



UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Remarks of Commissioner Noah Joshua Phillips*

FTC Hearing #12: The FTC's Approach to Consumer Privacy

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These hearings, on the FTC's approach to consumer privacy, reflect the fact that we are in the midst of a robust debate nationally (indeed, internationally) about consumer data privacy. For those who have been studying and advocating about these issues for years, many of whom are with us today, I hope this is a welcome development. It surely reflects a great deal of perseverance.

But, for many policymakers, lawmakers, and consumers, our consumer data privacy moment seems to have come out of nowhere, and in a very short time at that.

News events about large tech companies, data breaches, and politics here and in Europe each and together too often lead this important debate to skip right past the basic groundwork we need for a coherent policy outcome. Some people are freaked out, and in some cases with good reason. Chairman Simons noted this morning that privacy violations can result in real and legally-cognizable harms.¹

* The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

¹ Chairman Joseph Simons, Federal Trade Commission, Prepared Opening Remarks at FTC Hearing #12: The FTC's Approach to Consumer Privacy (April 9, 2019), <https://www.ftc.gov/public-statements/2019/04/prepared-opening-remarks-chairman-joseph-simons-hearings-competition>.

The questions we face, and the answers we choose, will have broad ramifications. So I'm concerned about how many have been talking about consumer data privacy; and I think you should be, too. Whatever your views are, I would hope we all agree that policy must be grounded in informed debate.

The hearings we are holding this week are critical in this regard. I'm particularly pleased they began with the topic of the first panel today, a notionally modest but actually difficult and essential step: defining the *goals* of consumer data privacy.

As I have said repeatedly, including to the Senate, in discussing consumer data privacy, we need, first, to distinguish between the operations of a privacy enforcement regime and the underlying harms we are trying to address.²

Too much of the discussion here in Washington and in op-ed pages has focused thus far on questions like whether the FTC needs penalty authority; whether we need rulemaking authority; whether we need money. These are important policy questions, but – ultimately – derivative ones. Rulemaking, penalties, funding – these are merely tools. It is the substance – the harms we are addressing and the rights that Congress intends to create to address those harms – that requires our primary attention.

Privacy is a nebulous concept, and different people can and do conceive quite differently how individuals are harmed by a privacy “violation”. They also differ

² See, e.g., *Oversight of the Federal Trade Commission: Hearing Before the Subcomm. on Consumer Protection, Product Safety, Insurance, and Data Security of the S. Comm. on Commerce, Science, and Transportation*, 115th Cong. (2018) (statement of Commissioner Noah Joshua Phillips, Federal Trade Commission).

whether and to what extent they experience a given kind of conduct as a violation, and in how much they would pay to avoid it. Are consumer data privacy harms limited to physical injury and financial loss? Do they include emotional distress? Is a sense of surveillance or creepiness characteristic of an eggshell plaintiff, or something Congress needs to prevent? What about a lack of empowerment or a loss of control? And how, if at all, do these things take us back to Brandeis and Warren’s famous “right to be let alone”?³

The decision as to which harms deserve vindication by Congress is the predicate for deciding how any law should look, including what liability scheme we adopt – what we permit and prohibit, and under what circumstances – and, then and only then, what tools are appropriate for enforcing the rights Congress creates.

To me, one area of general agreement jumps out for action. When the National Telecommunications and Information Administration surveyed Americans in 2017, the number one harm they reportedly feared was identity theft.⁴ That is why I think the most significant thing we can do for consumer data privacy is to improve data security. While we often discuss data security and privacy disjunctively, they are close relatives. All five FTC Commissioners agree on the need for data security legislation, including having the FTC’s authority in this area codified, providing us with civil penalty authority to enhance deterrence, and giving

³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁴ Rafi Goldberg, *Most Americans Continue to Have Privacy and Security Concerns, NTIA Survey Finds*, NTIA (Aug. 20, 2018), <https://www.ntia.doc.gov/blog/2018/most-americans-continue-have-privacy-and-security-concerns-ntia-survey-finds>.

the Commission jurisdiction over common carriers and non-profits. Moving that legislation forward would be a major win for consumers.

To go beyond this area of agreement, as I said earlier, this week's hearings are critical. We are asking the basic questions we need to ask about what we should remedy, and *then* considering real questions about how a regime ought to look – the roles of notice and choice, access, deletion, correction, and accountability. The order of these conversations is essential, and the nation – and Congress – ought to follow them.

I have focused in my remarks today and elsewhere a lot on Congress. That is not by accident. Some months ago, I was invited to address the Privacy Coalition at the Electronic Privacy Information Center's offices and answer questions. After I gave similar remarks about the need first to agree upon the privacy harms we would address, a participant asked me why I was focusing on harms, and not rights. That is a great question, and the answer could not be more important.

Unlike, say, in Europe, here in the United States, there is no basic right to consumer data privacy, or at least not yet. Political philosophers locate the source of rights in G-d, in Nature, or our emergence from the State thereof, or stemming inevitably from Kantian reason. As a practical and legal matter, however, rights flow either from the Constitution or the laws Congress makes pursuant to it. The mere fact that I believe I have a right to something does not mean I do. That is the role of the democratic process.

Congress has, in fact, created consumer privacy rights, including ones that apply to data. We presently have a risk-based model, where we, sensibly, guard more jealously information the disclosure of which concerns us more.⁵ And Congress may, as we are all now discussing, create more general rights regarding consumer data privacy.

