

Senator Maria Cantwell

Q&A Before the Senate Committee on Commerce, Science and Transportation

Hearing: Examining Legislative Proposals to Protect Consumer Data Privacy

**Witnesses: The Honorable Julie Brill, Former Commissioner of the Federal Trade Commission, Corporate Vice President and Deputy General Counsel, Microsoft;
The Honorable Maureen Ohlhausen, Former Acting-Chair of the Federal Trade Commission, Co-Chair, 21st Century Privacy Coalition;
Ms. Laura Moy, Executive Director and Associate Professor of Law, Georgetown Law Center on Privacy & Technology;
Ms. Nuala O'Connor, Senior Vice President and Chief Counsel, Digital Citizenship at Walmart;
Ms. Michelle Richardson, Director of Privacy and Data, Center for Democracy and Technology**

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CANTWELL: Thank you, Mr. Chairman. Again, thank you to the witnesses, I'm going to try to go fast because there's so much to cover but all your testimony was so helpful. I just want to clarify if I could just on quick Yes/No answers if you do believe in consumer privacy rights writ large, that we should say that they are rights and that those rights should be enforced somehow, depending on how. It's just a "Yes..."

MS. BRILL: Yes

MS. OHLHAUSEN: Yes

MS. MOY: Yes

MS. O'CONNOR: Yes

MS. RICHARDSON: Yes

CANTWELL: Okay. And several of you mentioned harmful data practices. Are people for specifying harmful data practices and that consumers should be protected against harmful data practices?

MS. BRILL: Yes

MS. OHLHAUSEN: Yes, with an understanding that consumers may have different preferences.

MS. MOY: Yes

MS. O'CONNOR: Yes

MS. RICHARDSON: Yes

CANTWELL: Okay go back, Ms. Ohlhausen, on that. What do you differ preferences—either there's harm—I mean harmful has to be determined, right?

MS. OHLHAUSEN: Right, harmful has to be determined but for example, at the FTC when we did look at things like substantial injury, did the consumer—could the consumer avoid it wasn't something—consumers can sometimes make different types of choices where I may not want to share information but my—someone else, my neighbor may feel more comfortable sharing that information. Just kind of getting an understanding that consumers also may have somewhat different preferences.

CANTWELL: Okay. Let's go to something maybe a little bit harder, and I apologize Ms. O'Connor, I should've—my team should've come up with somebody that wasn't here today. But on Walmart, this is just an example, we all know that people put up a general privacy statement. They basically say something like—actually I saw a statistic like that, I don't know, 70% of companies now share data with third parties and as just standard part of their privacy statements. But on your website, I think you have a privacy statement that basically says yes, information might be shared. But now with Ghostery you can actually see, you can pull up a—Ghostery can now show you an actual tracking of how many different people are tracking that data. So 19 different advertisers are taking that data that you generally said, here's what's in our privacy statement which you have to read. Now we know by using that app, that 19 different people were tracking that data and information. So, our concept at least my colleagues and I here are saying you should be more upfront about that, that's just a little too vague on what's happening to information and data. So where are the witnesses on what we should do about this so that there's clarity to consumers?

MS. BRILL: Sure, so this is actually a really important question and of course the California law focuses on giving users the ability to opt out of sharing with third parties. And a number of the proposals that various committee members have pulled together also focus on what is happening with respect to sharing with third parties.

CANTWELL: I'm going to run out of getting answers, so do you think we should be more explicit with consumers than just we're sharing information with a third party? Do you think they should list the names? Or list the companies? Or what data's being shared?

MS. BRILL: I think focusing only on third parties is not business-model neutral and will have competitive effects that are unintended but will be severe.

MS. OHLHAUSEN: We're in favor of increased transparency for consumers but in a way that is not overwhelming, so if they want more details they can get it, or if they just need general types of third party sharing, that would also be available.

MS. MOY: I do think third party sharing is a huge problem and it's impossible for consumers really to know where their data is going. I think one of the things that I see in the draft bills is that the rights, when consumers exercise their rights, those rights would have to be communicated to additional parties and exercised by them and I appreciate that.

MS. O'CONNOR: Thank you so much, Senator, and thank you for using our website, of which actually we are very proud, and we have worked on of a tremendous team in Bentonville and in San Bruno and Sunnyvale, California. Most of what you saw in your ghost research is likely online tracking that we do of ourselves to see who's coming to the website, how long they're staying, better service you on a return visit so that as you probably know, when you leave and you've got something in your basket, it should hopefully still be there when you return. I don't believe any of those, and I'll certainly follow up with

your team and staff and my staff as well, are sharing personally identifiable data about our customers. And let me be just really clear: we do not sell or lease personally identifiable information about our customers outside of the Walmart family.

CANTWELL: And we want to hear from Ms. Richardson, but—whether it's—this is the practice writ large that we have to get to figuring out what we can do and what consumers are doing—Ms. Richardson I think I know your answer because you said in your testimony you should just be able to say no, don't do this.

