that we might think of, they would have the effect of maybe restoring some balance or altering the balance at the Commission.

But they nevertheless might meet a sound governance test. And so I was interested in that last one. Do you have any comment on that and how you put those things together?

MR. LYONS: I'll take a stab at it. So, on the one hand, I think the Commissioner is exactly right, that elections have consequences. Right? So to the extent that the reigning party won the previous presidential election and has the right to

decide three of the five commissioners says something. It says something about what the American people think about the agenda that the President's party is putting forth.

So there's a sense in which it doesn't make sense for us not to defer to that. But at the same time, elections are messy. Right? There are a number of people who may disagree with the President's views on communications law policy but will continue to vote for him for other reasons.

That's the reason why process ends up being so important, so that the administrative process under the APA, that's designed to make sure that all interested stakeholders have a say on particular issues before the Commission, makes sure that every decision being decided by the Commission is being decided based on input of all relevant parties, as opposed to is simply the function of some noisy presidential election two, three, or four years ago.

So I think the point Gus was making a little bit earlier about the importance of process for legitimacy ties in quite nicely. And I think, in fact, by respecting the process and making sure that each individual decision by an agency is a well-informed decision that allows us to become more comfortable with ultimately deferring the substance of the law to the majority.

PRESIDENT MAY: Okay. Do you want to add something quickly?

MR. WILEY: Yes. I'll agree with those comments, I think. That's well-stated, Professor.

PRESIDENT MAY: All right, Gus. Go ahead quickly.

MR. HURWITZ: Another aspect of legitimacy is ultimately Congress is there as a stop. And I really enjoyed your earlier comments, former Chairman Wiley,

about the historical conduct, how you governed the Commission.

You can imagine a world where we say, for instance, that at the Commission any vote needs to have at least one minority commissioner. It needs to be a majority vote with at least one minority commissioner. That's never going to happen, and I think that's what Commissioner O'Rielly was saying we shouldn't try and do.

You can also imagine a world, however, where Congress looks at four years of 3-2 votes and says, "huh, something's not right here." We should think about this. There's an important, informal role for how the Chairman manages the Commission, and that goes to the establishment of the Chairman's legacy in the legitimacy of the Commission.

I think that Commissioner O'Rielly is right that we can't really legislate how that operates. But it nonetheless is an important soft form of process that any chairman should be aware of.

PRESIDENT MAY: Well, I appreciate all of the panelists' remarks so far. So we're going to turn to questions. I see Howard Buskirk got his hand up first again, so I'm going to call on him. We're going to give you the mic. You might be ineligible for this power pack thing, but I don't know. Go ahead.

QUESTION: I'll still try to --

MR. WILEY: Did you tell him everything is off the record today?

[Laughter.]

QUESTION: Prizes or not, I'm still going to try to ask a good question.

The Commissioner talked a lot about process reform. And there's a task force that just was announced last week that Diane Cornell's heading with the staff and

everything, including the eighth floor staff. But he seemed a little pessimistic about the outlook on that.

My question is: What is the outlook that we're going to see anything come out of that? Because I think the corollary to that is that a lot of the kinds of reforms that the Commissioner was talking about sort of start to chip away at the authority of the Chairman. And it's issues like delegated authority, and what justifications do you have to put into the orders.

So isn't there just a natural process that would be against these kinds of reforms taking place? That's my question.

MR. WILEY: Well, I'll just take a stab at that. I would applaud the fact that the Chairman started this task force. I think we have to give it an opportunity. Obviously, it's not going to probably end up completely eliminating his authority; I think that's unrealistic. But I'm going to be optimistic about it.

There are a lot of different suggestions that have been made, helpful ones. Commissioner O'Rielly has made some today. Others have testified on the Hill. And I just think we have to watch what the result is. I'm going to give it a fair chance.

MR. LYONS: I don't know what's going on in the task force; I have no inside information along those lines. But looking at the previous report that has come out, the vast majority of the recommendations that have come through so far have been, I suppose, what you would call sub-eighth floor level. Right? It's things like -- I have the recommendation list here -- "Work with NTIA to ensure a smooth FCC/NTIA coordination process," and, "Make sure that all FOIA decisions are being posted and easily accessible on the website."

These are things that are good. But they're not reforms that are aimed at the fundamental way in which the FCC is making decisions. And so when we're talking about process reform, we often use the same phrase to mean two very different things.

My concern is that the task force may focus on sub-eighth floor decision-making, which will make the machinery maybe run a little bit better but glosses over some of the more fundamental problems that Commissioner O'Rielly is highlighting.

PRESIDENT MAY: Rick, did you have a question?

QUESTION: Rick Brecher from the Greenberg Traurig law firm. Full disclosure: I'm not a member of the press, but there was an empty seat at this table.

[Laughter.]

MR BRECHER: My question is about the *ex parte* process. And for that frame of reference, I was involved in a rulemaking proceeding a couple of years ago where by actual count, I made 62 filings in the case before the rules were adopted. Two of those filings were my comments and my reply comments. The other 60 were ex parte letters.

