

THE BROOKINGS INSTITUTION

FALK AUDITORIUM

THE ROLE OF THE FEDERAL TRADE COMMISSION IN PRIVACY AND BEYOND

A FIRESIDE CHAT WITH COMMISSIONERS  
REBECCA KELLY SLAUGHTER AND CHRISTINE S. WILSON

Washington, D.C.

Monday, October 28, 2019

PARTICIPANTS:

CAMERON KERRY, Moderator  
Ann R. and Andrew H. Tisch Distinguished Visiting Fellow  
The Brookings Institution

REBECCA KELLY SLAUGHTER  
Commissioner  
Federal Trade Commission

CHRISTINE S. WILSON  
Commissioner  
Federal Trade Commission

\* \* \* \* \*

## P R O C E E D I N G S

MR. KERRY: Good afternoon and welcome, everybody, here. Welcome to our C-SPAN audience. I am Cameron Kerry, I'm the Ann and Andrew Tisch Distinguished Visiting Fellow here at Brookings in the Center for Technology and Innovation. And I am pleased to continue our discussions on #ThePrivacyDebate. Please feel free to live Tweet on that.

The Federal Trade Commission has certainly been very much at the center of that debate, both as Congress moves forward and, you know, as we as a government, as a people, deal with the policy issues of privacy. The Commission has been very much in the spotlight with major cases -- the Facebook and Cambridge Analytica settlement, You Tube settlement, and a series of hearings on competition and consumer protection in the 21st century, a lot of that focused on issues of data and of privacy.

So we're fortunate to have with us today two Commissioners, Rebecca Kelly Slaughter and Christine Wilson, both of whom have sort of long backgrounds in public policy, Rebecca Slaughter on the Hill, Christine Wilson previously as chief of staff at the Commission and both experienced in private law practice and in other capacities.

So I want to just jump right into it and just kind of begin, if we could, with an overview. I think, Rebecca, you started in May of last year Christine in September, so both of you are about a year on; you've had the experience of the cases, the hearings. How do you see the privacy landscape today? What do you see as the key issues as we move forward?

MS. WILSON: You're the senior commissioner on the panel, Becca, so I defer to you.

(Laughter)

MS. SLAUGHTER: Almost 18 months of experience now. Thanks, Cam; thanks for having us. It's really nice to be here. It's really nice to be here with Christine. This is an issue I know we both care a lot about and are excited for an opportunity to talk about together.

So what are the key issues? Obviously this is an issue to which I've been giving a lot of thought from the perspective of enforcement, which is different from the policy perspective that I had and lens that I had for so long on the Hill.

So a few observations that are key in my mind now. The first is that I think that when we

just use the term "privacy" we maybe unintentionally cabin ourselves to too narrow a universe of thought about the data issues that we are facing, because privacy generally refers to the sharing of information that people would rather not have shared. And there are real harms that flow from that, and that's a real set of values that we need to protect. But I think we can't separate those harms from the kinds of harms that flow from the use of that data to turn around and make decisions for people or about people or target manipulative information or harmful information to people.

So my first observation is that I have been trying to think a lot more about data abuses rather than the narrow frame of data privacy because I don't want us to get too cabined into a universe that prohibits thinking about the full panoply of issues that we're encountering.

The second big observation that I would share is I'm really over notice and consent in this universe. You know, notice and consent is a framework that informs a lot of FTC enforcement action and it makes a lot of sense. You tell people what you're doing with their data, you keep your promises, and we can enforce where you lie or you don't. That sounds reasonable. But for notice and consent to be meaningful, both notice and consent have to be meaningful. And in the space of data, I don't think either are particularly. If you take notice, first of all, we've all seen the statistics about how long it would take normal people -- or even very well educated people -- to read all the privacy policies they encounter in a year. It's months. People don't do it. And even if you try to do it, you can't -- I mean I try to do it and I can't understand what is being done with my data in a lot of cases and I have the best tools at my disposal of basically anyone to do that analysis. So I don't think the notice is particularly meaningful.

And consent isn't particularly meaningful either because most of these options are take it or leave. Even if you take the time to read the privacy policy, you can't turn around and say, well, I'm fine with paragraphs one through eight, please make these edits to nine, and then I will click consent. You just have to say yes. And, in fact, you often have to say yes to access a service that's necessary for your participation in society.

And so I think we need to reframe the guideposts away from the concept of notice and consent and think more about consumer expectations. What do consumers expect will be done with their data and what's reasonable from that framework.

And then the last point that I'll make, and I'll turn it over to Christine, is that I think we

need to be particularly sensitive to how these problems of data abuses and how the challenges of notice and consent fall disproportionately on vulnerable populations. That's important from a policy making prioritization standpoint and it's also important from how we're thinking about enforcement efforts.

So I think with those observations I'll defer to Christine.

MS. WILSON: Thanks, Becca. And, Cam, thank you for having us. It is great to be here with Becca. And I think the folks here today will see that we agree on almost everything in this space, so it's good to be here.

MS. SLAUGHTER: Not true on every issue.

MS. WILSON: Right. If we were to --

MR. KERRY: Well, we'll dig down into that.

MS. WILSON: Exactly, exactly.

