Discussion

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JUDGE KOZINSKI: Thank you. I thought maybe the best way to proceed is to try to sink our teeth into a hypothetical that the panelists can each take turns addressing. Then, as people in the audience are moved to do so, they can step up and ask questions.

It turns out that in the next issue of *Family Circle* magazine there is an article describing a study by two little known scientists from the University of Bucharest. The study reveals that fluorescent lights of the type commonly used in offices and homes have a statistically significant effect on the risk of skin cancer. This not being a scientific journal, they do not give us the data, but we are led to believe that data does, in fact, exist. The study, though done abroad, was done under accepted scientific procedures.

The day after it hits the stands, we have a lawsuit in the Central District of California brought on behalf of all those exposed to radiation from fluorescent lights. There is a good bit of consternation and discussion about state and federal laws prohibiting employers from using fluorescent lights in the office and so on. We get a panel of experts together to consider this totally new scare that we had never really thought about.

What do we do as a society? How do we deal with the lawsuit? How do we deal with the legislation? How do we deal with the next year of our lives when we know that something that has been in our society, and that we all are accustomed to and rely on, has suddenly been called into question?

I am perfectly willing to go in the same direction as we have been unless somebody wants to jump in. Why don't we start with Mr. Sher. Feel free to cut in. I am just throwing the ball out.

DR. MICHAELS: This essentially happened with cellular phones on *Larry King Live* not very long ago. The difference is that we have not yet convened a panel of experts to make a great decision.

JUDGE KOZINSKI: Well, how do we deal with it? I wanted to get away from an actual case. How should we deal with something like that? It seems like Mr. Sher was about to start.

MR. SHER: Well, I think the key question is not the *Family Circle* article, but the study that underlies it. As an advocate who would be either concerned in the regulatory context or the tort context with trying to figure out how the government ought to respond, or if the government ought to respond at all, or how the tort system ought to allocate and assign liability, that would be the first place that I would go to look. I do not think that you can go much farther, Judge, in your hypothetical without more information about the study.
JUDGE KOZINSKI: Well, let's say we order the results, they get translated into English, and they look pretty much like a scientific report in this country. I only used the foreign country to raise the level of uncertainty a little bit. They are not scientists with whom you are familiar, but the data on its face looks pretty solid if believed, and it shows that those exposed to fluorescent lights will suffer an increased likelihood of skin cancer of five cases per 100,000 during the course of a year.

MR. WARREN: Well, first of all this is a common problem that practicing lawyers face. It really is. I think we should address separately each of the forums in which you might address a question like this. Looked at from the standpoint of a client, this is a horrible thing because whether there is anything to the report or not, your product sales are going to be adversely affected and very quickly. So you want to get to the bottom of this subject from a scientific standpoint, and from a public relations standpoint, as quickly as you can.

Now, first, I think in your hypothetical there were lawsuits pending or contemplated. Let's say pending so I can directly address the litigation issues. I would move to dismiss those lawsuits because I would hope the jurisdiction in which the lawsuit was filed was one that would not recognize such a far out cause of action as damages for fear of exposure to a potential carcinogen.

Secondly, if there was a flurry of legislative activity about this product, which would be common in those circumstances, I would want to have my people working on having the authors of the study testify at legislative hearings to provide us with an opportunity to cross examine those scientists, and review their underlying scientific data. Dealing with scientific studies is a very difficult problem, as a practical matter, for many practicing lawyers because the study may appear persuasive on its face, but unless you have access to the underlying data you really cannot refute its conclusions.

JUDGE KOZINSKI: You are the lawyer and your client—as a large manufacturer of these bulbs—has been implicated. Do you commission your own study after looking at the data or do you say, “I do not want to know?”

MR. WARREN: No. I think the first thing you try to do, as I say, on the scientific side . . .

JUDGE KOZINSKI: You look at that data.

MR. WARREN: You try to cast doubt on the data and undermine it. But in the end if you have had experience . . .

JUDGE KOZINSKI: Why try to cast doubt on it? Maybe it is good data and people are, in fact, dying.

PROFESSOR KRIER: It is called an adversary system. (Laughter.)
**Mr. Warren:** It is what it is called: the adversary system. But it is almost impossible for there to be an issue to address that is not in some way related to the scientific data. Again, analogizing this to the cellular phone issue, there is a whole lot of data on related electromagnetic field radiation injury, and I will bet you right now, just taking your fluorescent light bulb example, that there are thirty or forty articles in the scientific press somewhere related in some way or another to this issue. So you want to cast doubt on it.

