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REGULATING ONLINE CONSUMER PRIVACY AND EMERGING TECHNOLOGIES

A FIRESIDE CHAT WITH FTC COMMISSIONER NOAH JOSHUA PHILLIPS

Washington, D.C.
Thursday, March 14, 2019

PARTICIPANTS:

NICOL TURNER LEE, Moderator
Fellow, Center for Technology Innovation
The Brookings Institution

NOAH JOSHUA PHILLIPS
Commissioner
Federal Trade Commission

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P R O C E E D I N G S

DR. TURNER LEE: Are you ready?

COMMISSIONER PHILLIPS: I'm ready.

DR. TURNER LEE: Okay. Good morning everyone.

COMMISSIONER PHILLIPS: Happy Pi Day (laughter).

DR. TURNER LEE: Right, which pie (laughter)? Actually, I was going to tweet out, is it pi day mathematical, is it pie day food, or is it a Jeep Pie Day (laughter)?

COMMISSIONER PHILLIPS: I think we are supposed to celebrate the mathematics by eating the pie and if you can do it with a Jeep, you've really won.

DR. TURNER LEE: (Laughter) Well, we are glad to have you here at our event. I am just so honored to have the commissioner here. I am going to read his bio for those of you that are unfamiliar. Just a couple of things; I know it was handed out, and then we are going to jump into conversations.

At Brookings, we call this the fireside chat. So you are not on the fireside seat (laughter), hot seat, but just a chat. If you are following this conversation, we ask that you also tweet at consumer privacy so that we can share the love with other people who may not be with us in attendance, and the event will be taped and placed on the website later today.

So, before I get started, let me tell you who is sitting next to me, if you just do not know. FTC Commissioner Noah Joshua Phillips was nominated by President Trump to be a commissioner to the Federal Trade Commission and unanimously confirmed on April 26 of 2018. Before coming to that, he served as chief counsel to U.S. Senator John Cornyn of Texas on the Senate Judiciary Committee. And then from 2011 to 2018, he advised the Senator on legal and policy matters including antitrust, constitutional law, consumer privacy fraud, and intellectual property, and prior to that he worked at a law firm: Cravath, Swaine and Moore, my sister actually worked there.

COMMISSIONER PHILLIPS: Oh.

DR. TURNER LEE: For a period of time (laughter).

COMMISSIONER PHILLIPS: Let's talk about that later.

DR. TURNER LEE: Yeah, I meant to ask you about that. He received his AP from Dartmouth and his JD from Stanford Law School. Let us give him a warm welcome for being here (applause). All right, let me get comfortable over here.

COMMISSIONER PHILLIPS: All right, good.

DR. TURNER LEE: So let's start with this question of the FTC, you're there.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And there has been a lot of conversation lately so I will just jump right into it in terms of the authorities allotted to the Federal Trade Commission. How has your experience been so far, looking at the FTC as it's agency that is now sort of charged with protecting the digital economy?

COMMISSIONER PHILLIPS: Before I answer the question, let me start with two really important caveats. The first is, thanks for having me here at Brookings.

DR. TURNER LEE: Oh, you're welcome.

COMMISSIONER PHILLIPS: It's an honor to be interviewed by you so I am really pleased, and I just, sort of, for the record, we always have to start with this: what I am going to say today are my own views and not necessarily the views of the other commissioners or the commission as a whole.

So, I think it probably makes sense, to answer your question, to situate the Agency a little, historically and with respect to the authorities that we have. There are two basic things that we do. We've done one of them for over 100 years and that is Antitrust Law.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: So, we were started in 1915 and in the '30s we got authority to police unfair and deceptive acts and practices, which broadly speaking is consumer protection.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: The nature of our authority on both sides of the House is, by Congress, worded pretty broadly. And what that has enabled the Agency to do over time is develop to meet challenges that are presented. And, there has been a lot of development in the conduct of businesses on both sides of the House over the many decades; in fact, the century that we have been in business. All of that said, now is a really interesting time.

DR. TURNER LEE: I was going to say. One of the reasons that it is more interesting is that P word, privacy.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And so I know you are familiar because it's something that you do every day that we are having these really intense debates on the need for Congress to step in and implement privacy legislation for the FTC to potentially step up their role, and this all comes on the heels of Cambridge Analytica as well as a variety of data breaches that are not getting as much attention. Speak to me a little bit about what you think about the whole privacy debate and where you think we are headed; is it going to be sectoral, is there going to be a congressional law that comes out, a Federal law, or is this something that you think we are going to debate for the next couple of years.

COMMISSIONER PHILLIPS: So, the first important thing that I learned from seven years in the Senate is not to prognosticate too much on what's going to happen -

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DR. TURNER LEE: (Laughter) Right.

COMMISSIONER PHILLIPS: In the legislature. Let me say the following. My view is that we are here because the use and sharing of data is endemic in the economy. It is everywhere. It is not just about a small group of firms.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Oftentimes, that's how we talk about it, but

little firms, big firms, across industries are using more and more data, they are monetizing more and more data. We are going to have more of that over time.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: The FTC has been involved in privacy for a very long time.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: The Fair Credit Reporting Act is basically a half a century old and there are a bunch of other statutes that regard privacy, and then there is that organic statute that I mentioned from the 1930s. The interesting question with respect to the legislature is, are we going to get new authority.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Are there going to be new rules about how we handle data. That is something we are seeing internationally. It is something we are seeing at the state level.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: And, in part, those processes are very much informing the national debate.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: To me, and I have said this to the senators, the most important thing that I think we need to do as a country is take stock of where we are and decide what are the harms that we are trying to solve. Privacy is, to me, at least, a fairly nebulous concept. When people talk about privacy, they can mean a bunch of different things. So, you mention data breaches -- I think that one of the best things we can do, if not **the** best thing we can do for privacy --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Is to have a National Data Breach law.

DR. TURNER LEE: Mmm.

COMMISSIONER PHILLIPS: If you survey people and you ask them, what are you concerned about, what of the things they are most concerned about, according to a recent study of the thing they are most concerned about, is bad guys are going to get a lot of information about me.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: So that is one thing you might be concerned about. You might also be concerned about a lack of empowerment.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: I don't know what's happening to data that are collected about me. I have no visibility; that's an information deficit.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Discrimination, there are all sorts of different harms and what I want most is, as we go through this process, I want Congress -- they don't have to agree on the tools --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But I want them to agree on the harms. What are the problems that we are actually solving? And, then let's have a debate on how best to solve those problems because if you have a debate on how to solve a problem you haven't defined, a) I worry you don't solve the problem, and b) I worry you will create other problems.

DR. TURNER LEE: Right. Why worry that Congress actually will come up with what the harms are, you think that is a feasible solution? Will Congress be able to actually figure that out given the desperate areas that you are talking about?

COMMISSIONER PHILLIPS: I think they can and in a sense I think that is what legislators do.