So my views on privacy and privacy legislation have changed over time. As Cam mentioned, I did have the honor of serving as chief of staff to Tim Muris when he was chairman of the Federal Trade Commission. I was with him in 2001 and 2002. And at the beginning of that decade we were grappling with how to deal with privacy issues. And it was a significant topic of discussion as Tim was working through his confirmation hearing. And we brought early cases, like Eli Lilly and the Microsoft case, where misrepresentations were made or poor data hygiene practices resulted in sharing of data in ways that consumers would not expect. And those were good cases for the FTC to bring. We created the do not call registry. And I think given the experience that we have with robo calls today we realize that technology has outpaced the telemarketing sales role. And in the same way, there are a lot of technological developments that have outpaced some of the thinking that we did in those early days about how the FTC's authority could be brought to bear. And frankly, I think we have found the edges of the FTC's authority in this area.

And so I am in favor of light tough regulation and I had to grapple over the last several months with eventually embracing the need for federal privacy legislation. There's a great paper by Cyril Ritter at DG COMP who explored all of the different ways that you could address harms and abuses, and should it be ex ante or should it be ex post. And working through his rubric helped me get comfortable with the need for federal privacy legislation in this area. And ultimately I think businesses need

predictability and certainty. I think, you know, the vast majority of businesses want to follow the law, comply with the law, but right now I think there's a lot of gray areas in how to do that. I think we all agree on the abstract principles of how to deal with consumer privacy and data security. And there's accountability and there's risk management and there's transparency, but doing that in an informed way is very difficult without bright-line rules in some instances and guidance from Congress.

And so I think particularly with CCPA potentially coming on line and GDPR on line, and other states looking at privacy legislation, businesses need that certainty and predictability. By the same token, I think consumers need more information. I think there is significant opacity with respect to consumer data. So I think the average consumer does not understand all of the different kinds of data that are collected and what it is done with the data once it's collected, with who it is shared, how it is monetized, how it gets transferred to third-parties, with or without safeguards for the protection of that information. And so there are significant information asymmetries and I would love to see legislation that helps boost that transparency. I believe that consumers can make informed decisions about which services to participate in and avail themselves of, but without that full information about what's happening with their data, those decisions will not be informed.

And then, finally, I think we need privacy legislation because there are lots of gaps that have emerged given evolution of technology. So the Fitbit that I wear collects health data, but it's not covered under HIPAA. There are many examples like that. And so I think it's been a long process for me in the year that I've been at the Commission, and lots of conversations with Becca and Rohit and my other colleagues at the FTC who have been incredibly patient with me as I'm thinking through all of these issues.

But I am now firmly on the side of needing federal privacy legislation.

MR. KERRY: So let me explore a little bit more on the content of that. You talked about some additional forms of transparency to increase consumer choice. Is that enough or do you think there is more needed to address how businesses handle the data beyond consumer choice?

MS. WILSON: Absolutely. And I think Becca was one of the first people that I heard say it in this way, but basically it is impossible essentially for consumers to make all of the decisions that they need to make. And so some onus to some extent needs to be on the businesses to handle the data that

they have with accountability and with applied risk assessments and that sort of thing.

And so I don't think transparency is the beginning and the end of federal privacy legislation. And I agree with Becca that notice and choice, if at all, has a use only in pretty limited applications.

MR. KERRY: Yes. So in that vein, I mean one idea that keeps coming up is data ownership. Senate banking committee last week had a hearing on that subject. Is that simply another form of notice and choice? Is money thrown into the bargain?

MS. SLAUGHTER: I will say I'm not an expert on this issue, I haven't studied all the proposals in detail, but my initial reaction is to have a lot of anxiety about the idea that if we pay people for their data we solve the problems that we're seeing in privacy and data uses. For among other reasons, data is valuable in aggregate when many, many people's data is collected from many, many sources and aggregated, which means the marginal value of each piece of data is very small. So the amount that an individual consumer might realize -- the monetary value they might realize by being paid for their data strikes me as small. And we're talking about a universe where people are already giving up lots of data without being paid. So wouldn't a consequence of this likely be that already large companies with more money pay people more to aggregate more data which raises questions, serious questions in the competition space, as well as in the privacy and consumer protection space. And I am not sure what problem it solves. Because, again, if we're getting to the point where if we're thinking about things through the lens that data is used in problematic ways, not just collected in problematic ways, facilitating collection by paying people may even exacerbate the use problems rather than solving them.

MS. WILSON: I guess I have a slightly different take. In conversations that I've had with Peter Winn at DOJ over the last several months, he and I have talked a lot about whether that concept of data ownership helps us get to the answer that we want. So if I go to Target, I buy 10 items, who owns the list of items that I purchased and for how much? I need those for my accounting and budgeting purposes, but Target needs those for inventory and revenue and accounting purposes, the merchant bank needs the information, the acquiring bank needs the information. Who owns that data?

And so I'm not sure that talking about data ownership gets us to the answers that we're looking for.

MR. KERRY: Mm-hmm. You know, you mentioned some of the discussions you've been having among commissioners and with others. Let me ask you both a question that your colleague Noah Phillips raised here at Brookings, and I think in a number of other forums, sort of what is the harm that we're trying to prevent?

Commissioner Wilson, you want to?