But ultimately anybody who is experienced in this area is going to know you cannot lay it to rest. So what you want is to have a blue-ribbon, truly independent evaluation of this thing and you do not want to have your hands all over it. What you really want is to get first class scientists to look at it and that is going to take some time. That is one of the reasons you try to cast doubt on it early.

**Dr. Michaels:** It is not so easy to define class and science unfortunately. I think a lot of issues have demonstrated that. The most important point to me here is that *Family Circle* has no scientific gatekeeper.

**Judge Kozinski:** Has no what?

**Dr. Michaels:** It has no scientific gate keeper. There is no expert editorial review process to ensure scientific credibility. It is like Carl Sagan publishing in *Parade Magazine*. We do not hold a lot of stock in that.

The question that I would ask is what is this doing in *Family Circle*. To what learned societies do these scientists belong?

**Judge Kozinski:** None accepted by the West. These are scientists from a country that has just emerged from communism. We have no reason to doubt their competency, but they just do not belong to the normal scientific organizations.

**Dr. Michaels:** They must be very good linguistically to publish in *Family Circle*.

**Judge Kozinski:** This is where they managed to publish. So maybe it is not the best magazine. Professor Huffman?

**Professor Huffman:** To get away from the possible lawsuit for a moment, I would make a point relative to the second part of your hypothetical problem, which was that regulation was anticipated. I think another good example of this is the Alar scare that the Natural Resources Defense Council (NRDC) brought upon us a few years ago.

**Judge Kozinski:** Alar?

**Professor Huffman:** Alar, the chemical used on apples. The immediate result in that case was government action to regulate the use of Alar combined with a lot of impacts on the industry. It seems to confirm a point, that both Professor Krier and I were making, that one
thing we want to do is look at the alternatives. What are the relative risks? Even putting aside the question of the validity of the science, if we assume the science is valid, what are the costs in terms of all manner of human consequences, health risks and others, of taking that action.

There is a whole range of factors that need to be taken into account. I think what happens is a scientific assertion is made, and the conclusion drawn from that assertion is that we should take a particular policy action. That conclusion is often made without ever talking about what the true policy issues are. We never really examine the consequences of this action versus some other action.

DR. MICHAELS: I find this rather interesting in that I find myself outnumbered on this panel because, as a scientist, I am questioning the validity of the science.

MR. SHER: Well, I am with you on that.

JUDGE KOZINSKI: Let’s say you question the validity of the science, but you have to live tomorrow. You have to do something tomorrow in the face of uncertainty. The question has been raised. It has not been raised in a way that is satisfactory in every way, but it has been raised in a way that makes one concerned. The question is, what do we do as a society while we are sorting out the risks?

MR. WARREN: Yes. I think first of all that, of course, it does matter in what journal it is published, and I would have a different view of this subject if it were published in Science or Nature, or the New England Journal of Medicine. But there are a lot of second and third rate journals that have science attached to them. If you changed your hypothetical so it covered one of those journals, I think I still would have basically the same reaction. What you have to do is quickly get at the facts. I am only looking at it from the standpoint of a client, but I think that is a valid perspective. Alar is only one of many examples where these things have very major immediate impact and they need to be addressed. But ultimately, if you change the hypothetical to be Science magazine so that it has some legitimacy from the outset, then I think I would still stick by my feeling that what you need to do is to put it into a debate or into an arena where it can be debated on its merits by people who are experts. Just by issuing a study, it does not follow as the night to day that, if there is a problem, you ban it or even regulate it severely.

PROFESSOR KRIER: Am I right in assuming that the makers of fluorescent bulbs are also the makers of incandescent bulbs?

JUDGE KOZINSKI: Some are and some are not.

PROFESSOR KRIER: Really? There are companies that only make fluorescent light bulbs and scorn incandescent light bulbs? I cannot believe that. I mean, they might not give a damn. It will just stimulate
the market for incandescent light bulbs. So pull the fluorescent bulbs off the market for a while, while you do a study so the problem can be illuminated, and use incandescent bulbs in the meantime.

**JUDGE KOZINSKI:** The problem is not the bulbs; it is the fixtures. A lot of places do not have fixtures for the use of incandescent bulbs, as they are equipped for fluorescent bulbs. Now, quickly you develop a market for a converter.