DR. TURNER LEE: Yeah, yeah.

COMMISSIONER PHILLIPS: Legislators create rights, right? They can

create illegality in something. They can say, this is something we just want to ban or you know, however they structure it. Fundamentally, that is a democratic judgment, right. That is what a legislator is supposed to do. You know, capability?

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: You know, we will see over time but in affect, they have to answer this question.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Because they have to decide what's in and what's out.

DR. TURNER LEE: That's right.

COMMISSIONER PHILLIPS: What are we banning, what are we mandating.

DR. TURNER LEE: And that should drive, I mean, just to kind of go -- just another layer on this, will that then drive the tools. You know, there have been conversations around, is it opt-in, is it opt-out, what should we put as guardrails.

COMMISSIONER PHILLIPS: Right.

DR. TURNER LEE: Should we be relying on old statutes? Should we be developing by colleague and carriers here, principles around that? What do you think the tool-kit might look like based on the harm?

COMMISSIONER PHILLIPS: Well, I think that's -- they way that you are defining tool-kit, which, by the way, is the right way to define it.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Is the most difficult question.

DR. TURNER LEE: Yes, yes.

COMMISSIONER PHILLIPS: And one of the things that concerns me is we're not talking, or at least the legislature isn't talking as loudly as I would have them do about the difficult questions.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Are we doing opt-in, opt-out? What's in, what's out? Do we have a notice? How does that work? Do you have to come up, consistent with international best practices, do you have to come up with a privacy risk assessment?

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: How does that work? We are talking about things that, to me, are really important.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But they are even further from the core questions. Things like preemption, you know, rule-making authority, fees. I think we have to answer the question.

DR. TURNER LEE: That's right.

COMMISSIONER PHILLIPS: At the end of the day.

DR. TURNER LEE: So, let's talk a little bit about why we are here though, right.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: So, Cambridge Analytica was one of those impetus that sort of drove us to do this, but now we see the general data protection rules that the EU has put out, and we are up against what some legislators think is the urgency to get something done at the Federal level before California's Act is actually implemented.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: What is your opinion about both? Should we be looking at the EU, Commissioner, for taking some cues on what we should be putting into this Federal law? Let's start there.

COMMISSIONER PHILLIPS: I think we have to look at what they are doing.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: I think we have to look at what affect it's having.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: In a sense, we have a national opportunity, and that is Europe has done something, how is it working? One of the things that I have expressed is that I'm a little concerned at early signs that one of the effects of the law is that it's anti-competitive.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: And this can manifest in a number of ways. One is, you now, very basically that compliance costs are really expensive.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: And if you are a big firm, you can manage that. If you are a smaller firm, that can be a little harder.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Another thing is that there is, and you sort of hear a lot of this publicly, but also privately, there are vendors who stand at the ready, to help you deal with this.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Give your data to me at my cloud computing company.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: And I will resolve your problems. That may be good, by the way.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Maybe that's good for data security, but it may not help with competition. At the end of the day, this doesn't answer the question finally, because what you are talking about potentially, are competing values.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: So it may be that something is important enough that we are willing to take a little bit of competition out of the market. But my point is, we ought to do our best to know what is happening.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: See the effects, and see why they are happening.

DR. TURNER LEE: Right, but what about California, I mean, that has placed up, as I told people, California has become its own country (laughter), what are we going to do with California in terms of what they are actually going to enact, which is perhaps, some of the strongest privacy protections that we've ever seen.

COMMISSIONER PHILLIPS: Well, the thing about California is that it's not in affect yet.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: So, it's hard to know, it's hard to judge the impact.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: My understanding is there is a lot of feverish work going on in California about that but at the end of the day -- I mean, I still think it's early to evaluate the effect GDPR.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: It's **really** early.

DR. TURNER LEE: Early, right.

COMMISSIONER PHILLIPS: To evaluate the effect of CCPA.

DR. TURNER LEE: Should we be pushing for preemption, though. I mean, is this a conversation that the legislature should be having, or is that something you can't answer?

COMMISSIONER PHILLIPS: No, that I can answer.

DR. TURNER LEE: Uh huh.

COMMISSIONER PHILLIPS: I absolutely think we should push for preemption. I don't think in the world that we inhabit today, having a multiplicity of laws helps, especially with competition.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: You know, this is one of those areas where there are some precedents at which we can look. So, HIPAA, HIPAA is a national law. Everybody knows about HIPAA because every time you go to the doctor's office --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: You fill out a bunch of forms. HIPAA, by the way, is a portability statute.

DR. TURNER LEE: Yeah, yeah.

COMMISSIONER PHILLIPS: That is what the P is, it's not privacy.

DR. TURNER LEE: Yep.

COMMISSIONER PHILLIPS: So, people really ought to look at like, how does the portability regime that we have in place today work. Most people don't even understand that about HIPAA. And in fact, doctors use it to say, oh I can't send you the email.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Not true at all.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: They can send you anything under HIPAA, but HIPAA doesn't preempt so talk to the little medical firms, right, talk to the people who are trying to make healthcare cheaper and more efficient. Does having 50 state HIPAAs, I don't know the actual number.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Does that hurt you, does that hurt you?

Again, maybe it's worth it.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But it's a conversation we need to have.

DR. TURNER LEE: And that also brings up, you know -- and I know for -- I see a lot of people in here who are working on this issue, statue laws.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And state rights when it comes to any kind of Federal legislation. I think that is something also that California is triggering for people. States have traditionally been the ones that have enforced their own policies. There are probably 50 state laws when it comes to privacy. Will a Federal law sort of strengthen the states, or will it take away from the states the ability to do their job?

COMMISSIONER PHILLIPS: Look, on some level when you are talking about preemption, you're more in the Hamilton camp, right.

DR. TURNER LEE: Yeah, yeah.

COMMISSIONER PHILLIPS: Right? I think we can say that. What I will say, is that in the Constitution, it's the Interstate Commerce Clause.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: To make regular, right, interstate commerce. This kind of commerce is profoundly interstate, in fact, it's international.

DR. TURNER LEE: Right, right. So let me switch over to this other hot topic that sometimes gets linked with the privacy debate, which is antitrust. Now, I'm going to start by actually commenting, or ask you to comment on your understanding, your opinions on antitrust as it applies to other industries and sectors first.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And then we will go into the tech-sector.

COMMISSIONER PHILLIPS: Okay.

DR. TURNER LEE: Because I think we can stay in the tech-sector for a long time but at the FTC you do a lot of other stuff, right. So, you've spoken a little bit about antitrust with the mutual funds sector, if I understand.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: Can you talk a little bit about, I mean, what's your opinion on that. What have you verbalized around antitrust frameworks, in general? Just a moment ago we were talking about the consumer welfare standard being applicable for the FTC as still being agile enough. Tell us a little bit more.