MS. WILSON: Well, I think it is a great question. It has a way of focusing the mind. What are the problems that we are trying to solve? We don't want to rush and create a vast legislative framework without thinking specifically about the harms that we're attempting to address. And I think the FTC already has a vast set of precedents regarding harms that we view as cognizable and worthy of avoiding, so physical injury and -- you may want to talk about Retina-X. You made the announcement there, but we made an announcement last week about Stalkerware. And that is absolutely an appropriate use of our privacy jurisdiction. Financial injury, reputational injury, unwanted intrusion.

So we have a case in which computer rental companies actually installed cameras that could be remotely activated and those were in people's bedrooms. And so obviously the harms that we're seeking to address are not limited to financial harms. There was a vast array of harms, and again, the FTC cases provide a wonderful list and overview of the harms that at least today the FTC has viewed as cognizable.

MS. SLAUGHTER: I agree with all of that, but I would build on it. But first let me mention the Stalkerware case was a really important one. It was our first case against the Stalkerware app. You could buy an app and install it on somebody else's phone and the app came basically with instructions on how to jail break the phone so that the person would not be able to know that they were being tracked. I mean it's not just creepy, it is lethal in a lot of circumstances for victims of domestic violence. Those are incredibly important harms that we need to talk about.

But it is also very important to me that that not be the closed universe of harms. So let's think about children, for example. There was a study that came out recently that talked about the increase, the dramatic increase in teen suicide rates in the U.S. And there's a pretty notorious case in the UK of a young woman who took her own life at 14 after being the target of some online bullying, but also material that was pushed to her that talked about how to commit suicide. I mean, that's indescribably

scary and damaging. That's not a privacy violation in the same way we might have traditionally thought about it, but it is a real harm from data use, data targeting. I think about, you know, terrorist recruitment or recruitment for hate groups. I think about the targeting of manipulative information to voters, to children. These are all real material harms. And what's really important to me in this debate is that we not fall into the trap of thinking we need to be able to quantify harm in order to find it cognizable. You know, it's really easy to quantify -- it's sometimes easy to quantify financial harm, although in the data privacy case, not always. But a lot of harms are not quantifiable and are still very, very real.

So one thing that I think that we as an agency need to do, and that I hope Congress will do, is provide helpful guidance about the types of harms that we think are important, but not limit that. Because I also think that there are things that we can't anticipate today that will emerge as problems and continue to be problems. And we need to make sure that we have the flexibility to address emerging problems and not just the ones that we are aware of right now.

MS. WILSON: And if I could just augment. I think in terms of thinking about harms that are not technically within the FTC jurisdiction but that concern us, I am very concerned about the impact on the Fourth Amendment of essentially developing this sense that nothing is private anymore. And so in Fourth Amendment law the question is was there a reasonable expectation of privacy that was violated. And if in the commercial arena people have the sense that nothing is private anymore, how does that impact the Fourth Amendment jurisprudence when a court, a judge, making a decision with respect to societal norms, was there a reasonable expectation of privacy, and you look at the commercial arena and there is none, then that has an impact. And I am concerned about the erosion of Fourth Amendment protections. Obviously not something that is within the FTC's jurisdiction, but I think something that we as a society should be thinking about and federal privacy legislation providing bright-line rules about data use, data abuse, privacy protections and expectations can help us reframe that discussion and tell us what is in and what is out of bounds, and hopefully provide a little more guidance to the courts on Fourth Amendment issues.

MR. KERRY: I mean I think we deal with that to some extent by recognizing I think, as you said, Christine, that any transaction you have certain interest in your grocery list, but so do other people. And the question is how do we balance those interests. And I think that gets us to what may

have been a point of departure between you two in the Facebook settlement. Maybe not so much a point of departure on the substance of things as much as FTC authority.

But, Rebecca Slaughter, you dissented from the decision because you wanted to see what you called meaningful limits on what Facebook collects, uses, and shares.

MS. SLAUGHTER: That's among other things. Yes.

MR. KERRY: Yes, among other things. But that's the one that leaped out at me. So can you flesh that out a little bit? I mean what kinds of --

MS. SLAUGHTER: So I will go back to the expectations principle that I started with. I think the framework for what data companies can collect about people should start with what people reasonable expect to be sharing with them. So if I use a mapping app, I reasonably expect that company will need my location information. If I use a flashlight app, I do not expect that that company will need my information, because it does not.

So I think the first set of limitations should be is the information you're collecting reasonable or necessary to provide the service that you're offering. And then, second, are you using that data in a way that is connected to the service that you are offering, or are you then going beyond what you are providing to use that data for other information.

You know, in the case of Facebook, my concerns involved the data that Facebook collects about people beyond what they expect, including from third-parties, and across behavior across the web, not just on the Facebook platform, and from non-Facebook users who don't anticipate that they have any relationship with that company and therefore are sharing information with them.

So I think those are all things that are really important to me, but instead of making our framework notice and choice, making our framework reasonable expectations of what is collected and how it is used makes a lot more sense to bring us in line with not putting -- with consumers anticipation of how their data will be used and not putting the entire burden on them to make decisions that they don't have the information or the ability often to meaningful make.