I have described the FCC *ex parte* process to clients and to colleagues of mine -- law partners, lawyers at other firms -- who practice elsewhere, including other administrative law practices, and the response I get is always the same. They've never heard of anything like that.

I kind of like the process because of the flexibility and the interchange between advocates and staff. But it's unusual that the advocacy process at the FCC begins after the comment cycle ends. Do you have any thoughts on whether and how

that should be reformed?

PRESIDENT MAY: I thought he was going to say he liked it because of the billable hours.

[Laughter.]

PRESIDENT MAY: I know Dick might have added that. But go ahead. That's an interesting question.

MR. HURWITZ: Well, how it should be reformed, that's harder. It is a "fun" process. It's fun to go in and talk to people. You write your little letter. You send it in. It is a very weird process, though.

The real concern about it is that it creates substantial access for insiders. And people who aren't familiar with the process, who aren't able to get to D.C., who can't hire attorneys, it locks them out of the process. Even if you can go in and make one or two ex partes, perhaps, and that's your time to get before the Commission, others go in 62 times.

So I think, you're exactly right. It is an atypical process, and the simple answer to how we should reform it: we should look to other agencies and we should normalize the process. Other agencies do have *ex parte* processes as well, but they're not used to this extent. And the process should be more open.

I think another aspect of the reform could be going to Randy's comment about notice of inquiry versus NPRM and reining in what counts as a logical outgrowth. Again, that needs to come from the courts or Congress.

But get more of this consultation process done before we have the proposed rules so that the thing before the public is closer to the final thing that the

Commission will be voting on. Then, there's less need for shaping and crafting after the document is on the table.

PRESIDENT MAY: Daniel?

MR. LYONS: I'm of two minds on this. On the one hand, the FCC's *ex parte* process is not a new problem. You can go to, I think it's 1976; the D.C. Circuit lambasted it in the *HBO* decision, really ripping into the problem of insider access that the *ex parte* rules create.

On the other hand, what the FCC does is really complex. And so it seems like there should be an opportunity for Commissioners, before they walk in and cast a vote, to be able to call somebody that knows something about the issue and say: "Look, lay this out for me. Educate me so that I know what's going on. Even if I don't necessarily agree with you, give me a little bit more information outside of the public eye, so the public doesn't necessarily know that I'm not as well-informed as I should be."

We want some opportunity for Commissioners to be able to gather that information. And I'd rather it be people connected with the industry than a Wikipedia page or something like that. So there's some value to the *ex parte* system as well, although ultimately I'm not sure as to whether the pros outweigh the cons or not.

MR. HURWITZ: There is an *ex parte* process for editing Wikipedia, though.

PRESIDENT MAY: Rick -- I'm going to ask a question -- how many of those 62 ex partes that you referred to resulted from someone at the Commission calling you and asking a question versus you initiating the process? Because that's a good point, I thought, that Daniel made.

MR. BRECHER: Yes. That's a very good point. And the answer is -- I don't have the number -- but quite a few. There was that interchange between staff and us, yes.

PRESIDENT MAY: So that supports the value, really, of the process in that regard.

MR. BRECHER: One last thought. I know a prior Commissioner had a policy that when you went into that Commissioner's office, the Commissioner wanted to have the other side in the room at the same time so we could have a debate in front of the Commissioner. And I thought that was very helpful, very instructive, and it's not done very often any more.

MR. WILEY: Yes. One of the problems, of course, is that it's more than two sides oftentimes, Rick, and you can't have an army in there. I think realistically the Commission needs to hear some of the substantive arguments that people with expertise have, and so I'm not opposed to the current practice.

I think as long as those statements are published so people can look at them, and if they disagree with them, they can come in and make their own *ex parte* comments. I think that's just a realistic process. You're never going to get perfect knowledge into the Commission. I think this process is working about as well as it could.

PRESIDENT MAY: Bob? Bob Quinn.

QUESTION: I'm curious, Dick, how it worked in the '70s, the NOI and the NPRM. It seems now that NOIs are only really done to completely bury an issue so that somebody could say, “hey, we opened up a docket, but then that's where the issue

goes to die.”

It seems to me that a lot of the transparency issues and a lot of the surprise that's created by orders that are coming out of NPRMs that are just no more than NOIs create a lot of the issues that we have.

When you guys did items, if you do this right, you're doing an NOI. You're coming out with an NPRM that, holy gosh, actually has proposed rules in it. And then it results in an order to really fully flesh it out. Is that how it worked when you were chair?

MR. WILEY: It did. We did try to work it that way. I think you're absolutely right. The problem, of course, again is the expedition of action. NOIs were great because they did flesh out the issues. You really learned a lot in the process. You could form a good rulemaking.

But if you're going to take a year and a half to do an NOI and then a year and a half to do a rulemaking or maybe longer, the process just stretches out too far. I think that's what the Commission's been concerned about.