COMMISSIONER PHILLIPS: Okay, so let me explain this to the extent the audience is filled with tech folks, what you are referring to.

DR. TURNER LEE: Right, exactly (laughter). I threw a monkey wrench in there.

COMMISSIONER PHILLIPS: There is a really fascinating debate going on right now on an issue called, common ownership.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: So, actually, I'm sort of curious from the audience, if you have money at BlackRock, which by the way includes the TSB if you're a Federal person, raise your hand. Okay, and Vanguard? So, in America right now, increasing amounts of money, literally trillions of dollars, are invested using large asset managers.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Through all the various ways in which they hold peoples' assets and the many funds and ETFs and things like that, increasingly, these firms are owning substantial amounts of shares in competing companies.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: So, United and Delta or whatever. I'm picking on airlines for a reason, I'll explain in a moment. Recently, and with particular respect to the

airlines, the claim is being made that the fact that these large managers own substantial shares of competing firms, is having an anti-competitive affect, or price affect; meaning that it's leading firms to compete less. And the theory is basically, that if you're biggest shareholders don't want you to compete because they would benefit from noncompetitive kinds of conduct that is how you as a CEO are going to behave.

It's a fascinating area of debate. The debate kind of went like this: early papers showing some really interesting things done by economists.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Hot minute lawyers proposing drastic changes in how our financial markets work. I'm concerned about that jump.

DR. TURNER LEE: Okay, yeah.

COMMISSIONER PHILLIPS: What I want, and what I have said publicly is, I want us to continue to do the research. I want us to learn, is this right? Are we seeing it in other areas of the economy? How does this mechanism work? And then get to the policy solutions.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Not jump to the policy solutions based on one paper.

DR. TURNER LEE: So, I say that because that was your first speech.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: So, now you're at the commission for a little bit more time, right. Now the whole thing is big tech. When I was at South by Southwest recently Senator Warren came out and said big tech should be broken up.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: There has been a lot of conversation around big tech companies and antitrust violations. Help us explain, based on your experience now and what you've looked at with the mutual fund industry, how should we be looking at this sector

though, as well. Is it the same kind of thing, same framework, or what?

COMMISSIONER PHILLIPS: I think the framework is the same. The law is the law.

DR. TURNER LEE: Yes, yes.

COMMISSIONER PHILLIPS: Antitrust law is, for the most part, not specific to any given industry, and it's developed over time. I think the reason the tech -- I mean there are a lot of reasons the tech sector draws a lot of attention -- the companies loom very large.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: As a matter of fact, they loom very large in the public's imagination. They are very disruptive.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And in particular, they are very disruptive of a lot of competitors.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Right, so a lot of business models are being upset.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And that is part of why we are having such a loud conversation.

DR. TURNER LEE: Yeah, but when we talk -- go back to privacy, there's been conversation to commission around, well maybe we should place privacy and one of those indicators of antitrust violations. Are you one of those fans of that thinking, of that line of thinking, or is that something we should totally keep separate in our conversations around this?

COMMISSIONER PHILLIPS: I'm not a fan of that kind of thinking. One of the kind of things that I worry about in grouping too many concepts together is it leads to a

lack of clarity.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: So, I don't know what to do. I don't know what the rule of decision, you know. There's an old philosophical principle called Buridan's Ass. He's a donkey, and he's got two equally sized piles of hay and they are equi-distant from him and he can't decide which pile to eat and he starves to death.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And the principle is meant to illustrate that if you have goods that are non-reconcilable through different values --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Trying to choose between them is really hard to do. So that's for the law enforcer. For the company trying to decide whether their deal is legal, you know, how do you reconcile that? How do you plan in advance? And, as a corollary matter, I worry that it gives too much discretion to people like me.

DR. TURNER LEE: Yeah, and I guess going back to that, the Chairman of the FTC wants more rule-making authority, though, around that area. Do you agree that there should be more rule-making at the FTC, so that you can actually look and see what part of the donkey's EH is actually (laughter) --

COMMISSIONER PHILLIPS: Which pile of hay?

DR. TURNER LEE: Yeah, which pile of hay?

COMMISSIONER PHILLIPS: So, that is actually part of the privacy conversation and what I think about rule-making is that, and it goes back to what we were talking about earlier, I think the fundamental democratic judgments need to be made in Congress.

DR. TURNER LEE: Mmm.

COMMISSIONER PHILLIPS: I don't think you want to give five people, or three people, the authority to legislate. The first is for democratic reasons, like, we are not

elected.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: The second reason is what you don't want to see, especially with rules that potentially impact so much of the economy --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Changes over time. Whatever you think the rule ought to be, what you shouldn't want to see is every four years, or every eight years, or even some other period of time, dramatic shifts in what the rules of the economy are.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: That is really hard for firms to predict.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And to plan around.

DR. TURNER LEE: Well, there was recently an announcement of the FTC putting together that new commission, right on big tech and --

COMMISSIONER PHILLIPS: Task force.

DR. TURNER LEE: Yes, yes. So do you think the FTC actually has a natural in-road into enforcement, then, maybe, based on the, you know, like you said, the big umbrella of really determining what it is that you are actually look at? What is the problem?

COMMISSIONER PHILLIPS: So the Task Force, just to be clear, it's not a privacy thing.

DR. TURNER LEE: Yes, it's a competition tool.

COMMISSIONER PHILLIPS: It's a competition, exactly. So, to me, what the Task Force is about, we all marvel --

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: At some of these firms in the technology industry. And some of these -- I don't mean marvel as like a positive necessarily.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Maybe awe is the right word I'm looking for. There is a lot to look at. And what you want to do, you want to look at the firms, you want to look at the practices, you want to look at what we do, our processes; and most importantly for us, are we thinking about competition the right way.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: let me give you an example, which to me is a really interesting question; maybe the hardest question we deal with. A lot of the firms that a lot of the folks are talking about, benefit from what we call network effects.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: So you know, the sort of curve reviews goes up in such a way that it can be winner take all.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: So, is the competition, like other firms that don't compete in that way, further on down the line, or is there an earlier part of competition that deserves more attention.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: The Task Force is part of thinking of those kinds of questions.

DR. TURNER LEE: Right, so I want to go into -- and we are going to be taking questions in a moment. Again, follow our conversation on the #consumerprivacy, and if you have questions for the Commissioner, I will be opening up the floor in about 15 minutes, I'm just taking moderator privilege and asking some more questions.

So, let's talk about emerging technologies just as a flip.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: To flip the script here. A lot of these tech companies are actually in the space of artificial intelligence. We at Brookings are actually involved with that. The FTC has traditionally been involved in algorithmic bias.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: Previous administration took that as one of their areas of interest and I actually did a big data workshop five years ago talking about big data.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And now we call them algorithms, right (laughter), to a certain extent. As we think about algorithmic bias.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And we have a paper coming out here at Brookings on that, should the FTC be taking a more active stance with this. I mean we are seeing people get denied loans as a result of algorithmic bias, we are seeing higher education decisions be made, bail and sentencing decisions being made that disproportionately affect protecting classes. Curious as to your thinking, is this a privacy issue again, or is this something that might be in its own bucket by the FTC to ensure, you know, there is not deceptive practice or discriminatory effects.