And then I do want to say in terms of the disagreement about the Facebook outcome, I'll let Christine speak for herself, but fundamentally one of the points that I was making in that case is that getting things in settlement negotiations is hard. There may be cases where there are things I'd love to

see in a settlement that don't make it in at the end of the day and I support the settlement anyway because I think it's the best use of the agency's resources. In this particular case, because of the magnitude of the case and its impact on the markets and the signal that it would send and the scope of the company's reach, I thought it was important for us to fight in court if necessary for the outcome that we really thought was important at the end of the day. But I will also be the first to recognize that that's not a maneuver that's guaranteed to achieve those outcomes at the end of the day. But I thought that the transparency that came with open court litigation and the potential of a finding of liability at the end of litigation would be more effective in helping to change the behavior that we uncovered as problematic to begin with.

MS. WILSON: So with respect to Becca's two points, I don't disagree with Becca's points about how it would be desirable to impose limitations on the collection and the use and the sharing of information. There was a significant question about whether the FTC within its current authority has the ability to do that. We are asking Congress to provide those guidelines and to legislate accordingly, but I did not feel that it was appropriate to legislate for an entire industry through this settlement. And so, you know, we had lots and lots of conversations, very cordial and collegial and actually enlightening, and very helpful behind the scenes conversations about Facebook. And frankly it was a struggle for me to decide whether to vote in favor of the settlement or to pursue litigation. I am very sympathetic to the benefits of litigation, to the transparency that that would bring. Ultimately, I was convinced that consumers needed assistance today. And the relief that we got was very real and meaningful relief

Mark Zuckerberg now has to essentially enter into Sarbanes-Oxley type representations every quarter that he and his company are abiding by the constraints and the obligations of the order. And the early reports back indicate that in fact the focusing of the mind, which is what we sought when we included that requirement in the order, is taking place and is having the desired effect. Facebook has already suspended tens of thousands of apps. Early reports indicate that there are many other changes that are taking place behind the scenes and I look forward to be able to talk about those publicly at the appropriate time. But the early reports indicate that in fact beyond the monetary relief there is very real change that is occurring because of this order. And so that is ultimately what led me to vote in favor of a settlement as opposed to litigation. Even though I agree absolutely with Becca's point about the benefits

of litigation, my concern is it is a long and drawn out process that may or may not grant the kinds of relief in the end that we were able to extract here today for the immediate benefit of all Facebook users.

MR. KERRY: So that sound a little bit like what you talked about earlier, that you're bumping up against the limits of your authority.

MS. WILSON: That's exactly right.

MS. SLAUGHTER: But I will just say I think it is important in some of these cases, and it's true in COPPA cases too, the limits of our authority, if we don't litigate in some case, we don't know what they are. It is really important for us not to impose on ourselves limits that don't exist in the law and in areas where we have limited litigation experience, which is true on order enforcement and civil penalties, and it's true on COPPA remedies. I think it is difficult for us to assess. We have to apply our best judgment and read the statutes and think about what we in good faith believe to be the limits of our authority, but I'm not convinced that those limits exist in the law and I don't think that we know that that's always the case until we go through court.

And then if we do go through court and find those limits are there, I think it also helps us in making our case to Congress about the limitations of the law.

So basically, my answer is I think we can do both. I think we can talk to Congress and explain where we see constraints today and push the envelope where we think it's appropriate and in the interest of consumers at the same time.

MR. KERRY: Okay. So let's talk about that here. So what do you see as the constraints today in order to do the job that you've talked about being needed in privacy and -- let's call it data protection or information privacy? What do you see as the constraints today, what's the authority that you need?

MS. SLAUGHTER: So I'll start with where Christine started. She talked about the comfort that she has developed with rulemaking authority. I have substantially more comfort in the first instance with rulemaking (laughter) than she does. And this is an area where I think it's particularly important for the reasons that Christine talked about. I find it frustrating to hear businesses complain that they don't know what is expected of them, but also those same businesses complain that they don't want the FTC making rules telling them what is expected of them. (Laughter)

And I do think that in the area of data protection more and more of those businesses are saying, oh, you're right. Actually it would be really helpful to have clear rules of the road spelled out in a participatory, notice and comment, rulemaking process that lets us know what we need to do and how we need to do it. So I think that that's the first thing.

Related to rulemaking authority, we do not, as a general matter at the FTC have the authority to seek monetary relief for first instance violations. So we can get disgorgement sometimes or we can get redress for consumers, although that authority is also under attack in the courts right now. But in the case of privacy, that's very hard. It's very hard to measure what is an appropriate disgorgement amount. It's very hard to measure consumer harm and tailor a number to that in order to seek redress. And it would be much more effective I think from a deterrent perspective to be able to have civil penalty authority for first instance violations.

So we have that as a general matter under COPPA, because it's connected to a rule. The reason we could get a civil penalty in the Facebook matter was because they were already under order for violating the FTC Act. I don't think that's in the best interest of society for us to have to slap someone on the wrist once before we can create a financial deterrent penalty. And the fact that we see case after case after case of privacy and data abuse violations tells me that we do not have a broad enough deterrent effect right now with the authority that we have.