**PROFESSOR KRIER:** Right.

**AUDIENCE:** With all due respect to the distinguished panel, I believe that they are missing the point. The piece of research that was published, although it was published in Romania, may, in fact, be a perfectly credible individual piece of research. I remember past histories with fluorescence, which has been implicated with things like leukemia, nervous disorders, and such. You can always run an experiment or run a sampling on a study in which you will find these sorts of results.

There is no way that science can give you a definitive answer with a phenomenon like this as to whether there is a “significant effect” or not. The question depends not on what is the result of this study because, after all, the studies that find a significant effect, or an effect while not significant as being above the average, are the ones that wind up being reported. Of the infinite number of experiments that can be and are run, the ones that achieve notoriety are the ones which are likely to cause concern.

The difficulty with the legal system in dealing with these sorts of issues is that once we assume that there are grounds for action because of enhanced risk, we have lost any ability to make the political decision as to what kinds of risks are acceptable, and we have also lost the ability to make the decision as to what are the appropriate limits of government activity in controlling this.

**JUDGE KOZINSKI:** What about the potential that one study can be an outlier?

**DR. MICHAELS:** Well, there are ways to address that.

**JUDGE KOZINSKI:** How do you deal with that?

**DR. MICHAELS:** There are meta-analyses that can be done where you can find out. Scientists do not exist in a vacuum. You find out who looked at this problem and did not get the result. That adds to the sample size. When these meta-analyses are performed, often times the finding or the putative linkage between cause and effect become statistically insignificant.

**PROFESSOR KRIER:** But to be fair to Judge Kozinski’s question, what do you do in the meantime—bearing in mind that in the meantime the worst case could be more catastrophic? Like the fluorescent bulbs
could melt down and you get a new kind of pale blue China syndrome or something like that?

Dr. Michaels: Well, I certainly have a lot of difficulty in entertaining the credibility of the scenario when we get that far, frankly.

Professor Krier: Well, what about Chernobyl and the Challenger?

Mr. Warren: I mean, I think that the difficulty with a hypothetical in this sense is that people who are experienced in this area, whether scientists or lawyers, would tell you that there is probably not cause for alarm. I am trying to think of an example of a single study identifying an environmental risk that turned out to be very significant.

Professor Krier: In 1943, photochemical oxidant caused smog in Los Angeles, although that wasn’t a well-understood fact at the time. Because photochemical oxidant is a product in part of hydrocarbons, the auto companies were fingered as an important contributor to the problem. But they said: “Bull, it’s not us.”

Mr. Warren: That is true.

Professor Krier: Yet the science of the matter itself was established beyond doubt way before we managed to fight the auto companies into the corner.

Mr. Warren: And certainly asbestos, in 1964, was shown to cause cancer, and certainly some of the most recent evidence on lead indicates that it has significant adverse health effects. But usually these do not come out of the blue. There were lots of previous indications. There are things that have been studied and most studies confirm or extend previous studies.

Alar is an example of what more typically happens where you get a panic over something that is not real. I think the reaction of most people when trying to defend these situations is to worry about the immediate problem and how do you deal with that. But, at the same time, it is important to recognize that anything is possible, and you could have found the unusual situation where something truly significant has been discovered. You have got to be prepared to recognize that, and deal with it if it is, in fact, the case. The only way you can really deal with that is to try to do something credible and independent.

Judge Kozinski: Now I have heard a couple of times, perhaps from Mr. Warren, but I thought it was from more than one person on the panel, that Alar was a big scare that did not have any substance. Does everybody agree?

Mr. Warren: Yes.

Dr. Michaels: Yes.

Judge Kozinski: If you reach a consensus that you have done something and it turns out to be really stupid, how do you undo it? What if
you rip out all the fluorescent bulbs because you are afraid of the blue meltdown, and then you find out that there are no health risks posed by fluorescents?

**Dr. Michaels:** We would obviously have to temper the precautionary principle. That is really where this discussion is going. We have this beast lurking now in the environmental system called the precautionary principle, which states that if something is suspected of causing harm, we have to do something about it, whether or not there is any evidence that it actually causes harm. I think that it is the blind acceptance of that principle which is going to get us into an awful lot of trouble, particularly with respect to some of the larger issues.