COMMISSIONER PHILLIPS: Well, let me tell you this, it's not unrelated.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: We actually -- I mentioned FCRA, the Fair Credit Reporting Act --

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: This is a statute.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: Which we've had on the books for a long time that can be applied to this. There is a recent case that people can look up called Real Page.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: We had a company that provided a great product for people who wanted to rent apartments quickly to evaluate the person who wanted to rent the apartment.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But the results coming up weren't so great.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Right.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And we entered into a settlement with them to improve sort of what they do and find the money.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: So there are already tools at our disposal to help deal with that. I think it does need to be an area of focus.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: I think that's right. I also keep in mind, though, and this is so funny for things like the extension of credit.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: I don't think that anyone should nostalgize the old world of credit.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Where it's like you and I play at the golf club together and you come into my bank and I know you and you're a good person, not sure that biases didn't impact that process.

DR. TURNER LEE: Yep.

COMMISSIONER PHILLIPS: So there is promise in using objective metrics.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: There's promise in using AI, but we have to look out for when it has bad effects.

DR. TURNER LEE: Right, and there is also this conversation because of

some of these technologies are still nascent form, like facial recognition, etc. Should we be trying to figure out ways to balance that innovation before we prescribe rules over these things, or you know? It seems like everything we are talking still has time that we have to look at these things.

COMMISSIONER PHILLIPS: Yeah, look, I think we have to keep in mind the U.S. remains, fundamentally, a very innovative economy.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: That's a good thing.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: We want to encourage that.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: It doesn't answer all of the questions. We also want to understand what we are purporting to regulate; we want to weight the costs and benefits.

DR. TURNER LEE: Right, that's right. Now, I would be remiss if I didn't ask you this question as well, when it comes to algorithmic bias, will the FTC also be looking at conservative bias, like political bias, as, you know, as a non-protected group, but clearly it has gotten a lot of conversation on The Hill, so I'm actually also curious, while you're sitting here, if that's actually also curious while you are sitting here, if that's actually going to be a scope of interest to the FTC?

COMMISSIONER PHILLIPS: So, I've tried to say this on The Hill --

DR. TURNER LEE: (Laughter)

COMMISSIONER PHILLIPS: I've tried to say this in public; I don't think we should be involved in that business.

DR. TURNER LEE: Yeah, okay.

COMMISSIONER PHILLIPS: One of the things that scares me as a public official is the notion that public officials should be looking at which opinions are getting what

kind of treatment in the market.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: And then trying to correct that.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: I think that gets you into really, really, really dangerous First Amendment waters and I don't think we ought to be there.

DR. TURNER LEE: Yeah, so let's switch modes for a minute, because I know there is a whole lot more that you do at the commission than what we are talking about, and it actually worth probably having a discussion on that. I know that you recently spoke about non-compete agreements.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: I'm curious to one, explain it to the group, why that's an important area that you took on, and two, what your perspective is on those?

COMMISSIONER PHILLIPS: So, just because I haven't even spoken on this yet, I did -- it found its way into some testimony.

DR. TURNER LEE: I was going to say.

COMMISSIONER PHILLIPS: So, non-compete agreements are something that one finds in the economy. They traditionally have been understood as a mechanism that a firm uses to make sure that it retains the incentive to train, to protect trade secrets, things like that. So, you know -- I'm trying to think of an example -- you go to a tech firm and they say you can't go work with our competitor --

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Or our competitors for some amount of time.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Very different state regimes in the United States. Interestingly, California, very suspicious of non-compete agreements. California also happens to have a lot of innovation.

DR. TURNER LEE: Right, I was going to say.

COMMISSIONER PHILLIPS: And this has not escaped the notice of a lot of policy makers. To me, the issue of non-compete folds into a set of issues that relate to a broader, like a real issue in the United States economy right now, and that is labor mobility.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: So, for years the FTC has done some of the best work on issues of occupational licensing.

DR. TURNER LEE: Mmm.

COMMISSIONER PHILLIPS: Barriers, that states are at legal barriers to entry that prevent people from starting new businesses. Sometimes that's important.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: For health and safety. But sometimes it's not so good. Sometimes its people protecting themselves or their friends through use of legal barriers and that can be really anti-competitive. In 2016 the DOJ and the FTC got together to do HR guidelines.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: And one of the things that came out of those HR guidelines is a great initiative that they are doing over at DOJ, and that's to look at what we call no-poach agreements. So that is firms that agree not to hire each other's workers. What we are also seeing in a lot of the academic research is that non-competes are much more prevalent than at least we thought they were; I don't know if they are more prevalent than they used to be.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And they are prevalent in areas of the economy where we might not expect them.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Like fast-food workers, where you are not

thinking about like stealing the client list or the IP, or what have you. To me, these three issues: occupational licensing, no-poach agreements, and non-competes together inhibit the free flow of labor, they inhibit the ability of workers to bargain for what they are worth, and I think policy makers in general ought to take a look at that.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: I will say, from an antitrust perspective, a particular non-compete agreement, it is often hard to see how that becomes to see how that becomes an antitrust case.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But if you look on The Hill, people like Marco Rubio are taking a really close look at this from a policy perspective, and I think that's the right thing to do.

DR. TURNER LEE: And as it relates to the tech sector, would that have an impact there, or, it seems like it could actually.

COMMISSIONER PHILLIPS: Labor mobility in the tech sector --

DR. TURNER LEE: Fast.

COMMISSIONER PHILLIPS: Is like a fascinating story of the times.

DR. TURNER LEE: It is, really fascinating.

COMMISSIONER PHILLIPS: As I mentioned, California traditionally has been really hostile to the non-compete stuff and some people attribute the innovation to that.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: So, my inability as your boss to keep you from going to the competitor allows you to move around and share ideas.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Now, we don't want you to share trade secrets.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But sharing ideas and ways of thinking about something can really foster innovation.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: California is also the place where DOJ brought a case a few years ago involving some really big firms doing this no-poach stuff.

DR. TURNER LEE: Mm hmm. And that brings me to this last question before last; again, I will open it up to questions from the audience. Should we be looking at, or the FTC be looking more carefully, though, at these labor issues that are associated with the sector that we have just discussed? I was just on The Hill the other day talking about diversity in the tech sector talking about all the implications of this growing part of our economy, is this a concern the FTC should be taking on?

COMMISSIONER PHILLIPS: Something that both the Chairman and the head of our Bureau of Competition have talked about looking at increasingly is the issue of labor monopsony.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: To what extent, for instance, a merger might have an anti-competitive effect on the demand side for labor. So it is something we are taking a look at.