MS. WILSON: So I agree with Becca on the need for civil penalty authority. I do think that it would be a useful deterrent in this area. I think again, we disagree on the breadth of rulemaking authority that should be granted to the Federal Trade Commission. I think COPPA actually provides a very useful analogy here. And we had talked previously about roles for Congress versus roles for the FTC. I think it is up to Congress to sketch out the rights that consumers have and the obligations that the businesses should be subject to. And there are a lot of models out there that have been used, Sipel and a number of different organizations have advanced frameworks. And the tricky part obviously is to distill those into essentially the daily practice of business.

And so how do we take accountability and risk assessments and transparency and create essentially understandable and transparent obligations for businesses that they can abide by.

And then for the FTC to fill in with narrow APA rulemaking as appropriate. So Congress,

for example, in COPPA said we believe it is important for children under the age of 13 to have their parents give verifiable parental consent before websites can collect their information. And then the FTC came along and did a narrow rulemaking that said here's how that VPC, the verifiable parental consent, could be obtained and given. And I think that's a nice balance between the role for Congress and the role for the FTC.

In terms of other authority, I think the Federal Trade Commission should receive jurisdiction over common carriers and nonprofits. So, for example, schools and hospitals are collecting very sensitive information and I think those should be subject to FTC privacy authority, as should commercial businesses. And so I'd love to see a rollback of the nonprofit exemption. I think as Congress is creating the bill that would be wonderful if they take into account the need to preserve incentives for competition and for innovation. Privacy is important, so is competition.

And so if there are ways that legislation could be crafted that will create the incentives to continue innovating. American ingenuity is an amazing thing. How do we continue to foster that while at the same time providing protection for consumers' privacy.

And then perhaps a couple of areas of disagreement. I think that we should have federal preemption. I think consumers and businesses need to know what their rights and obligations are as they cross state lines. The internet doesn't stop at state boundaries, let alone national boundaries. And so I would support federal preemption.

And then I think a private right of action would be incredibly difficult. I think we don't need more legislation in the courts, we need to provide businesses with guidance about what is and is not appropriate.

MR. KERRY: One of the challenges I think in the privacy arena, particularly in using the unfairness authority, has been the consumer harm standard. And it sort of goes to that question of what the harms are. So thinking in terms of what legislation might do, if Congress spells out some boundaries on collection, you know, you've got the I propose a reasonably articulable basis for collecting the data, boundaries on the use, boundaries on the sharing. And then such violation of these is a violation of section 5. Does that provide you with enough authority?

MS. WILSON: I think absolutely. I think that's the hope and the expectation, at least on

my part, that Congress will provide more clarity about the rights and obligations that consumers and businesses have. Absolutely.

MS. SLAUGHTER: And I think to the extent, Cam, your question is would it be a problem if the FTC had to identify particular harms in any enforcement action. I think it is a problem to have to do that with particularity because a lot of the harm that can flow from data abuses is not immediately identifiable, it is not clear today. So take identity theft as an example, if my data is stolen today, I don't know whether it is going to be used to steal my identity or open a line of credit in my name in three years. I know that it could be. And that's a real harm. And it could be used in various other ways. But needing to prove that link is a burden the government can't meet. And I think that that -- it would be counterproductive to set up a regulatory regime that is intended to protect consumers, but is functionally unenforceable by the federal government.

And I will just piggyback off of what Christine said. She's right that we don't entirely agree about preemption and private right of action. And I think on the latter point, one thing I'd say is that I have a lot of anxiety about closing access to courtrooms for real people in every circumstance, but particularly where the FTC has been so systematically underfunded and state attorneys general are so systematically underfunded that unless you pair enforcement authority with dramatic -- like astronomical increases in resources, there's no way you're going to capture the universe of problems.

And so making sure that enforcement is possible, not just in the context of what are the standards, but also who can do it and who has the resources to do it is really important to me.

MS. WILSON: And that's one of the questions that we got at the oversight hearing, would we support giving state AGs the authority to enforce federal privacy legislation as a force multiplier. And I completely agree that it would be helpful in that sense, but I also hope that we get more resources.

MR. KERRY: So on the resources, you both I think have drawn comparison to some of the data protection authorities overseas which have orders of magnitude, greater numbers to bring to the problem. One of the proposals in a couple of bills in Congress is to create a new bureau, let's say a bureau of data protection, which would allow you to sort of combine some of the technical expertise of the technologists across both the privacy and data protection issues and the competition issues. Is that something that makes sense? Or should it be parceled in the existing buckets?

MS. SLAUGHTER: Well, the first thing I'd say is I think we need more technologists generally. We put an economist on every single case that we bring, competition or consumer protection. And I have seen vanishingly few cases in my admittedly short tenure that wouldn't have also benefitted from the eyes of a technologist. But I think organizationally how you do it, I think there are a lot of good options. The one thing I will say is I do think the FTC is the right place for new authority to be located, rather than having a DPA, for exactly the reason you just pointed to, Cam. One of my concerns about independent DPAs that really just deal with data protection is they don't have the competition authority and they don't have the competition lens. And I think it would be to the broader societal deficit for us to not be able to apply that lens and that thinking to the kinds of issues that we're seeing in the digital space. Because I think a lot of them sound in both competition and consumer protection at the same time.

One area that I think the FTC is working on improving and can continue to improve is having a little more cross pollination between our two traditionally siloed mission areas. And where we have cases that implicate both areas, I know Christine and I both ask a lot of questions of the staff about how the staff on the other side see these questions. And that's just really important to have that lens, to make sure that we are thinking through some of the innovation issues that are implicated in these questions.