I think if we could have deadlines and have an NOI on really complex issues which the Commission doesn't know a lot about, I think that would be constructive. But it's kind of a dying art, I'd have to say.

PRESIDENT MAY: I know there were a lot more NOIs back then because remember, Dick, that Commissioner Quello, your colleague, I can remember him saying so many times that when he disagreed with something, he would vote for it and say, "Well, it's just an NOI." Remember? "It's just an NOI," thinking he would get it the next time.

Another question? Scott, I think you've had your hand up. Wait. And formally announce yourself.

QUESTION: Scott Cleland, NetCompetition. Because the public interest is so central to what the FCC does, and especially like in mergers, should the process of deciding what the public interest is be changed? Like the Court said, there was a cost-benefit issue. There are other things, boundaries, that should be on the definition of the public interest.

MR. HURWITZ: You don't like the process of the "public interest" being what three commissioners say it is? I think you're exactly right. And there have been court cases where these issues are litigated, where the courts have demanded more rigor in defining what the "public interest" is. And I think *Michigan v. EPA* is another signal that agencies need to be more rigorous.

Part of the problem here is the cost of the process, and this is an area -- again going back to my initial comments about the SEC and the FTC and now the FCC relying extensively on adjudication, and this possibly raising due process concerns.

Agencies are relying on adjudication because it is exceptionally rare for parties to challenge adjudications and go through the process of litigating, typically before a bureaucrat within the agency, then the full agency, the full commission, and then ultimately getting to court.

So when you have a broad standard like the public interest standard, it's very difficult to challenge that. And I think that is an area that we do need to see, and I expect we will see in coming years, a lot of judicial attention.

PRESIDENT MAY: Okay. We're just going to take one or two more

questions. And I see Daniel's hand up over here, and then, Chris, I'll call on you. And we'll have to make those the last two questions.

QUESTION: Daniel Berninger. A quick comment. I think we will need to put dismantling the FCC on the table in terms of government accountability because again, coming from an entrepreneurial world, if I didn't worry about failing, I could do anything I wanted.

So if you take away that -- no matter what you do, you cannot fail -- then you've lost control. And of course, that's sort of a general statement about Washington, D.C.

My question is, there's been a big change, and I've gotten interested in the change in enforcement, the magnitude of the enforcement fines, and the arbitrariness from one Chairman to the next of it exploding. Does the panel have any comments on the change of enforcement?

MR. WILEY: Well, my goal when I was Chairman was to try to get compliance and not necessarily to get penalties. I wanted to get my staff to make certain that people were staying with the rules that we had established, and sometimes that meant working with the regulated industry so they understood what we were trying to accomplish. So it may have just been a different approach than we currently have.

MR. LYONS: I'd really take a look at Commissioner O'Rielly's blog post on this because he talks a lot about the march toward bigger and better numbers, that if the Enforcement Bureau points out that it's had more penalties this year than last year, that suggests they're better at enforcement. And he said it's sort of like saying a city's doing better than it did last year because they have more arrests. That's not actually a

sign of progress.

From an Enforcement Bureau perspective, what I would like to see is some guidelines on how we come up with a particular number, something beyond the defendant's ability to pay, as the benchmark of the amount that we choose in the instance we decide to assess damages.

MR. HURWITZ: I'll just say "amen."

PRESIDENT MAY: Okay. Now, don't forget to tweet in these last moments when you get back to your office, #FCCReform.

This is the last question, and it's got to be the last. I know, Gus, you've got to go. So I'm going to call on Chris Wright for a crisp question.

QUESTION: Well, thank you, Randy and the Free State Foundation, for another excellent program on an important topic. I don't really have a question other than thanking you and saying it's such an important topic, I know the Federal Communications Law Journal is planning an issue this year on FCC process reform. I hope your speakers and people in the audience think about participating.

And I know that a large part of the annual seminar next May that the FCBA holds is going to try to build on what you've started here and address the same issues. Thanks.

PRESIDENT MAY: Well, thanks to you, and thanks for your leadership of the FCBA and for what you're going to do with that law journal issue. I appreciate that. I'm tempted, since you thanked me for this program, to say that you should get one of these things for that excellent comment.

[Laughter.]

PRESIDENT MAY: That's very tempting. And I shouldn't go out on a limb and do this too much, but what I'm going to do --

MR. HURWITZ: Auction them. Auction.

[Laughter.]

PRESIDENT MAY: Yes. Yes. I'm going to award one to Rick Brecher, not only because he's a longstanding friend of mine and was a colleague at the FCC, but because I thought that was an important question. And I'm going to give the other one to Bob Quinn, who I thought had an important question as well. But we'll do more of these in the future.

Listen, I thought this was just really fantastic. I'm always really gratified and pleased, and the panelists, I know, feel good about it when no one leaves at one of these things. So join me in thanking our panelists here for this program.

[Applause]

PRESIDENT MAY: We'll see you next time.

[Whereupon, at 1:58 p.m., the seminar was concluded.]

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