DR. TURNER LEE: Yes, no that's good to hear because I think different demands, different economies have different scales. So, before I go to questions, I do have a question to ask you.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: So, what's going to be your legacy? You're there, it sounds like you've got a lot of things on your plate, but what do you want your legacy to be as the Commissioner?

COMMISSIONER PHILLIPS: I think that I want more than anything is to do my best to make sure that the policy we push and the cases we bring are well-grounded and

well thought out.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: There are a lot of people talking about the issues that we deal with right now.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: More so than I think I've seen in my lifetime?

DR. TURNER LEE: I know.

COMMISSIONER PHILLIPS: And, in a sense that is really good.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: But, I just want the conversation to be grounded.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: That's what I think is the most important --

DR. TURNER LEE: So if you become the Grounded Commissioner, you'd be happy.

COMMISSIONER PHILLIPS: Boring is what I do (laughter).

DR. TURNER LEE: Now, the Commissioner said before I came out, I'm not sure I'm lively, but you've been great. I mean, the conversation has flowed; we could sit here and talk for hours. That's why we call this a Fireside Chat. He's almost in my living room having conversation.

COMMISSIONER PHILLIPS: Some living room.

DR. TURNER LEE: Yes, I know, it's a big living room. I have a lot of guests (laughter). So, I actually want to open it up for Q&As. We have enough time, I know the Commissioner has put out a lot of information and it's always great to have them in person. So, we have a microphone coming. We will start with the gentleman in the middle and then we will go to the gentleman here, and then I think I saw a hand over here.

QUESTIONER: Hi, it's Mark McCarthy with Georgetown University. Great

conversation, good questions, great answers, so can you give us more reaction to Senator Warren's tech proposals, in particular, her ideas that some of the tech mergers should be unwound.

COMMISSIONER PHILLIPS: Let me say the following, one of the things I was talking about of privacy a few minutes ago, was the notion that we ought to line up the remedies that we apply, the sort of tools that Congress gives us, with the harms that we perceive. That principle of aligning harms and remedies, very much exists in antitrust law and ought to do so; meaning, when we block a merger or require some sort of remedy, or when we pursue a conduct case, right, we are going against an anti-competitive thing that a company is doing, we ought to pursue remedies that are tailored to the harm.

DR. TURNER LEE: Mmm.

COMMISSIONER PHILLIPS: The break-up of a company -- so, sorry -- divestitures happen all the time in merger review, but the break-up of a company isn't something that is all that common in American history, and the reason for that -- well, there are a number of reasons for it. One of it is, in a sense, it's sort of like the starkest remedy, in another sense, it's really hard to do and complex. It's not so simple, oftentimes, as just as my, as an outsider, or even my as a regulator saying, just take that and that and move them apart. There are all sorts of complexities and there have been historically decades of litigation over these things.

I think that the question always should be what is the harm at which we are aiming? How does the remedy address the harm? Different firms have different businesses. If you are just talking about the same remedy to address the same perceived thing and you're not even differentiating the businesses, I worry that you are missing some nuance.

DR. TURNER LEE: Mm hmm. Next question is right here.

QUESTIONER: Hi, good morning, thanks for being here, Dave Preaer from Emlex, you've said many times that remedies have to match the harms when it comes to

privacy. Could you take a stab at what your perception of the current privacy harms are, specifically?

COMMISSIONER PHILLIPS: Sure. Let me pick off one in particular. Well, actually, let me back up for a minute. One of the interesting things about the privacy debate --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Is the degree to which people don't agree on that.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Which is why I think having this debate, and having the democratic process decide which harms we are going to address and which harms we won't, is important. I said before, you know, one of the best things we can do for privacy is deal with data breach. I think people largely view --

QUESTIONER: That's a remedy.

COMMISSIONER PHILLIPS: No, my data being unwarranted disclosed to other people, I might very well think of as a harm. I might spend time and money to deal with that.

DR. TURNER LEE: Right

COMMISSIONER PHILLIPS: Right? The figuring out, like, do I have to call the credit bureau, do I have to freeze things; that's a cost.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: The worry of thinking, oh no --

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: A bad guy -- so I think that is harm.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Another example, I think there's a very good argument that there is something of an asymmetry in information in the market between

consumers and firms about what is being done. So, I think thinking strongly about how to give consumers more information is something we really ought to do.

DR. TURNER LEE: Mm hmm. And would that be like that transparency effort, or whatever is that transparency tool-kit would actually be a remedy for that particular harm?

COMMISSIONER PHILLIPS: Potentially.

DR. TURNER LEE: Yes, and I totally agree with you just on that moment of the data breach. The work that I do here at Brookings deals with historically disadvantaged communities a lot, and vulnerable populations, and the greatest asset that they have is their Social Security Number.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And if you think about those populations compared to those of us, I mean I've had my credit card hacked multiple times, but I can easily go to another credit card. A person who has their Social Security Number hacked, that's it.

COMMISSIONER PHILLIPS: That person also probably has a schedule --

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: That doesn't allow them to spend a lot of time on the phone with customer service.

DR. TURNER LEE: That's right.

COMMISSIONER PHILLIPS: Right. They've got to pick up their kids; maybe they have to pick up somebody else's kids --

DR. TURNER LEE: That's right.

COMMISSIONER PHILLIPS: So, these little bleeds of time can have a real impact on people.

DR. TURNER LEE: Yes, mm hmm.

COMMISSIONER PHILLIPS: And I do think, as a general principle, you want to focus on the areas of the greatest harms first.

DR. TURNER LEE: So you think -- I just want to piggyback on this gentleman's question -- do you think it's worth then doing a grid that has these harms sort of explicated and then a remedy tool-kit as a result of that. That's a different way, I think, of a methodological process for the debate that we are in right now; could be.

COMMISSIONER PHILLIPS: Yeah, no, I think that's a great idea.

DR. TURNER LEE: I don't know, something came to me; Cam, you hear that (laughter).

COMMISSIONER PHILLIPS: Yes, we can debate.

DR. TURNER LEE: Exactly.

COMMISSIONER PHILLIPS: Like, does the remedy address the harm?

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Does it outweigh its cost?

DR. TURNER LEE: Yes, looking at my colleague Cam Kerry, we might have a paper here (laughter) with regards to that, because I have not heard that spoken about in a way that you have sort of laid it out, which could get into the details that I think many of us are struggling with right now. Next question, okay, who's got the mic?

QUESTIONER: Hi, I actually had a quick follow-up on that topic right there before my main question, and that is, do you think that the FTC can move forward with harms without a dollar quantification? Because, I know that the FTC privacy-con, privacy-con that has been going on has been focused on asking academia, which is where I come from, over and over again, can I put a dollar amount on privacy harm, can I do it, can I do it? And, the answer has continuously been, we don't know how? So, can you move forward without dollar quantification?