And I think a lot of it ends up being a follow the money question, in competition and privacy where the dollar is flowing. Why are they flowing there, how are they being used. And we can apply that analysis from both the consumer protection and a competition standpoint.

MS. WILSON: So I would echo essentially all of what Becca has said. I think in the first instance it would ill serve the American taxpayer and prudent enforcement to create a different agency to enforce privacy laws. I think the Federal Trade Commission has been thinking about these issues for an incredibly long time. It has moved up the learning curve in terms of incredible sophistication regarding enforcement of the issues, listening to all of the different stakeholders about the interplay of the tensions and the different interests at stake and how to balance them. It has held workshops and conferences and round tables, it has issued many reports that are very insightful and helpful as we seek to enforce in a very nuanced way going forward in a way that preserves privacy while also allowing competition to flourish.

And so I agree with Becca that, first of all, any privacy legislation should give authority to the FTC. And, second, that our enforcement authority on both sides of the house benefits from the interplay of the competition and consumer protection issues.

And I was actually at the Fordham Conference just a few weeks ago where heads of authorities were talking from around the world and that was a general sentiment, that each side informs the other. So for agencies that have had or are looking forward to having both competition and consumer protection authority, they believe that there is a helpful reinforcement and an alignment of missions.

And, finally, I would agree with Becca that I am relatively agnostic about how we structure that new expertise within the agency. I think we do need more resources. When you look at the incredible growth in the economy and the essential stagnation of the number of FTEs that we have at the FTC, it becomes very clear that we've been outpaced and outmanned. And to protect consumer privacy and other consumer interests, more resources would be useful.

MS. SLAUGHTER: And I just want to hammer that point a little bit because I think something that I wouldn't have appreciated and didn't appreciate before I got to the FTC is that when you look from the outside at an enforcement decision that you think leaves something to be desired, the part of that analysis you don't see is the staff and the commissioners grappling with the question of well, if we went back and pushed for more in this case, what are we giving up doing, what are we not doing instead. And some of those decisions, even if I don't ultimately agree with them at the end of the day, don't come from my sense of well, this is good enough and we want to let this company go, they come from a sense of we have obligations across our mission area to protect consumers and if we put more into this case we will be leaving full cases on the table in other areas. So, again, you can disagree -- and I have disagreed about that decision in particular cases -- but understanding that that analysis really comes from hard looks at budgets and employee numbers and resource management. It's something that I hadn't appreciated until I was on the inside of those conversations. And I think it's easier to judge on the outside when you don't have a window into what are the other cases that you might be giving up to move forward here.

MR. KERRY: So one more question before we go out to the audience.

You know, you talked about competition and privacy and sort of points of overlap or of

divergence between the two. So what do you see as the relationship, the role of privacy in competition policy, and vice versa?

MS. SLAUGHTER: Well, I'll also state myself with Christine's remark. So our colleague, Noah Phillips, talks about this issue also too, and what he tends to say is competition -- you know, privacy is important, but competition is also really, really important. And we have to think carefully about how any new privacy regime would affect competition. So far I think we're both with him. But then he tends to go into, and therefore we should not have a new privacy regime, and that's where I'm like, and you've lost me. (Laughter) I am much closer to where Christine in that we have to think about it carefully. And, again, I sort of said earlier, follow the money, but a lot of this to me -- I think advertising is the heart of both of these questions. Data collection is fundamentally about facilitating advertising and digital advertising markets are raising a lot of really important competition questions too. And I think looking at that with eyes on both sides is a really valuable thing to be doing.

MR. KERRY: Well, I'd love to explore that more, but maybe the audience will have some questions on that.

So please stand and wait for the microphone so that everybody here and in CNN can hear the question. So the woman on the aisle first and then the gentleman behind her.

MS. BAKSH: Did you want me to stand as well?

MR. KERRY: Yes, please.

MS. BAKSH: Okay. Thanks. Mariam Baksh from Inside Cybersecurity.

Thank you, Commissioners, for being here. Hopefully you can speak to given the court's recent ruling on the restoring internet freedom Order and the remand on public safety, how you are thinking about the responsibilities of internet service providers as in regard to DNS and cashing, since that's what they identified as an argument for the information service classification?

MS. WILSON: At a more general level -- and maybe Becca has thoughts about the specifics -- the Federal Trade Commission welcomes the ruling in the Mozilla case. We have had authority over broadband ISPs since they began to compete in the marketplace. We have brought a number of cases that sound in the bundle of rights and obligations that get wrapped up into net neutrality. And to continue moving up the learning curve on this front, we held a hearing on broadband issues within

the rubric of the competition and consumer protection hearings that we've held over the last year. We issued a 6B study to collect information from ISPs regarding the ways in which they collect and use and protect consumer information. And so the FTC long had the jurisdiction. It was removed under the open internet order and then it was restored to us. And we are back on the beat and looking forward to protecting consumers and to preventing any competition violations or consumer violations, consumer protection violations in this space.

MS. SLAUGHTER: Perhaps unsurprisingly I disagree with Christine and did not welcome the Mozilla decision, except for the remand portions, which I thought were important.