Which is precisely the point – Congress needs to make those rights.

The framers of our Constitution, who established a republican form of government that has lasted for centuries and remains a symbol of liberty (and economic success) the world over, relied heavily for inspiration on the philosopher John Locke. In 1690, he famously wrote:

The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.⁶

Our elected representatives in Congress – not an enforcement agency led by unelected officials – are vested with the responsibility to make the fundamental value judgments that consumer data privacy legislation requires. For these choices to have legitimacy and authority, they must come from Congress.

Not only would delegating the FTC too much rulemaking authority risk that legitimacy and authority, it poses other risks as well. I am concerned about the impact on the market of a set of far reaching rules that could morph with electoral politics. Businesses – whether they like a particular law or not – need certainty and

⁵ Commissioner Noah Joshua Phillips, Federal Trade Commission, Our American Privacy (October 23, 2018), <https://www.ftc.gov/public-statements/2018/10/our-american-privacy>.

⁶ JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 141 (1690).

predictability, so they can plan and make investments. These are crucial for them, and for our economy. If substantial substantive changes to the law are in the hands of just five people, the chance the rules of the road will change back and forth will, on its own, chill economic growth.

Consider the consequences. The collection, use, and monetization of data is endemic in the economy – it is not just a few very noticeable firms. My children talk to Siri; and, someday, my toaster will talk to me. This data-driven economy has provided incredible benefits to business and consumers. Even as we are facing questions about negative aspects of that economic development, we need to make conscious decisions about trade-offs, balance sometimes competing goals, and develop *good* policy on the future of consumer data privacy.

Think about the regulatory advantages held by large corporations, and the impact of regulation on competition. A new set of rules has the potential to entrench the largest incumbents who are best able to navigate and finance compliance, while posing substantial barriers to entry for smaller players – even as those rules further some privacy goals.⁷ Consider data portability, a mechanism that many hope will facilitate competition. Last week, Isabelle De Silva, President of the French merger authority, told the folks assembled at Spring Meeting about complaints she was

⁷ Commissioner Noah Joshua Phillips, Federal Trade Commission, Keep It: Maintaining Competition in the Privacy Debate (July 27, 2018), <https://www.ftc.gov/public-statements/2018/07/keep-it-maintaining-competition-privacy-debate>.

hearing from startups in France that the data portability provisions in the GDPR might enable big companies to lure away customers.⁸

This brings me to my next point. As I've said, any consumer data privacy law will involve trade-offs. And, to be clear, they may be worth it. But we should make those decisions in an informed and honest manner and, where possible, achieve an optimal balance among different priorities: competition and consumer protection in particular. We, and Congress, should be data-driven and thoughtful, using existing research and commissioning new studies when necessary. That means, among other things, taking the lessons we are learning from the impact of the GDPR and applying them to our policy frameworks.

I want to end on what, for me, is a critical point: we, as a society, are undergoing a major shift in how commerce is conducted. However uncomfortable that may make some of us, it is not going away. We will not succeed, like the Samurai of old, in keeping the guns off the island.⁹ (That didn't ultimately work for them, either.)

And, no matter what laws Congress passes, in a sense they will not be enough. Proscriptive rules and law enforcement only go so far, especially without trade-offs that many do not want.

⁸ Luuk de Klein & Lisha Zhou, *French, Australian agency chiefs share ideas on privacy, competition interplay*, in PARR, ABA ANTITRUST SPRING MEETING 18 (2019), https://www.acuris.com/assets/PaRRABAreport2019_1.pdf.

⁹ NOEL PERRIN, *GIVING UP THE GUN: JAPAN'S REVERSION TO THE SWORD, 1543-1879* (1979).

To deal with what some have called the “Fourth Industrial Revolution”,¹⁰ consumers and businesses – not just government – must play a role. Laws alone are not going to inculcate a sense of responsibility with regard to data, an ethical perspective, or a mentality of privacy by design. To accomplish this more fundamental shift in behavior and thinking – which can do more than any law enforcement agency, with its limited resources, can do to protect consumer privacy – we need to encourage companies across our economy and across the globe to view consumer privacy as a core value and as a business differentiator for industry; and – most of all – we need to encourage consumers to take their own privacy seriously.

So here is my pitch. The discussion about consumer data privacy is one of the most complex policy debates we have had for a while, likely with dramatic economic, political, and social consequences. There may be no do-overs if we get it wrong. So let us go forward deliberately and carefully, taking shorter-term wins where the consensus is clear – as in data security – and making sure we are evaluating any new privacy regime with data and careful analysis. And let’s work on developing a shared framework that helps consumers and businesses understand the value of consumer privacy, so that any consumer data privacy legislation is built on that framework of shared values and a recognition of the importance of privacy. Laws work best when they reflect fully shared values.

These hearings are a great example of the discussions I think we need to have. To those of you in this room and those who have submitted comments or

¹⁰ Klaus Schwab, *The Fourth Industrial Revolution, What It Means and How to Respond*, FOREIGN AFFAIRS (Dec. 12, 2015), <https://www.foreignaffairs.com/articles/2015-12-12/fourth-industrial-revolution>.

otherwise engaged, I want to say thank you. Thank you for engaging and debating, for putting the meat on the bones of this privacy debate. I look forward to learning from you today and in the future.