COMMISSIONER PHILLIPS: It's a great question, and one of the most interesting things, to me, is the degree to which, that was like two years ago a really big debate. Now, in the context of this privacy legislative forum, it's sort of (laughter), people are not focused on it. You know, we have historically, even under Section 5, where you have to

show substantial harm, we have looked at things that I think don't all align with out of pocket loss; so, reputational harm.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Although there was, sort of, more economic harm as well. I'll take as an example a rather, the whole thing is unfortunate, the Ashley Madison case.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: This is a website where people would go to cheat on their spouses, in particular, men go to cheat on their wives and they promised really good security, and they were breached. So, that, I mean, I don't have infinite sympathy for the victims, but there is no question they wanted to keep that private.

DR. TURNER LEE: (Laughter).

COMMISSIONER PHILLIPS: Right. So, I think we have at the margins, but the really important question for purposes of the privacy debate, is, in my mind, almost any way this shakes, if it ends up in legislation, you're going to be in a world where you are addressing precisely those kinds of harms.

Now, let say the following: there is nothing particularly out of the ordinary about Congress saying, this is a harm, and you should have a remedy; whatever, however that remedy looks. That is a perfectly plausible thing, but I do think in a sense, that debate, which is super important, and loomed incredibly large like two years ago, has been superseded by this debate about, which harms are we addressing, many of which are non-economic.

DR. TURNER LEE: That's right, that's right.

QUESTIONER: So, sorry, my actual question (laughter).

COMMISSIONER PHILLIPS: (Laughter) But I like your first one.

QUESTIONER: I was an FTC intern. The next one is, so you said that fundamental democratic judgments should come from Congress versus coming from the

FTC rules. A good example for when there is an actual need that Congress isn't filling, especially when Congress is moving very slowly like it has the last couple of congresses, is COPPA, where there are maybe not quite defined harms happening, but there is an understanding that harms are happening, even if we can't define them and a rule needs to be made because there is no congressional, you know, step-in to protect, and COPPA, for those who don't know, protects children and children's privacy, thank you.

COMMISSIONER PHILLIPS: I'll start with this, we have done rule-making on COPPA.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: And I think Congress ought to look at like, at that process and what people said around that process. I think that's a -- like I was saying with respect to HIPAA earlier -- I think that's a really important way for Congress to learn about how we have made rules on privacy in the past.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Personally, especially as a parent of three children, I'm a paternalist when it comes to kids.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Kids though, are not the whole population, right. So COPPA also addresses and area -- I think consistence with the regime we have now, which is a risk-based regime, where Congress has stepped in and has said, look, that's an area that requires special protection, right. Kids, health information, financial information; it is not shocking that we have this scheme that we have today.

DR. TURNER LEE: Right, right. Actually, I wanted to -- moderator privilege -- go back to her first question though, because you had me thinking about something and then we will go to the next question, on monetization, right. So, there are conversations that are happening about consumers owning their data and giving it a value right.

COMMISSIONER PHILLIPS: Mm hmm.

DR. TURNER LEE: And it's sort of an input, output; if you quantify harm, should we also have the ability of consumers to quantify the value of their data as well?

COMMISSIONER PHILLIPS: So --

DR. TURNER LEE: There's a lot of talk about that going around now.

COMMISSIONER PHILLIPS: There is a lot of talk about that. I need to learn more, let me start with that. I am not enthusiastic about that concept. I find it analytically really difficult.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: I also really wonder, especially as a lawyer, you create a property right in something that is shared everywhere by lots of people.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: And has a value about which we can quibble a lot.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: What effect does -- I mean, with rights, come remedies, right?

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Lawsuits.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Right, how does that look?

DR. TURNER LEE: Yes, yes.

COMMISSIONER PHILLIPS: And I have not been sold that, as a metaphor, you know, the -- it's tempting to think of it that way and there is no question that when firms collect data about us, there is a value to them. What the value from our perspective may be very different even of the data that they collect from us.

DR. TURNER LEE: Right, right.

COMMISSIONER PHILLIPS: Because they can use AI, right, they can use

big data to imbue it with more value, and that's what firms do across the economy in a variety of contexts.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: And to some extent, you know, this is part of the debate we are having, let's not forget the fact that consumers already derive quite a bit of value.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Right, so you get a lot of good things for free.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Now, I think people are -- the Nation is in the process of evaluating, well how free is free -- I'm sorry, when I say free, I mean not out of pocket cost.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Is it really free and is it worth it? Those are fair questions to ask.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But, it is certainly not true that on the other side of the ledger there are no benefits for consumers.

DR. TURNER LEE: Yes, and well, I mean, the internet was, for those of you, a history lesson, the internet was based on our free exchange of data, which is why we could have a supported model that supports all of the great things that we do to a certain extent, but that is an interesting question because again, I think people are starting to think, I have this natural resource, should we value it in such a way that I am able to sort of control that. But, it could also stifle innovation so --

COMMISSIONER PHILLIPS: And you know, also as a -- sorry to interrupt you --

DR. TURNER LEE: Yeah, yeah.

COMMISSIONER PHILLIPS: But, you now, the market can take that into account, right?

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: I'll be interested to see to what extent are privacy driven business models popular.

DR. TURNER LEE: Right, right, and that goes back to the young lady's question, in terms of the children's protection, perhaps Federal legislation should use those as sweet spots to focus on. Obviously, I don't think any of us want to evaluate our health data. We want that private no matter what, right, and we don't want to barter that as some kind of trade, potentially.

COMMISSIONER PHILLIPS: We don't want to barter it, but let me pick on that and this is something I've been thinking about increasingly; just my personal experience, and this is not a good way to make public policy, I'm not convinced that there is really good sharing.

DR. TURNER LEE: Mmm.

COMMISSIONER PHILLIPS: Of health data going on.

DR. TURNER LEE: Yes, it's supposed to. It's supposed to have happened.

COMMISSIONER PHILLIPS: That was what HIPAA was supposed to do.

DR. TURNER LEE: What it was about, right.

COMMISSIONER PHILLIPS: And instead, for a lot of people it works as an impediment.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: And you know, you want -- okay, you don't want your data breached and you don't want, maybe you don't want ads predicated upon it but do I want my primary care physician to talk to my specialist? Yes!

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: I do!

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: And our choices in healthcare are governed by a whole, you know --

DR. TURNER LEE: Yeah, and I think --

COMMISSIONER PHILLIPS: Complicated scheme --

DR. TURNER LEE: And I mean, we can have a whole conversation on this because I just think, like, you know, do you want people to say, oh yeah, for 25 cents, take this part of my healthcare record and I'll value -- and I think that's a difficult conversation that people aren't getting to the weeds of, when we actually talk about this new commodity.