**Judge Kozinski:** Is that the problem Professor Krier was talking about? Once you start talking body count, popular perception builds on that. What do you do about that? Do you say this is scientifically proven, or that studies show there will be an increase of five skin cancer incidents in 100,000 over the course of a year?

**Professor Krier:** Ideally you just compare it to the alternatives. The question is how many dimensions you use in the course of doing that. The fact is that your case is challenging, but not particularly interesting to me in the sense that if the worst case is not all that bad, then in my view we can afford to muddle through, and look for the cheapest and easiest way to learn by doing. I would just want to save as many resources as possible as we screw around and ban this and then let it back in. So in that sense your problem is just not that interesting.

The interesting case is the one that takes on more of an "end of the world" aspect, as with global warming. You fool around and wait and see on global warming, or is it global cooling, and by the time we decide that, gee, we might have a real disaster on our hands. *That's interesting!* Especially when you have long latency periods.

**Dr. Michaels:** If the latency period were that long, it would not be a problem because the ecological statute of limitations would be exceeded.

**Mr. Warren:** Yes. You know there is one other thing that was implicit, and I think Dr. Michaels actually asked this question, but we just did not quite pick it up. Suppose you have scientific evidence and you act on the evidence by issuing regulations that require $X$. That regulation today is going to be based upon all kinds of precautionary principles, and is going to be conservative or risk averse.

And as the science develops, suppose the consensus begins to emerge that maybe we have gone a bit too far. Moving back from $X$ to one-half $X$, or one-third $X$, or one-fourth $X$, in terms of your regulatory standard, is an extraordinarily difficult thing to do as a practical
matter. You do not have to agree with my example to understand my point. Dioxin is a good example of this.

During the Reagan administration, in the midst of Anne Gorsuch’s decline, she evacuated Times Beach and declared one part per billion in soil to be a terribly risky thing, and it was all predicated upon a very, very hyper-conservative assessment of the risk posed by dioxin.

The paper industry now, after years and years of effort, has been trying to undo that risk assessment and it is an extraordinarily difficult thing to do. Huge amounts of resources get spent both investigating the problem and debating the issue, and responding to that regulation. So, as a practical matter, these actions are awfully difficult things to undo once they get under way.

I have used dioxin, and, of course, you can disagree with that particular example, but there are many other examples. We were discussing photochemical oxidants. The original standard for ozone was set in the 1970’s based on a lick and a promise in thirty days. This standard was relaxed in 1979 to 0.12 parts per million, but only after enormous effort.¹

The ability to ask the kinds of questions we have been asking here today—like what is the consequence of two annual violations of the ozone standard at 0.12 parts per million—is important. But trying to sort them out in a manner that looks at what society gains and loses by particular regulatory measures after the fact is a very difficult problem indeed.

**JUDGE KOZINSKI:** Professor Huffman?

**PROFESSOR HUFFMAN:** The discussion presumes that if the science is good and that this risk, whatever it is, exists, we, meaning government at some level, ought to do something. That presumption seems to me to be incorrect. The readers of *Family Circle* can make a decision themselves about what to do about fluorescent light bulbs. I think this case is uninteresting to Professor Krier because it is a case where individuals can make those choices. There is really no good reason, as far as I can see, for us to act as any sort of community.

So I do not think we should proceed on the assumption that every risk that arises, if we can demonstrate that the science is good, requires some sort of governmental response.

**PROFESSOR KRIER:** If it is just another voluntary risk?

**AUDIENCE:** But doesn’t that raise a central question as to who ought to address the risks? You have got three possible places that you have mentioned: the courts, the legislature, or the executive branch through

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promulgation of regulations. Someone has to make a decision as to what factors would be used in a risk analysis. And if you say that Congress is not going to do it, and the executive branch is not going to do it through regulation, then aren't you then throwing it to the courts, and asking the Central District of California to decide what society will live with in terms of a risk analysis on your light bulbs? These decisions are not just whether a product should be banned, but whether a manufacturer perceives that the risk of producing the product is unwarranted.

**MR. SHER:** I think you are right, and I do not think that you can answer any of these questions in the abstract in a single way. I think we all must make individual judgments about risk in our own personal lives. Further, our regulatory institutions and the courts must make judgments about risk all the time. Those judgments are made on collections of information, which may include an initial study from behind the former Iron Curtain, and later replications and judgments, which may clarify the issue.