MS. RICHARDSON: Right, yes. We would support limitations on third party sharing.

CANTWELL: Thank you. Thank you, Mr. Chairman. I could go into a bunch of AI questions which I really have because I really do think that what we're discussing today is really, really important, but I guarantee you, tomorrow's challenges are going to be much more significant and we have to figure out how to get something in place to help us deal with that for the future. Thank you, Mr. Chairman.

...

CANTWELL: Thank you, Mr. Chairman, and I think our second vote did just start so I will try to be quick, and if the witnesses could help me, another kind of yes/no answer on the first part. That is, you know as we're talking about what is sensitive data and information, and is facial recognition sensitive?

MS. BRILL: Yes

MS. OHLHAUSEN: I don't think the coalition has a position on that.

MS. MOY: Yes

MS. RICHARDSON: Yes

CANTWELL: That was a yes, Ms. O'Connor?

MS. O'CONNOR: Yes

CANTWELL: Okay thank you. Okay, then on—one of the things we've tried to do is clarity, obviously, because predictability is an important thing. Where do you think it leaves the colleagues that I have joined with in putting out a draft, where do you think that stands as it relates to GDPR in comparison what do you—how do you view that as far as clarity, obviously if it was enforced the way it was enforced or what have you?

MS. BRILL: One of the issues that I look forward to working with you and the Chairman on is ensuring that the provisions that you've put in place do not unintentionally favor some parties over other parties. I think there is a bit of a thumb, unintentional, on the scale in terms of favoring very large firms that are soup to nuts, can just surface ads to users without having to share with third parties. Again, unintentionally so—

CANTWELL: That's the same problem with California today.

MS. BRILL: Absolutely.

CANTWELL: Very big problem.

MS. BRILL: Absolutely.

CANTWELL: So we're not even going to have a free media in this country if we continue to persist in not clarifying this. And we won't even control any of our content that we see because they'll have all the money and they'll plan all the content and then they'll have all the advertising.

MS. BRILL: I think that is an issue with the California law as well, I agree.

CANTWELL: Yeah, so we don't want that. But related to GDPR...

MS. BRILL: There are—your proposal, as well as the Chairman's proposal, have embraced a great many of the concepts in GDPR that I think are going to be helpful for users and in particular, what is very encouraging to see, is that both proposals, both yours and the Chairman's, focus on user control and the real kind of data subject rights that you see in GDPR subject to the absence of a right to object to first party processing. That's the piece that would help with this competition issue. And you also have some of the accountability measures like data minimization, very important to require accountability on the part of companies as well and we see that in GDPR too.

MS. OHLHAUSEN: I think both proposed bills provide more clarity, I think there's some ambiguity in GDPR and I also think it's less onerous as my colleague Julie Brill pointed out on small and medium businesses.

MS. MOY: Yes and I agree that I think that adopting the rights framework is a really important thing that both frameworks do, similar to some of the rights that are expressed in GDPR. And then I would also just mention that in terms of clarity, again the rulemaking authority is really critical there so that if there are issues that cannot be encoded in the statute at this moment in time because doing so might make the law less flexible to accommodate changing technology in the future, that an agency could do so in the future.

MS. O'CONNOR: There are many companies that have quibbles with the GDPR but the one thing you can say about it, is it's done and it applies to everyone in Europe and so--

CANTWELL: So you prefer that over what we've been talking about this morning?

MS. O'CONNOR: No, no that's not at all my point. Simply that a federal standard is where we want to go because it will provide certainty for all consumers.

MS. RICHARDSON: I think your bill is definitely clearer than GDPR, I would say areas that I think might be subject either to litigation or exploitation in the future, or anywhere in the bill that references like a reasonable user, if we do not have guidance about what Congress thinks the reasonable user is I see that being a problem or if it's substantial harm that isn't defined, so to the extent that we can get even deeper on some of those issues, I think that will provide better protection for consumers and predictability for companies.

CANTWELL: Yeah I was looking at a much broader thing but this is very helpful so thank you. So do you think that's a better approach than GDPR or no?

MS. RICHARDSON: Yes, for the U.S. absolutely.

CANTWELL: Okay. That's the main thing and yes, that's the whole point. The more clear we can be, the more predictability we can have here. But yeah, it means having definitions and it means having real enforcement. In a lot of these things, I've enjoyed the discussion because we're very involved in putting anti-manipulation standards into both the FERC and the CFTC and the FTC. And a lot of people are like, oh no, can't do it, can't define manipulation.

Well I guarantee you, we've collected hundreds of millions of fines against companies that have manipulated starting with Enron, electricity markets and now other energy markets. And so, and people have called it, what started out as a little acorn has turned into a mighty oak because people knew what manipulation was. And so hopefully they'll understand what harm is, too. And I appreciated that everyone has supported harm today. Thank you, Mr. Chairman.