COMMISSIONER PHILLIPS: But, I'll give you an example, and just to be clear, the FTC doesn't even do HIPAA, but you are getting a certain kind of treatment and let's say you are dealing with two or three different doctors. Unless things are really going as planned, and they often don't, it's you --

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Maybe sick, talking to different people and trying to convey the same story. The fact that you forget a material detail in one conversation can have a real difference.

DR. TURNER LEE: Yes, yes.

COMMISSIONER PHILLIPS: Like, there is a world of data sharing that helps too.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: And that is just something important to keep in mind.

DR. TURNER LEE: Yes, no, thank you for reminding us. So, I completely lost track of who is next but I think it was this gentleman right here in the green jacket. I'll go there, I'll go there and then Merida will get you a third.

I'm sorry, before I go there, this gentleman way in the back, because I do

have my glasses on and I can see you (laughter), we will go here to the gentleman in the back, here and then to Merida.

QUESTIONER: I have a question about rate of progress. One of the privacy related issues are the innumerable spam phone calls we get every day imitating other phone numbers and often they are out to fraudulently take money away from people. FTC has been addressing this I don't know how many years, or how many years, the only remedy was file a complaint with the FTC, which every month gets more complicated to do, and you have this long list, but I have seen very little progress in implementing the very well-known technical solutions to this problem, which just don't allow people to create a phony telephone number.

COMMISSIONER PHILLIPS: In my own life, and certainly when listening to people talk about what we do, this issue might loom largest.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Because you are reminded five times a day that whatever it is, it isn't working.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: We have been and will continue to bring cases, under the telemarketing sales rule, to enforce the authority we have, but part of what you are seeing in the market is that the cost of internet telephony is zero. I mean, it's nothing, and the technologies are spreading. It can even reach, or -- reach from, without our jurisdiction.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: It's not a problem that enforcement alone can solve. So, that is why you see two really important trends that I hope provide great promise. One is what we have been fostering, which is competition to develop technologies on the user end to help people identify or at least not take the call. So -- we held a contest -- you should go to our website, there's a bunch of apps that can help.

It's great that that is spreading. I know that telecommunications firms are working, and it's called like shaken-and-stir on protocols that help.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: I think that has to be part of the solution. But, it's terrifically annoying, it's terrifically costly.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: I mean, I pick up the phone twice a day and it's a Chinese person talking to me, I presume they don't know me.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Certainly, I don't speak Chinese.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: Look, I think it's PJ O'Rourke, I might have this wrong, who said that the do not call list, which was Chairman Tim Muris' initiative during the Bush years, was like the greatest public policy achievement since the Elvis stamp or something. I think if we could solve this problem, we all would do it. The problem is a lot of what causes this problem isn't something we could just whack. We are going to continue to whack at it.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But I think it needs to be a broader kind of effort.

DR. TURNER LEE: Yes, isn't it interesting, the old communications protocol still has a big, looming problem, so we can't actually stop that. Okay, this gentleman in the back.

QUESTIONER: Hi, Jeff Subrickey with Wal-Mart. I really appreciate the conversation today. A lot of the topics we have touched on today so far have also been included in the FTC 21st century kind of privacy and competition review. Could you touch a little bit on the learnings to date that you have seen and the conclusion of that in the coming

months, what are your expectations for activity from the FTC in terms of reports or other things, and any ideas of what you expect the conclusion of that to look like, thank you.

COMMISSIONER PHILLIPS: I'm more or less going to dodge the answer (laughter) because we have taken in so much learning, and everyone is still going through -- not only the people who are on the panels -- which, by the way, are still ongoing -- as well as the comments that came in. Broadly speaking, this is a process of, where are we? Taking stock of current learning; it's all modeled on this effort in 1995 by Chairman Petrofski which led to some really important improvements in how we think about IP and antitrust.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: How we think about efficiencies in antitrust. And it's absolutely plausible that there are innovations that come out of it but I think it's a little early to tell.

DR. TURNER LEE: Okay, there is a question here.

QUESTIONER: Hi, thank you, Charles Cutshaw, a member of the Brookings society, and taking a step back and thinking holistically about consumer privacy, regardless of your permission, your views on the privacy rules that came out of the FTC and what happened to them, do you think that we need to consider the rules of the road for telecommunications companies, which are essentially the highway system by which our information transits every day, and also, do you think that thinking about consumer privacy and not considering, perhaps a refresh of the way that the Federal government handles and individual's information would be a missed opportunity?

COMMISSIONER PHILLIPS: Sorry, repeat the second question again.

QUESTIONER: Sure, absolutely. A lot of the conversations that I have seen, a lot of the bills coming out of The Hill tend to really focus on technology companies and the role of the FTC, and I was wondering if you had any thoughts on whether or not there should be a conversation taking place about, perhaps, some of the outdated privacy protections that we have in the Federal government, Privacy Act of 1974, for example.

COMMISSIONER PHILLIPS: Right, like who guards the government.

QUESTIONER: The key word being 1974, there, the date.

DR. TURNER LEE: (Laughter).

QUESTIONER: I'm just interested in your thoughts and just in terms of more holistic approach to privacy.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: So the short answer is yes, right. And the reason the answer is yes is because the economy has developed in a way that is leading to this very conversation. With respect to your first question, should be think about telecoms, my sense is that we are thinking about everything.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: The telecoms are really important. The consumer companies are very important. The data brokers are really important. There are a lot of different areas; what we need to be thinking about when we talk about privacy, in my view, is the fact that it is not just a small set of firms.

QUESTIONER: Right.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: Like, this is not just a conversation about a few companies that each of us deal with every day online. There are thousands and thousands and thousands of firms dealing in your data, using your data in really beneficial ways; maybe they are using it in ways that you don't love.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: But any way you slice it, with respect to a particular person's preference, the point is that rules can have really broad impact and you need to think about that impact.

DR. TURNER LEE: So you think that -- just to follow-up on that question, so you think there should be a comprehensive privacy approach versus something that is

more sectoral, or should we still keep emphasizing like you talked about, with healthcare or the financial service industry, some points that actually apply to those sectors as well?

COMMISSIONER PHILLIPS: As I said before, to me, I like to focus on harms.

DR. TURNER LEE: Yes, to figure out the harms.

COMMISSIONER PHILLIPS: What harms are we addressing?

DR. TURNER LEE: Yep.

COMMISSIONER PHILLIPS: I think that part of why we are having a broader debate now is that people are beginning to see that the firms that deal in what they might view as sensitive data, are much, like, more myriad.

DR. TURNER LEE: Right, Mm hmm. Yes, because I think the question that I think this gentleman has is there was interesting, and that actually was related to the institution of the net-neutrality rules that there needed to be a greater use of that section to enforce it against telecom, but what we have later found out is that, I think most people are looking at being platform agnostic and technology agnostics and say hey, we need a comprehensive framework to actually move forward. So it's interesting. Okay, Merida you had a question here and I'll take this young lady in the back and then we will start wrapping up the event.

QUESTIONER: Thanks.