In the Northwest, in the timber context, we have seen a virtual unanimous shift in the scientific community from a way of thinking that focused on individual owl pairs, scattered and isolated across the landscape, to the need to preserve the species through large bodies of interconnected suitable habitat. The scientific community has gone along with that. Now there may have been times in the progress where there was debate on different levels, and there is still some debate going on. But those are the easier cases and the easy cases ought not be confused with the difficult cases. I think that the only thing that can be drawn from this discussion is that there are judgment calls which need to be made by different institutions over time.

**JUDGE KOZINSKI:** Okay. It is a year later and a couple of things have happened. Several teams of scientists have tried, unsuccessfully, to replicate the studies. The two scientists who conducted them are now living in Los Angeles, and they are consultants. (Laughter.)

They are consulting, among other things, in a lawsuit brought on behalf of a class of people who have suffered skin cancer, and who claim this was a result of exposure to fluorescent lights in the workplace. There is now a summary judgment motion filed by the defendants—makers of electric fluorescent light bulbs, various employers who use the bulbs in their offices, and a long list of others.

**Mr. Warren, you are bringing that summary judgment motion. Do you win? I know you want to win.**

**Mr. Warren:** Well, I know I want to win, but I want to know what the law in the circuit is, or at least what arguments I can make about the causes of action.
JUDGE KOZINSKI: Well, the Supreme Court has come down with the Daubert case and we have not yet decided on remand what to do with it, which is true. So we have to take the law in the circuit as being the Supreme Court's opinion and nothing else.

Let's not talk entirely about what will happen, but also about how you would deal with it. You have a study by people who are scientists and are willing to testify, to stand behind their findings, even though other scientists have not been able to replicate them. Do you let the lawsuit go forward? Do you let it die? What next?

MR. WARREN: Well, it is a judgment call here I think. Personally, I do not like to file summary judgment motions unless I think I am going to win them because it delays the process. If I felt I could get an early trial date, and if I felt that this study was no good and I could prove it, I might take my chances with a trial because I think it is difficult to keep anything with a modicum of credibility out in these situations.

Ultimately, my decision would depend on the specific facts about the available scientific studies. It would depend on exactly where it has been published. It would also depend on the quality of the subsequent evidence, including evidence that appears to be contradictory. At some point, the plaintiff's evidence becomes so weak that I would go after it on summary judgment. But if I thought I could get an early trial, and it was a close question, I would push it to trial because I think you can usually beat things like this if they are weak on their merits.

JUDGE KOZINSKI: Professor Michaels is bursting to say something.

DR. MICHAELS: My understanding of the Supreme Court's decision in Daubert is that the Court established a number of guideline criteria for admissibility of scientific evidence. These criteria included (1) testability; (2) peer review and publication; and (3) widespread acceptance of the methodology. If we are to go by those guidelines, the plaintiffs' scientific evidence is simply not going to be admitted. It flunks on testability. It might get a "D-" on peer review and publication, and on widespread acceptance of the methodology. Yet, because it has not been replicated, the methodology cannot be accepted. It has flunked. It is just that simple.

MR. WARREN: Except, I think, just reading Daubert as a lawyer, that the criteria laid out in Justice Blackmun's opinion is nothing more than dicta. What he is really saying is that the district judge has a lot of discretion in this area. I would, of course, argue everything you are saying to a district court judge, attempting to persuade him that

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3. Id. at 2796 (stating that "many factors will bear on the inquiry" of whether scientific evidence should be admitted, and characterizing the criteria laid out in the opinion as "general observations.")
every word that Justice Blackmun uttered on this was a hard and fast rule, and that according to the criteria he established, the plaintiffs' key scientific evidence must be excluded. However, I think the district court judge would likely conclude that all Daubert held is that district courts have the discretion that they always had. Thus, the district court judge is free to decide whatever he wants, and the Court of Appeals is going to be very reluctant to reverse such a fact-based evidentiary finding.

DR. MICHAELS: Actually, I think Daubert does say that the trial court has more discretion than it had before under Frye.

MR. WARREN: Yes, but then Frye was arguably not the rule.

AUDIENCE: This is a broader question on the liability scheme, which I think is on the minds of a lot of Americans. An assumption has been made that if your studies demonstrate that the fluorescent bulb is, indeed, causing an injury, then we have to go out and find every one of these manufacturers liable and get damages from them. I think there is a leap there. What if, when they made that bulb, there was no evidence whatsoever that they could have anticipated that their bulb would cause harm or that they could produce a safer bulb?