Look, I think net neutrality is a really good example of where the FTC's authority and lack of APA rulemaking imposes substantial limitations vis-a-vis where the FCC can be and has been in the past. And so I think -- I don't think we have seen the end of this particular movie and I think it all will continue to play out as states consider how to grapple with these issues, perhaps Congress considers how to grapple with these issues. But I think they are complicated and I'm concerned that our ability to address problematic practices that affect consumers is really limited by the FTC Act as opposed to some of the more substantive protections that the FCC could provide.

MR. KERRY: The gentleman in the pink shirt.

MR. HERCHENROEDER: Hi, I'm Karl Herchenroeder with Com Daily.

When Rohit Chopra testified last week, he brought up some issues about regulatory capture. So I was curious, do either of you have concerns about regulator capture at the agency?

MS. SLAUGHTER: I have disagreed with some of the big decisions that we've had in the past few years, but the basis -- I will say very sincerely, I have never thought that the agency was captured by any particular company or agency. As I said, I thought there were some good faith disagreements about the right way to resolve cases.

One nice thing about being a generalist agency rather than an industry specific agency is I think it does make us substantially less subject to capture. I think that we go broad across the economy. And that means we don't tend to have the same sort of narrow focus on particular industries that other agencies get. And that is to our benefit and the benefit of consumers.

So we should always be on the lookout for regulatory capture or other capture. We

should have public servants who serve the public. That is their first and best and greatest and only obligation. So it's something that I'm sensitive to, but it is not just candidly something that I have seen evidence of.

MS. WILSON: And I agree.

MR. KERRY: Other questions? Over here, up front.

MR. BALKAM: Thanks, Cam. Stephen Balkam with the Family Online Safety Institute.

COPPA, the Children's Online Privacy Protection Act is 20 years old. Is it up to what it was originally designed for?

And what is an ideal outcome of this current review?

MS. WILSON: So I would say one of the reasons that we are doing a rule review is to ensure that recent developments in technology are taken into account with the rule that we have. And we do have sufficient flexibility to build in guardrails for new technologies as they emerge.

And as far as saying what the outcome will be, I think that would be prejudging that neither Becca nor I would want to venture into.

MS. SLAUGHTER: Yeah, I agree with that.

I do think I have some questions about whether verifiable parental consent is really the only guardrail that we need for children. I understand how it can be valuable. And as a parent I appreciate the concept, but I'm not sure that it captures the whole universe. And I'm very concerned for children in the digital divide space, where children who come from families with fewer resources, whose parents may be less available because they're working 15 different jobs. I want to make sure that we are not depriving those children and those communities of protections that better resourced parents are able to provide their children.

And I'm not sure that's entirely captured by COPPA at this point. So I'm not sure. I have an open mind about the rulemaking. I think it is a good example of how when we have rulemaking authority that allows us some flexibility, we can make sure that our rules and our guidance is up to speed with technology and refresh them more frequently than the legislative process perhaps get refreshed. But I also think we should be honest and transparent about where boundaries of our authority lie and call them out if we think that they're problematic.

MR. KERRY: Nicol.

MS. LEE: Thank you, Commissioners, for being here and I'm glad we at Brookings are able to host you.

So I want to go back to the point that was made around vulnerable populations. And in particular I'm curious if the FTC is going to start thinking about online bias and discrimination and the role that they'll play, particularly as emerging technologies. Will the opacity make it harder to sort of identify where there is some level of disparate impact?

So just curious, given that privacy legislation is now taking on this conversation in a very meaningful way in terms of algorithmic bias and targeted marketing and the ability of emerging technology tools to actually do that and amplify stereotypes and discrimination, have you all thought about that? And what jurisdiction you'll have over that and how you'll actually make determinations of that impact.

MS. WILSON: So I would just note as a baseline that the Federal Trade Commission has looked at these issues, particularly in its report on big data. And so the FTC has long been thinking about and grappling with these issues and has brought cases where the rest of the business conduct may be to deprive consumers of credit or the ability to get an apartment, and have acted in a way that causes unfortunate outcomes. But Becca may have more.

MS. SLAUGHTER: Yeah, I think that's right, but I think it's something we need to continue to focus on because exactly as you say, as some of these decisions become hidden behind algorithms and are more opaque, it is all the more important that we shine lights on them, uncover them where they exist, and pay attention to them. And to me this is both about thinking about general practices and whether they're acceptable, and making sure that we prioritize our enforcement efforts to reflect an understanding that this kind of harm is real and material to real people.

When I talked about data abuses at the beginning and decisions that are made for people, one of the things that I was referring to, although I didn't say it explicitly at the time, was biased algorithmic decision making that can, as Christine said, go to credit, go to housing, go to job applications, go to all kind of things that make an enormous difference in access to opportunity for real people.

MS. WILSON: And I think, you know, that's the upshot of the HUD case against

Facebook, which is concerning.

MR. KERRY: So we are coming up against time, so let's take any questions that are out there remaining. I see on here on the aisle, over there. Any other takers? Going, going, gone. Over here on the left. And you can take -- so let's bundle the questions and you can give any wrap up comments you want to make.

QUESTIONER: Other than with respect limited to resources, could you comment on some lessons learned in the very, very slow government agency response to cutting out spam and robo calls?

MR. KERRY: Okay. And let's have this one over here. It's closer, and then around to this side.