DR. TURNER LEE: This is good.

QUESTIONER: Hi, Commissioner Phillips. Rita Coley from Multicultural Media Telecom and Internet Council, you indicated earlier that we should be pushing for Federal legislation that preempts state law.

COMMISSIONER PHILLIPS: Mm hmm.

QUESTIONER: Based on some of your experiences, other than privacy, can you sort of drill down on that a little bit and help us to understand why that is important, and which we agree, too, but I just wanted to understand that.

COMMISSIONER PHILLIPS: Sure. I'll give you a one-word answer. The reason is competition. Where you have regulations of any kind, one of the impacts that they can have is a barrier to entry. Compliance costs money. Compliance on these kinds of issues can cost a lot of money. I'll give you an example. In GDPR, there are certain rights about accessing your data and correcting it. If you are a firm that hasn't been collecting data by person, you have to figure out a way, with whatever databases you have, to link the data you have collected to some sort of identifier. By the way, I'm not even sure that process is great on its own for privacy.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But it's certainly expensive. The more different schema you have, the more expensive that will be, and that hits smaller firms harder. So, I think for me, preemption is a mechanism to make sure that when you start your company, or even if you are dealing with a company that didn't realize it was dealing with data before, or just wants to monetize the data that it has had for years, you're a small firm, you don't have to hire tons of lawyers.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: When you are small a start-up and you have five people, one of them should not be a lawyer.

DR. TURNER LEE: (Laughter).

COMMISSIONER PHILLIPS: We should all -- I love lawyers -- (laughter) I am one.

DR. TURNER LEE: (Laughter).

COMMISSIONER PHILLIPS: I come from one.

DR. TURNER LEE: (Laughter).

COMMISSIONER PHILLIPS: But that is not the best way for us to innovate so to my mind, having one standard is a really good idea.

DR. TURNER LEE: Yes, before we go to this last question, I do have to ask

this one question.

COMMISSIONER PHILLIPS: Yeah.

DR. TURNER LEE: We've been talking a lot about domestic, and I said I would ask this question: international, you know, where are the conversations around global governance around privacy, international frameworks, data portability sharing; that conversation is still going on, correct?

COMMISSIONER PHILLIPS: Oh yeah.

DR. TURNER LEE: Yeah.

COMMISSIONER PHILLIPS: So, I was just -- a few weeks ago, I was in Santiago, Chile, and this was at the meeting of the APEC, the Asian Pacific Economic Council, and one of the issues on the table is portability of data.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: As different countries develop different standards the growth, the economic growth we have had in the economy can be inhibited by the fact that you may not be able to share data. American firms spend a lot of time worrying about these issues. To me, the most important thing is, however different states resolve their preferences with respect to privacy; and people will have different rules because they have different traditions and preferences and so forth. We ought to find a way to interoperate.

DR. TURNER LEE: Yeah, and should we have some -- and as we prepare for this last question -- should we have some guiding principles that apply across countries, because it seems to me, that the way that we could probably find ourselves in a patchwork of privacy rules, is the same we could actually go globally. You know, there are some things that we have like privacy shield, etc., but I'm not sure where the international conversation is going with this.

COMMISSIONER PHILLIPS: I'm not sure either. I think the Europeans very much want to take what they have done and spread it to the world.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: I don't think that's the only model.

DR. TURNER LEE: Mm hmm.

COMMISSIONER PHILLIPS: What I think, though, is critical is: whatever result at which a particular nation arrives, that we still be able to have, like, all share in the benefits of the economic growth --

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: That we have been enjoying.

DR. TURNER LEE: That's the key. All right, last question, and then we will wrap up and thank the Commissioner for coming.

QUESTIONER: I have personal information on the internet that I have never posted, published or authorized, that is impeding my efforts to find a job.

DR. TURNER LEE: Mmm.

QUESTIONER: And the FTC said they could remove that but Congress hasn't given them the authority. What would it entail to have a do-not-post, do-not-publish list we can put our names on, and the list itself would be hidden, but the personal information would not be able to be put online. Is that feasible?

DR. TURNER LEE: Mmm.

COMMISSIONER PHILLIPS: The short answer is I don't know. In Europe, something you hear about is what we call, the right to be forgotten.

DR. TURNER LEE: Yes.

COMMISSIONER PHILLIPS: In the states, that may raise First Amendment issues.

DR. TURNER LEE: Right.

COMMISSIONER PHILLIPS: But I will say, just to sort of echo your point, I have hit times where I have found -- I mean now, I'm sort of a public official, but I found data about myself online that I was very surprised to see.

DR. TURNER LEE: (Laughter).

COMMISSIONER PHILLIPS: I mean I think that's one of those things where the reason we are having the conversation we are on privacy now is because people are experiencing things like that and they are saying, wait, what?

DR. TURNER LEE: Right, well, I would actually just leave us on this thought on the right to be forgotten, to this young lady's point. So, I was at South by Southwest, sitting on a panel hosted by a group called LGBT Tech, and we were talking about encryption and somehow the GDPR always comes up when you talk about privacy, but someone asked a question -- just something to think about when we think about the right to be forgotten -- know in this country you can't be forgotten as a sexual predator, your credit report has certain guidelines in the Credit Reporting Act; but someone asked the question about my gender fluidity and my ability to sort of re-curate my identity under a clause of right to be forgotten so that I'm not longer identified as the previous person I was. I'm still that same person, but I'm actually different now.

And, so I would just put it out there more as a comment, it may be put a highlight on to say, perhaps there are scenarios and circumstances where it could be interesting, you know, to apply a right to be forgotten, particularly since America has changed, you know what I mean. So, I'm not asking you to comment on that, I'm just wanting to put that out in the universe because I said I would come back to D.C. and say it at some conference or panel (laughter), and I found the right one and thank you for actually bringing up that question. But it's something to think about for those of us that have carefully looked at what could be applied in the U.S. in the GDPR; gender fluidity is obviously one of those topics that has made a real in-road in our country in terms of how we look at people.

On that note, I will say, thank you Commissioner for actually coming. Let's give him a round applause for his participation today (applause).

COMMISSIONER PHILLIPS: Thank you for having me.

DR. TURNER LEE: It was good, right.

COMMISSIONER PHILLIPS: It was fun.

DR. TURNER LEE: Thank you to all of you for being here. Shameless plug, continue to follow #consumerprivacy, follow us at the Center for Technology Innovation, we've got a paper coming out on algo-bias soon, that we would like to share with all of you and continue to follow the work of my dear friend and colleague Cam Kerry, who writes explicitly on privacy here at Brookings.

COMMISSIONER PHILLIPS: Everyone should follow Cam Kerry.

DR. TURNER LEE: Everybody should follow Cam Kerry (laughter).

COMMISSIONER PHILLIPS: I agree with that.

DR. TURNER LEE: Everyone should want to be like Cam Kerry (laughter).

Thank you very much.

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