In the Superfund context and some of our other environmental laws today, this is exactly what we are doing. That is what Senator Hatch talked about. We are applying strict liability for damages. Is that even appropriate? Shouldn’t we be taking a step back and looking at why are we deeming that manufacturer liable?

JUDGE KOZINSKI: You can all address that comment in your two minutes.

MR. WARREN: You are right. Superfund is weakly retroactive. I argued about the issue and lost in a decision in a South Carolina district court that was subsequently affirmed by the Fourth Circuit. It is not quite true that the tort law is so retroactive as you imply because a manufacturer still has a right to say: "I had no duty to warn because I did not know." However, you can get into very muddy litigation regarding what the manufacturer did or did not know. So I think it is a difficult situation, and the way the law tends to deal with this is by applying retroactive liability, and judges have said that this is constitutional.

DR. MICHAELS: My original remarks were on the implications of some of the modifications of the Frye rule and the environment. I will just take a couple of seconds here to give you what my conclusions are.

I think the Supreme Court used the opportunity of the Daubert case to provide a slight, but very important, broadening of the Frye

rule. I think this is going to be very interesting news for environmental law and legislation, because it is going to expose the lack of scientific foundation that underscores what we call the precautionary principle in environmental regulation. The precautionary principle states that if there is a possibility of environmental damage, regulation can be warranted even if there is a lack of any hard evidence.

I think that if Blackmun's opinion serves as the background, we are going to see the great diversity of legitimate scientific opinion with respect to the precautionary principle on what is the most important environmental issue of our time, the issue of global warming. I suspect the bottom line is going to be very important. I think that there will be a muddying of the waters, and in this case the waters may deserve to be muddy. We likely are never going to see anything like the carbon tax hold up until the planet shows considerable evidence for disastrous warming, which has not yet been demonstrated. If the facts of the last 100 years are a guide, such evidence of disastrous warming will likely never be demonstrated. So I think this broadening of Frye is going to save us perhaps an awful lot of money in the future.

JUDGE KOZINSKI: Thank you. Closing remarks? You do not need to take them; it is like rebuttal in court. You take them at your own risk. MR. WARREN: I cannot lose.

I do not think the Daubert case is going to make much difference. I do not think that the problems that we face as a society in the environmental area are determined by junk science. I think they are more determined by the laws established by Congress and the interpretation given to these laws by the courts, as well as by the common law rules established by the courts in the private litigation area.

In writing and interpreting environmental laws, Congress and the courts have, in my judgment, lost sight of the kinds of principles that ought to govern those decisions. We are writing rules that are highly risk averse and not good for society overall over the long term. That does not mean that we should not have environmental regulation in a number of areas, but not in the stringency, detail, or complexity that we have today. Without some return to base principles in evaluating what we ought to be doing in this area, I think the problems will only get worse.

PROFESSOR KRIER: I will paraphrase William Ophuls and yield my time to the future that never did anything for me. 5 (Laughter.)

PROFESSOR HUFFMAN: I would just make two points. In response to the liability issue, I think there may be things we can do to improve fairness in liability, but this requires fundamental modifications of tort law as it has developed in recent years. We have moved toward a

system that is focused entirely on compensation and away from a system that is based on fault and deterrence, and even to some extent causation. That, I think, requires as much legislative action as it does judicial action.

The second and more general point goes back to a comment that Professor Michaels made. Of course my point was not to ignore or just accept the science, whether good or bad. My point is to build a process, a legal and policymaking process, that prevents us from taking quick action based on bad science. I think we get closest to that by recognizing and insisting upon the distinction between questions of science and questions of law and policy.

**MR. SHER:** In the context with which I am most familiar, which is the regulatory context, particularly on public lands out West, the government has made a commitment with the National Environmental Policy Act to examine carefully the environmental implications of its proposed actions before it takes these actions. It will be interesting to see whether the *Daubert* opinion has any implications for NEPA law. What we have here, on the one hand, is an evidentiary rule established by *Daubert*, which, when it is invoked, excludes evidence from even reaching a decisionmaker. On the other hand, we have NEPA, which requires a full disclosure of risks including conflicting views and dissenting scientific opinions. I will look to see how this tension plays out in the future.

**JUDGE KOZINSKI:** Well, I do not give advisory opinions. So I think on that note we will close. Join me in thanking the panel for a great presentation.