QUESTIONER: Thank you. Katy Wong (phonetic) with NTD TV.

My question is we know several states have already drawn up their own legislation on the data privacy protection. So what's your expectation at the federal level? What will be coming up next year?

MR. KERRY: And then over here on the aisle.

MS. HOFFMAN: Thank you. Laura Hoffman, American Medical Association.

I'm curious, with some of the topics we've talked about today there's been discussion about, you know, how certain types of information may be used against people and to what effect. And essentially I'm wondering if in federal legislation you think there's value in describing certain types of information as particularly sensitive. Obviously health information is considered sensitive by many. And to Christine's point earlier, you know, Fitbit wouldn't be covered -- that data wouldn't be covered by HIPAA. But there's a lot more information now that it will be considered health information. And so would it be helpful to the FTC to have certain types of information such as health information, have additional protections, or should we be thinking more about the harms and impacts that any type of information being used inappropriately would have?

MR. KERRY: Okay. So, Commissioner Wilson, Commissioner Slaughter, the floor is yours to respond to those and take us to the finish line.

MS. SLAUGHTER: I'll start with robo calls and spam because I hate this stuff.

(Laughter) I mean like it is -- robo calls render your phone useless. They are killing the technology of telephone. It is infuriating. We bring all the cases that we can against the people that we can reach within the law, so within the U.S. They're not hiding out in a foreign country. And that's good and important work and I'm really glad we do it. It is a tiny, tiny fraction of the problem because most of the people who are spamming your call are actually also criminals who are trying to steal your money and don't really care about the business sanction of the telemarketing sales rule. We should go after people violating the telemarketing sales rule for sure, but what I actually think has become very clear in the case of both spam, but particularly robo calls is that these are problems that demand a technological solution. And if I were the queen of the universe I would put both the power and the onus on the carriers to do that filtering. I pay for my cell phone service. They get value from allowing robo callers to use their lines, but that value is going to disappear when people stop using phone lines because they become a dead letter. So I think that the responsibility -- and I think it is important to clarify that they have the legal capacity, that it is allowed to do better and more aggressive blocking, but also the onus should be on the carriers to stop a lot of that.

MS. WILSON: And as Becca says, we've brought many cases. We've got I think at latest count, 500 companies and 400 individuals, \$1.5 billion in judgments. We work with carriers to help trace back over multiple networks where the robo calls are originating, but it is very difficult to identify and to bring them to justice. And some sort of assistance from the carriers, which I think they're working on, would be wonderful and I too would really appreciate that.

MS. SLAUGHTER: It's fully whack a mole right now and that's just not going to -- we can't whack all the moles. We can't even whack a fraction of them.

MS. WILSON: And then with respect to the question from the AMA representative, I do think there are certain categories of information that require heightened sensitivity and awareness with respect to their treatment. I think we have a number of examples already in the law, so HIPAA for healthcare, Gramm-Leach-Bliley for financial data, and COPPA for children. I think all of those are areas that should require heightened protections and awareness. I also think there are others. So geolocation information, genetic information, which could fall within healthcare, and the contents of communications. CDT has a draft bill that provides a number of these areas, identifies a number of these areas. And there

are other model bills out there that do the same.

I think the interesting thing is that you can take several pieces of data that would not standing alone be viewed as sensitive, but then aggregate them and reach an incredibly sensitive result, as is the case for, you know, diapers and a pregnancy test in figuring out someone is pregnant and then notifying the parents through advertisements, which is problematic.

So I think absolutely, that is something that should be addressed.

MS. SLAUGHTER: And then the third question I think was about the prospects for federal privacy legislation.

MS. WILSON: And I'll leave that Becca, who's our resident congressional expert.

MS. SLAUGHTER: Well, by being a congressional expert, what I have learned is that my ability to prognosticate what is possible is extremely limited, and maybe there's a reason why I don't work in Congress anymore. (Laughter) But here's what I will say. I think we have the necessary conditions to get to a federal law. I am hopeful that they become the sufficient conditions. I think that my experience in drafting legislation is that people often come to the table and say I know you're offering me this, but I want this. And good faith staffers and members have to say, your choice is not between this and this, it's between what I'm offering you and the status quo. And particularly as more states consider legislation, I think the status quo may get more or less appealing to different sides of the debate, depending on what we see in the state legislation.

So reminding oneself that you don't get to have your perfect legislation, that's not how legislating works. If you can reach something that achieves important goals and protects the principles that you care about, that's a really important thing to do.

So I'm hopeful that we'll get there. I will say that I know the people who are working on this are working incredibly hard in exceptionally good faith, and they are among the smartest and brightest people I have ever had the pleasure of working with. So I have a lot of confidence that the right ingredients are there and that in their hands. I am hopeful that they will produce an excellent result.

MS. WILSON: From her lips to God's ears.

MR. KERRY: Absolutely. Well, good advice for stakeholders all around. This has been an informative and a very collegial discussion.

So thank you all for being here and please join me in thanking Commissioner Wilson and Commissioner Slaughter. (Applause)

\* \* \* \* \*

## CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Carleton J. Anderson, III

(Signature and Seal on File)

Notary Public in and for the Commonwealth of Virginia

Commission No. 351998

Expires: November 30, 2020